THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Ref No: 13858

Goodwood Case No: C1658/2012

In the matter between:

STATE

And

RAYMOND TITUS **ACCUSED**

Coram: BINNS-WARD & ROGERS JJ

Delivered: 10 FEBRUARY 2014

JUDGMENT

ROGERS J:

[1] This matter comes before the court by way of automatic review. The accused was convicted on 20 August 2013 of possession of 42 packets of tik (methamphetamine) which, according to the laboratory report, weighed 4,03 grams in total. On 23 August 2013 he was sentenced to 12 months' imprisonment.

[2] The record having been received at the High Court on 6 September 2013, on 11 September 2013 I directed a query to the magistrate regarding the conviction and the sentence. The query regarding sentence related to an apparently missing part of the record.

[3] After repeated contact between this court and the magistrate's court, the review record was returned with the magistrate's response on 6 February 2014, nearly five months after my query. This is unacceptable. The procedure for automatic review is aimed at protecting unrepresented persons against injustice. The fact that the reviewing judge has raised queries indicates that the case is one in which the accused person's conviction or sentence may not have been in accordance with justice, and a prompt response is thus called for. In the present case, and by virtue of the delay, the accused has almost certainly served his minimum time and been released on parole.

[4] My queries to the magistrate were expressed as follows:

'[1] In regard to the conviction, the State called only one witness, Constable Horn. He claims to have seen the accused in the company of another person and that the accused threw a plastic packet over the fence which was subsequently found to contain the tik. The accused's version was that he was walking with three other friends, that he did not throw any bag over the fence and knew nothing of the tik.

[2] The prosecution thus relied on the evidence of a single witness, which required caution. It ought to have been possible for the prosecution to call the colleague with whom Horn was travelling in the police van, Constable Pietersen. The judgment on conviction (record 29-32) does not specifically mention the need for caution. The accused's failure to call an additional defence witness he initially intended to call was mentioned in the judgment but the prosecution's failure to call Pietersen was not mentioned. There also does not appear to be an analysis of why the accused's version could not reasonably possibly have been true, with reference to demeanour and other matters bearing on credibility. They were at least

theoretically other possibilities (such as that the packet was thrown over the fence by one of the other persons in the street or that the drug evidence was 'planted' because the accused was believed by the police to be a drug dealer [record 8]). Your comment is invited.

[3] I notice in passing that the charge sheet states that the offence was committed on 23 October 2012. The magistrate's judgment says 27 October 2012. The correct date appears to have been 23 October 2011 (which is how Constable Horn's evidence was led and which ties in with the laboratory report).

[4] As to sentence, the portion of the record at page 34 omits the submissions made on behalf of the accused and the prosecution. Presumably the accused either gave evidence or made *ex parte* statements. Since the proceedings were mechanically recorded it ought to be possible to supplement the record. Kindly do so.'

[5] The magistrate's belated reply was the following:

'[1] The state called only one witness and I was of the view that he covered all the evidence. The witness categorically stated that the accused was wearing an orange jumpsuit and he saw him when he threw the plastic bag containing tik. According to the witness the accused was alone when he threw the plastic bag.

[2] I did not mention in passing the sentence that the evidence of the single witness should be treated with caution but that was considered.

[3] In respect of the day 27 October 2012 instead of 23 October 2011 that was an oversight.

[4] In respect of the mitigation of sentence I failed to invite both of the state and the defence to address the court. That was an oversight on my part. It is my humble submission that the same will not be repeated.'

[6] I have re-read the transcript of the evidence. This was a simple case of directly contradictory versions by Constable Horn on the one hand for the prosecution and by the accused on the other hand in his own defence.

[7] According to Horn, he was patrolling at night in a van with a colleague, Constable Pietersen, when he saw two people walking in the road. One of these persons was the accused and the other an unidentified person to whom I shall refer as X. X was walking more or less in the middle of the road while the accused was on the pavement. Horn saw the accused, who was dressed in an orange jumpsuit, throw a packet over the fence into an adjoining property. Horn and Pietersen were

about 15 metres away when this took place. They stopped their van. Pietersen held the accused while Horn searched and then released X. Horn went into the adjoining property with a torch and discovered a plastic bag containing the tik. The accused was also found in possession of R210. He could not provide an explanation for the money. He was thereupon arrested. Horn said that the plastic bag was too flimsy to have been thrown over the fence by a person standing in the middle of the road.

[8] The accused said that he was walking home with three friends. They were all more or less in the middle of the road though he was on or close to the pavement. Two police vans came up to them. Horn got out with a shot gun and told him to stand on the right-hand side of the road. Horn searched him and found nothing while his colleagues searched the other three persons and told them to leave. The police initially said he should also go but Horn then said he must wait, that he had not been properly searched. Horn again frisked him again and found cash of R1 000 which the accused had in his possession. He was asked where this money came from and he replied that it was from gaming, and that he was on his way home. Horn told him not to lie, that he had been at a place where drug dealing occurred. Horn then went into the adjoining property and came back with a plastic bag. The accused denied any knowledge of it but was told not to lie. He was then arrested. The accused testified that he was at no stage in possession of the plastic bag containing the drugs.

[9] Although s 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness, it has always been accepted that the evidence of a single witness must be viewed with caution. A conviction should follow only if the evidence is substantially satisfactory in every material respect or if there is corroboration. The fact that the single witness occupies an official position, such as that of a police officer or traffic inspector, does not add weight to his evidence (*S v Abrahams* 1979 (1) SA 203 (A) at 207B-H). It has also been said that the statutory authority to convict an accused person on the evidence of a single witness ought not to be invoked where the witness has an interest or bias adverse to the accused (*S v Mokoena* 1932 OPD 79 at 80). The need for caution may also be increased by other factors such as the

state's failure to adduce real evidence which should have been available (*S v Msane* 1977 (4) SA 758 (N)).

