OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

(Western Cape Division, Cape Town

CASE NO: A258/20

In the matter between:

GRAVEN GREEFF **FIRST APPELLANT**

HAGEN MAY **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT DELIVERED ON 1 MARCH 2021

NZIWENI AJ

Introduction

[1] The appellants were arraigned in Knysna Regional Court, on a charge of contravening section 5(b) read with certain provisions of the Drugs and Drug Trafficking Act, 140 of 1992 (dealing in drugs). The respondent alleged that on 18 January 2017, the appellants had dealt in drugs, to wit 4 060 *Mandrax* (*"Methaqualone")* tablets and 993 grams Methamphetamine (*"Tik"*), valued at R600 000. They both pleaded not guilty to the charges, and tendered a comprehensive plea explanation. On 07 February 2019 the appellants were convicted and sentenced to a term of ten (10) years imprisonment.

[2] The appellants sought leave to appeal against the conviction and sentence of 10 years. The magistrate refused leave to appeal. Consequently, the appellants petitioned to this Court for leave to appeal in terms of s 309 C of the Criminal Procedure Act, 51of 1977 (*"the CPA"*). This Court, granted leave to appeal against both conviction and sentence.

[3] Though leave to appeal was granted against both conviction and sentence, on petition, it became clear from the heads of arguments filed by the appellants and during oral submissions that the appellants no longer pursued the appeal on sentence. This much was confirmed during address by counsel on behalf of the appellants.

[4] It thus follows, that the scope and ambit of this appeal, has been narrowed by the appellants, only to the portion of the judgment pertaining to the issue of conviction.

The facts

[5] The version of the respondent was provided by two witnesses, Constable Appels and Mr. Ivor Baadjies. I shall hereinafter refer to these two witnesses as Appels and Baadjies respectively. Appels was the arresting officer, and Baadjies was the owner of the vehicle used to convey the drugs, which vehicle was driven by the first appellant, at the critical time.

[6] The respondent's version is that Appels, on 18 January 2017, between 16:00-17:00, met with the informant and the informant told him that a vehicle was coming to Knysna carrying drugs. Appels also testified that the informant also informed him that the drugs were being conveyed from Port Elizabeth to Knysna. During cross examination, Appels mentioned that the informant told him that Hagen May was in

the said vehicle and that he, should look for the drugs in the door panels of the said vehicle. On the same day at around 21:25 the informant contacted him again and told him that the vehicle was in Vigilance Street in Knysna. He proceeded to the area mentioned by the informant. He saw the vehicle and they pulled it over. He went further to testify that the first appellant was the driver of the said vehicle. The appellants were calm and cooperative with them. He then asked for permission to search the vehicle and the first appellant gave the permission. The vehicle and the appellants were subsequently taken to the police station. After the vehicle was searched they found drugs in the door panels of the said vehicle. He asked the appellants to confirm what was found and the second appellant said it was *tik* and *mandrax*. It was also Appels' testimony that when he asked the first appellant as to whom the vehicle belonged, the first appellant responded that it belonged to his nephew whose name he did not know. However, it turned out that the vehicle belonged to Baadjies shortly after the appellants were searched as was advised by one of the policeman who would have circulated the vehicle in their system.

[7] Baadjies testified that he is related to the first appellant. He stays in Port Elizabeth and the first appellant stays in Uitenhage. He lent the said vehicle to the first appellant four days before the appellants were arrested. He lent the vehicle to the first appellant because the first appellant's vehicle had mechanical problems and the first appellant wanted a vehicle to take his children to school. He was oblivious to the fact that his vehicle was in Knysna. He is the sole user of the vehicle. He never lent it to someone else and does not know how the drugs got to be where they were found.