[10] The magistrate in this case did not, in her *ex tempore* judgment on conviction, mention the need for caution. Although she has said in her response to my query that the need for caution was considered, the judgment does not indicate how it was considered nor identify the factors which allowed the caution to be laid to rest. No reference was made to demeanour. There were no prior statements with reference to which the credibility or reliability of either of the witnesses could be tested. One cannot say that Horn's version was inherently plausible while the accused' s version was not. One of them was lying or mistaken. There are various possibilities. The accused may indeed have been carrying a bag of drugs and thrown it over the fence. Or another person (X or one of the three people that the accused said were also on the scene) may have done so. Or possibly none of the persons in the road had the drugs in in his possession, and they were 'planted' by the police.

[11] As noted earlier, the fact that Horn was a policeman did not *per se* entitle his evidence to greater weight than that of the accused nor constitute a basis for laying caution to rest. It is true that the accused in the present case, if he was guilty, had a motive to testify dishonestly, ie to avoid conviction and punishment; but this is true in virtually every criminal case. Furthermore, and while one naturally does not expect a policeman to lie and falsely implicate an accused person, it is unfortunately not possible to say that this never happens. Police officials may have a desire to obtain convictions, particularly where a suspect is known to them as a person who has had previous brushes with the law or is one whom they suspect for other reasons (not founded in the evidence before the court) of having engaged in criminal activity. I do not for a moment suggest that the majority of policeman would behave in this way but, where an accused protests his innocence, one cannot dismiss it out of hand as being by its very nature a far-fetched possibility.

[12] Horn in this very case testified that the accused was well-known in the area for dealing in drugs, and Horn recognised him that night when he saw him on the street. The accused's version of the conversation between himself and Horn would be consistent with a belief on Horn's part from prior knowledge that the accused was

a miscreant. The accused, in his cross-examination of Horn, put to him that Horn's colleague Pietersen had said to him (the accused) that Horn was spiteful towards him.

[13] Let me make it entirely clear that I am not saying that Horn gave dishonest evidence. But in order for the accused to have been convicted one needs to be satisfied beyond reasonable doubt that the accused was definitely giving dishonest evidence. The fact that an accused is acquitted because the cautionary rule has not been sufficiently laid to rest does not mean that the single witness was not telling the truth; it simply means that one cannot be confident beyond reasonable doubt as to where the truth lies.

[14] There was evidence which the state could have adduced so that Horn was not left in the invidious position of being assessed as a single witness. Most importantly, his colleague Pietersen could and should have been called. (The accused himself, in questioning Horn, asked where Pietersen was, and Horn replied that he was the only one who had been subpoenaed.) Pietersen could not only have testified regarding the entire incident but could also have dealt with the accused's assertion that Pietersen told him that Horn was being spiteful to prosecute him. In regard to whether (as the accused testified) there were two police vans and a number of police officials on the scene, the state could have adduced the police records regarding the movements of the patrol vans that evening. In regard to whether Horn was armed with a shot gun, the state might have been able to adduce the register showing whether any such weapon had been issued to Horn on the day in question. The state could have produced the plastic bag which had been forensically examined and could have attempted to demonstrate that such a bag, containing 42 packets of tik and weighing 4,03 grams, could not have been thrown through the air over a distance of more than a metre or so (which is what Horn claimed).

[15] My sense is that the state simply assumed that the court would believe a policeman rather than the accused. That is not the way a criminal trial should be conducted. The cautionary rule exists for a purpose, and those responsible for prosecuting should take this into account in the calling of witnesses. Where an

accused person denies the commission of the offence and the sole witnesses to the crime were two or more police officials, the state should generally call at least two of the police officials unless there is other objective evidence which corroborates the witness' testimony or renders the accused's denial wholly implausible. Of course, the calling of two or more eyewitnesses to the same event poses the tactical risk for the prosecution that discrepancies between the versions will emerge, but that is the time-honoured way in which credibility and reliability are tested and there is no reason why the accused should be deprived of the opportunity of thus testing the witnesses. Prosecutors and magistrates would do well to remind themselves of the following statement by Hoexter J (Hefer J concurring) in *Msane supra* at 759C-E:

'The tendency of prosecutors to take short-cuts by not adducing all the available evidence should be discouraged by magistrates. The feckless[1] presentation of the case for the prosecution is subversive of proper criminal justice. It creates alike the risk of the acquittal of guilty persons and the conviction of innocent ones. Either result is unfortunate. But the possibility of the latter is, of course, a particularly disturbing one in the case hinging on a single State witness, an acceptance of whose testimony must result in the removal from society of the accused for a period of not less than five years.'

[16] I thus consider that the conviction should be set aside.

[17] If the conviction had stood, it would have been necessary to address the magistrate's failure to invite either the prosecutor or the accused to address her in regard to sentence. The magistrate in her reasons for sentence said that she had taken into consideration the submissions both by the state and the accused person but it is now apparent that no such submissions were received. There was no information whatsoever about the accused's personal circumstances. The only material placed before the magistrate in respect of sentencing was the record of his prior convictions. Clearly the imposition of sentence was procedurally irregular though it is doubtful, whether after this lapse of time, a remittal of the matter to the magistrate for re-sentencing would have achieved any practical benefit for the accused.

[1] The word 'feckless', which is not now in wide use, is defined in the *New Oxford Dictionary of English* as meaning 'lacking in efficiency or vitality'.

BINNS-WARD J:

[18] I concur. The accused's conviction on 20 August 2013 and the sentence imposed on him on 23 August 2013 set aside.

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BINNS-WARD J

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ROGERS J