[8] Both the appellants testified and vehemently denied that they knew anything about the drugs that were found in the said vehicle. The first appellant decided to

visit his friend, the second appellant in Knysna, for a day or two. He did borrow the vehicle from Baadjies to ferry his children to school, but whilst he was away in Knysna, his child was going to take a taxi to school. Only him, the second appellant and his parents knew that he was going to Knysna. He arrived in Knysna on a Wednesdays. After dropping his bags at the guesthouse, he and the second appellant headed to Rykmanshoogte. On their way to Rykmanshoogte, they were randomly stopped by the police, who were armed, looking for firearms. Appels claimed they intended to search the vehicle and proceeded to do so. The police never asked for permission to search the vehicle, but had they done so, he would have given them permission to search the vehicle.

[9] The second appellant testified in similar fashion to the first appellant. He confirmed that when the police asked what it is that they discovered, he told the police that it was drugs. He cannot really say if Appels asked for permission to search the vehicle. He could not hear what Appels and the first appellant discussed.

[10] Given the aforegoing summary of the evidence, it follows that the following facts were largely common cause or otherwise incontrovertible during the trial:

a) That on the evening of 18 January 2017 in Knysna, around 21:25, the vehicle driven by the first appellant was stopped by the police.
b) That the second appellant, was a passenger in the said vehicle.
c) That after the police searched the vehicle, drugs were found hidden behind the panels of the vehicle's doors.
d) That the second appellant told the police that what they discovered were drugs.
e) That the search on the vehicle was conducted without a warrant.

f) That the first appellant borrowed the vehicle in question from Baadjies to ferry children to school.

g) That Baadjies was not aware that the first appellant took the vehicle to Knysna

Appeal Grounds

[11] In respect of the conviction, the substantive issues raised are threefold. The first is whether the constitutional rights of the appellants were violated, when the motor vehicle in question was searched by the police without permission. The second one is whether the trial court erred in accepting the evidence of Appels, the respondent witness and in rejecting the evidence of the two appellants. Lastly whether the respondent succeeded in proving the elements of the crime of dealing in drugs.

Did the Magistrate misdirect herself in her credibility findings

[12] For many years the courts have made it plain that an Appeal Court would invariably be reluctant to upset the findings of a trial court. In *R v Dhlumayo and Another 1948 (2) SA 677 at page 705,* the following was stated:

'The trial Judge has advantages-which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be over-looked.'

[13] The Magistrate's findings regarding the credibility of Appels were heavily criticised. Amongst others, it was submitted by counsel for the appellants that the magistrate merely paid lip service to the cautionary rule, which was applicable to the testimony of Appels. It was further contended on behalf of the appellants that the

credibility of Appels is very low and under the circumstances the court *a quo* had no reason to reject evidence of the two appellants. The court *a quo* did analyse the evidence of the witnesses, however cryptic its reasons may have been and at times, appearing to have been done in a cavalier fashion.

[14] Albeit, the magistrate did not make any negative credibility findings against Appels, the record reveals that she scrutinized his evidence and she was alive to the fact that she needed to approach his evidence with the necessary caution. The assertion that the magistrate merely paid lip service to the cautionary rule is not borne by the record. This is so, because the record shows that the magistrate also considered flaws in the testimony of Appels. In her exercise of caution, she found that there were certain unsatisfactory aspects about Appels' testimony. She pertinently pointed out the evidence she considered to be contradictions in Apples' testimony, for instance the fact that Appels omitted to mention certain aspects in his police statements.

[15] Though the magistrate identified discrepancies as contradictions, it is however, clear from the record that the magistrate took cognisance of the discrepancies existing between the testimony of Appels and his police statements. Notwithstanding the deficiencies, the magistrate was still satisfied that Appels told the truth.

[16] It is indeed so that there were discrepancies between the testimony of Appels in court and his police statement. For instance, the reason for him not obtaining a search warrant after his first encounter with the informant at the police station, is not mentioned, it is also not mentioned in Appels police statement that he was informed

by the informant that the drugs belonged to the second appellant and was given the registration number of the vehicle.

[17] Appels never gave conflicting accounts as to what transpired, the record also bears the point. Equally important and true is that, when regard is had to the testimony of Appels, his evidence is actually far from being contradictory or at odds with his court testimony. Instead, the discrepancies that are there, are nothing more than him expanding to his testimony when he was being questioned during cross examination. Moreover, Appels cannot be faulted for not mentioning in his examination in chief that the informant told him that the drugs belonged to Hagan May. Clearly, this is hearsay evidence which is not in the normal course of a trial admissible. Furthermore, the failure by Appels to testify during evidence in chief or to mention in his police statement that he had an earlier encounter with the informer, is neither here nor there nor material; given that a common thread running throughout in both versions was that the arrest of the appellants was brought about by the information obtained from an informant. The consequence of which there was nothing to hide or sinister in the omissions. In the bigger scheme of things, Appels' explanation for omitting certain aspects in his testimony is very well tenable. I agree with the magistrate that the discrepancies under the circumstances of this case, are not fundamental but relating to peripheral issues and they do not render the evidence of Appels unworthy of belief.

[18] It often happens that a witness omits or misses out something he or she mentioned in his or her police statement or mentioned something which is not recorded in his police statement. Though the trier of facts has to take those into consideration in the determination of credibility, however, it is important to mention that, discrepancies do not always diminish the credibility of a witness. Only

discrepancies that go to the root of the matter can negatively affect the credibility of a witness. Nonetheless, it is not surprising that the magistrate did not find the discrepancies to be sufficient to cast serious doubt or aspersions on the acceptability of the evidence of Appels. In any event, in *S v Mafaladiso en andere 2003 (1) SACR 583 SCA at 584,* it was held that where there were material differences between the witness's evidence and prior statement, the final task of the trial judge was to weigh up the previous statement against *viva voce* evidence to consider all the evidence and to decide whether it was reliable or not and whether the truth was told, despite any shortcomings. In the circumstances, the magistrate's findings in this regard cannot be faulted.

[19] In S v Teixeira 1980 (3) SA 755 (A) at 761 the following was stated:

> "I think I am stating the obvious in saying that, in evaluating the evidence of a single witness, a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities."

[20] I cannot fault the magistrate for failing to make negative credibility findings against Appels. This is because there are also objective facts which support the acceptance of Appels' evidence by the court *a quo*.

[21] The respondent had a wealth of evidence against the appellants. The encounter between the police and the appellants was not a random one. The encounter was based on a tip off concerning the vehicle driven by the first appellant. Therefore, there was an individualised suspicion pertaining to the said vehicle and its occupants.

[22] It was submitted on behalf of the appellants that it is possible that Appels was lying about the existence of the informant. The evidence in this instance undermines

this assertion on behalf of the appellants. It is actually inconsistent with the evidence presented and it defies all logic. Clearly the informant's information set off a chain of events that resulted to the vehicle in question being stopped.

[23] Certainly the evidence in this matter suggests that it was not possible for the police to have fortuitously come across a random vehicle in a build-up residential street. This vehicle was stopped by the police in order to ascertain if indeed it was the said vehicle referred to by the informer. After the police identified the occupants, they immediately took it to the police station with an idea of having the vehicle thoroughly searched. That would not have happened without probable cause or reasonable suspicion. The police would not have stripped the vehicle door panels by a sheer stroke of luck and thereby discovering drugs hidden behind the door panels of the said vehicle. The proven facts in this matter demonstrate that it is pretty clear that there was an informant that informed the police actions on the night in question. For that matter, even the rejected version of the appellants that the police were looking for firearms suggests that the police did not randomly stop the appellant's vehicle.

[24] Appels' evidence also did not come across as being biased, maliciously embellished or that he was mixing the truth with lies. If regard is had to the testimony of Appels, one does not get the impression that Appels went out of his way to create an atmosphere of suspicion against the appellants. His evidence was not an attempt to plugging holes, in the respondent's case.

[25] Surely if he wanted to fabricate evidence he could have made sure that he builds a far more solid case for the state. He could have easily said that some of the drugs were found on the bodies of the appellants, yet he did not. In my view, it is

extremely telling that his evidence was no exaggerated. His testimony was all about recounting what happened that night with the two appellants and the vehicle.

[26] Without overstating the fact, the record does not bear the point that the credibility of Appels was very low, and that his evidence was merely a concoction by him. The fact that the drugs were found in the vehicle bolster his credibility and evinces that the testimony of Appels was not an outright fabrication. The version of Appels explains everything that happened and found on the different scenes.

[27] If regard is had to the evidence in this matter, the magistrate cannot be faulted for not being distracted by peripheral issues. In light of all the evidence in the case, the trial court had no reason to doubt the truth of Appels' evidence, and to not accept it. Hence I do not agree with the appellants' counsel that the magistrate was wrong in her credibility findings of Appels. Though the evidence of Appels stood alone, it is however, confirmed by conclusive evidence *aliunde*. Considering the nature of evidence led in this matter, it is not surprising in the least that the state did not call any further witnesses. For that matter, in terms of the provisions of section 208 of the CPA, an accused person can be convicted based on the testimony of a single competent witness.

[28] Though the appellants outrightly denied any knowledge of the drugs, if regard is had to what the second appellant told Appels during the discovery of the drugs that is, what was discovered was *tik* and *mandrax*; it is very illuminating that he knew exactly what the police discovered considering the facts of this matter. It is also significant to note that both the appellants confirmed in their testimonies that the second appellant did tell Appels that what was discovered were drugs. In the grand scheme of things, his defence that he did not know anything about the drugs is not

supported by the admission. The probability that consent to search was not given is extremely low. Even more so if regard is had to the following:

a) The fact that it is common cause that the appellants cooperated with the police.

b) The first appellant testified that if he was asked for permission he would have given it.

c) The fact that the drugs were well hidden in the vehicle.

[29] The first appellant wants to be believed that he borrowed the vehicle with a specific purpose of ferrying children to school yet in the middle of a school week he goes on a frolic to Knysna, with a long lost friend, who does not even have a place of his own. In doing so leaving a child who is still at crèche to take a taxi to school.

[30] Since it is the first appellant's version that it was only the second appellant and his parents who knew about his trip to Knysna, the question which begs is; who could have told the police about his arrival in Knysna, because even Baadjies was unaware of his trip to Knysna. Surely it cannot be a combination of bad luck and coincidences that they were stopped by the police and bad luck that contrabands were found in the vehicle. The combination is quite unlikely indeed.

[31] It is so that hearsay evidence elicited during cross examination is an exception to the hearsay rule. Furthermore, it is settled in our law that it is not possible to elicit hearsay evidence during cross examination that has already been led in the examination in chief. However, in the instant case, during the trial the legal representative of the appellants, notwithstanding strenuous objections from the state, went an extra mile and deliberately elicited hearsay which was over and above the hearsay elicited during evidence in chief. Without doubt the portions of hearsay

evidence which were never elicited during evidence in chief, are admissible as an exception to the hearsay rule.

[32] Amongst the hearsay evidence which was exclusively elicited during cross examination was to the effect that the drugs belonged to the second appellant. In my mind this proved to be a rather damning piece of evidence, particularly, if regard is also had to the fact that, it is common cause that the second appellant told Appels, that the items found behind the door panels of the vehicle were drugs; that the drugs were found in Knysna where the second appellant resides. In my view, these factors when considered cumulatively, and really call into question the version of the appellants. The version of the appellants has a hollow ring to it and the flavour of fabricated evidence. If regard is had to the evidence in its entirety it is pretty evident where the truth lies. There is overwhelming evidence in this matter to show that the two appellants did not tell the truth when they testified.

[33] It is not correct to say that there is no concrete evidence to connect the appellants to the crime. Under the circumstances of this case, it is inherently improbable that the appellants did not know about the drugs in the vehicle. The evidence in this matter proves beyond reasonable doubt that the drugs were under both appellants' control.

[34] The state also succeeded in proving beyond reasonable doubt that that Appels did have consent from the first appellant to search the vehicle, consequently it was not necessary to obtain a search warrant.

[35] I also consider it necessary to address the following point.

The issue of constitutionality of the search of the vehicle without a warrant

[36] It is apparent that in the written submissions, the appellants have raised issues much wider and radically different to the issues raised during trial and those embodied on their application for petition to appeal to this court.

[37] In the heads of arguments on behalf of the appellants, much emphasis was made on the constitutionality of the search of the vehicle without a warrant. It is contended that the search of the vehicle was done in an unjustified infringement of their constitutional rights, including their right to privacy and dignity. The argument continues that, all evidence obtained and flowing from that infringement is inadmissible, as it renders the trial unfair or is otherwise detrimental to the administration of justice. The magistrate noted the following in her judgment:

> "The issue that was disputed was whether the search was conducted lawfully and in compliance with the provisions of Section 22 of the Criminal Procedure Act."

[38] Without doubt, if the issue of constitutionality of the search was ever raised during the trial, the trial court would have made a determination as to whether a trial within a trial needed to be held to determine the admissibility of the evidence.

[39] In my view, by raising the issue of constitutionality of the search in these proceedings, the appellants seek to make out a new case or seek to raise for the first time a novel argument, which is entirely inconsistent with the trial proceedings and the facts around which the respondent's case was centred. Essentially, the appellants, at this stage want to rely on an issue which was not considered and ventilated in the court below. It is settled law that on appeal the appellant is confined to the four corners of the appeal record and must in advancing his case, limit himself or herself to the facts contained on record.

[40] When it came to the search of the vehicle, the trial court proceedings turned on a narrow point of dispute which was whether the search of the vehicle complied with the provisions of section 22 of the CPA. Hence the issue during the trial stage was not so much whether the constitutional rights were infringed but rather a credibility issue.

[41] This then begs another question, did Appels have the consent to search the vehicle as contemplated in section 22 of the CPA. This formed the heart of the trial proceedings in the court below. Counsel for the appellants submitted in these proceedings that a trial within a trial was circumvented during the trial, because Appels, testified that consent was obtained to search the vehicle. This assertion by appellants is actually spot-on, because had Appels testified that he never received consent to search the vehicle, the inevitable corollary of that would have been to determine the constitutionality of the search.

[42] The importance of a warrant can never be underestimated, particularly in a constitutional democracy. Consent to search is one of the two exceptions to the requirements in Section 22.

[43] Consequently, in these proceedings, the issue should not be about the constitutionality of the search but rather whether consent to search was given.

Was there a window of opportunity for Appel to obtain a search warrant between 16:00-17:00

[44] In my view, a point missed by the appellants during the trial and notably important in my view, is the fact that the enquiry as to whether the state had an opportunity to obtain a search warrant between 16:00-17:00 is a neutral factor and

adding nothing to this case. I hold this view because as alluded herein above; the respondent's case mainly turns on whether consent was given to search the vehicle.

[45] Consequently the issue of whether there was an opportunity to obtain a search warrant is of peripheral nature in this appeal. For that matter having regard to the fact that the information was to the effect that the vehicle was travelling from Port Elizabeth to Knysna at that time also created a problem of obtaining a warrant as the vehicle was in transit and mobile. One of the obvious problems was a jurisdictional issue. For instance, which court or police station would have had jurisdiction to grant the warrant as the vehicle was mobile, and moving from one jurisdiction to another. In the circumstances, this argument was totally misguided.

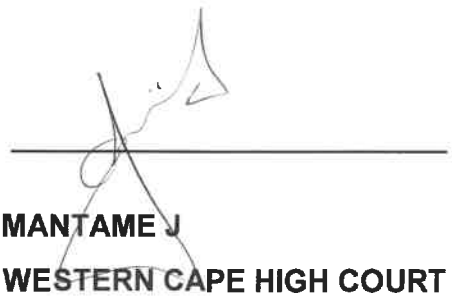
[46] Having made the afore-said findings, the appeal against conviction fails.

[47] In the circumstances I propose the following order:

47.1 The appeal in respect of both appellants is dismissed.

NZIWENI AJ
WESTERN CAPE HIGH COURT

I agree, and it is so ordered



MANTAME J
WESTERN CAPE HIGH COURT