IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Le Grange, J et Henney, J)

High Court Ref No: 208/22

Case No: 29/22

Magistrate's Serial No: 15/932/2021

In the matter between:

THE STATE

v

KIM PAULSE

REVIEW JUDGMENT: 29 JULY 2022

HENNEY, J

[1] This matter comes before me as an automatic review in terms of the provisions of section 302 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The accused appeared in the Magistrate's court of Cape Town on several occasions, after being arrested on 9 September 2021, during which time she was represented by an attorney appointed by Legal Aid South Africa.

[2] After being released on bail, she absconded and her legal representative as a result withdrew from record. Upon her arrest, on 27 May 2022, her rights to legal representation and legal aid were again explained by the Magistrate. She elected to

conduct her own defence. On 6 September 2022, her rights were again explained and she elected to conduct her own defence. The accused pleaded guilty to the offences as charged.

[3] The Magistrate proceeded to question the accused in terms of the provisions of section112 (1)(b) of the CPA and she was accordingly convicted on two counts of contravention of section 4 (b) of the Drugs and Drugs Trafficking Act 140 of 1992 ("the DDTA"), which she committed on 6 September 2021 and 19 April 2021.

[4] On 7 June 2022, the court took both counts together for the purpose of sentence, and the accused was sentenced to a fine of R3000 or 90 days imprisonment which was suspended for a period of five years, on condition that she is not convicted and sentenced for possession of drugs in contravention of section 4 (a) or (b) of act 140 of 1990 committed during the period of suspension.

[5] The proceedings by the Magistrate in terms of S112 (1)(b) of the CPA were recorded as follows:

In respect of count 1:

"*Accused: I will speak for myself.*

The State request the court to make the provisions of section 112(1)(b). These are explained to the accused and she understands and elects to answer the Courts questions.

COUNT NO 1:

Court: Your plea of guilty to these two courts, is it done freely and voluntarily so or were you influenced or intimidated to plead guilty?

A No, its freely and voluntarily done.

Court: The incident you are about to relate to curt, did it occur on the 06/09/2021?

A Yes.

Court: In your own words explain to court what happened that led to your arrest?

A That day I was in my room, with the lolly in my hand and the pipe was on the table, I heard someone tapping on my shoulder, (accused demonstrates) and when I looked back it was the police, they told me to stand up, there was about 6 police officers, when I stood up I was searched by a female police officer with drads. They found the lolly in my hand and put it into a bag, the found the pipe with mandrax on the cupboard and they put it in the packet they arrested me and I was hand cupped. Tik is methamphetamine.

Court: Do you know how much tik was there?

A No, the ½ mandrax pill, it was mandrax.

Court: Did you know that Mandrax and Methamphetamine (tik) are undesirable dependence producing substance?

A Yes, Sir

Court: Did you know that drugs are punishable by Law?

A Yes, Sir

Court: What was your intention with these substances?

A I was going to smoke it."

And in respect of count 2:

Q: Do you plead guilty freely and voluntarily so or were you influenced or intimidated to plead guilty?

A: No Sir, I plead guilty freely.

Court: Did it occur on 19/04/2021 at Main Road, Green Point?

A: Yes Sir.

Court: Tell me what happened which led to your arrest?

A: We were walking towards the Spar the van stopped a lady police officer came out and came straight towards me, she asked to see what is in my hand. I had a pipe glass pipe, she took it and searched my body, she found nothing on me and put me in the van and took me to the police station. We were standing in the parking, a van came and stopped next to me, the boyfriend, I had a small bag under my jersey. He told me to take it out as he wants to see what was inside, he found 3 units of Tik and the ½ (half) mandrax.

Court: Did you know that Mandrax and Tik are undesirable dependence producing substances?

A: Yes Sir

Court: Did you know that possession of Tik and Mandrax is punishable by law?

A: Yes Sir

Court: What were you going to do with there?

A: I was about to smoke it Sir

The State: I accept the plea on both charges as being accordance with the State case.

The Court: I am satisfied that accused intended to plead guilty on both counts had no valid defence and therefore pleaded guilty correctly.

The accused is found guilty on both count 1 & 2."

[6] Having considered the section 112(1)(b) proceedings, I had serious concerns whether the said proceedings were in accordance with justice and raised the following queries with the Magistrate.

""*The Magistrate is required to answer the following queries:*

1. *On what basis in respect of both charges did the court conclude that the accused possessed an undesirable dependence producing substance as*

listed in Part 3 of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 ("DDTA") being methaqualone and methamphetamine, based solely on the questioning of the accused in terms of the provisions of section 112 (1)(b) of the Criminal Procedure Act 51 of 1977.

a. *The Magistrate's attention is drawn to the following cases, S v Naidoo[1] and a full bench decision of this court to which he is bound of S v Adams[2] .*

2. *The Magistrate should also give reasons as to why he did not request the prosecutor to present the section 212(4)[3] certificate to him to ascertain the correctness of the admissions the accused made with regard to the fact whether the accused indeed were in possession of the undesirable dependence producing substances as listed in the act, before finding the accused guilty of the provisions of the DDTA."*

[7] In reply the Magistrate conceded that he based his finding that the accused possessed an undesirable dependence reducing substance as listed in Part 3 of Schedule 2 of the DDTA as being methaqualone or methamphetamine solely on the admissions made by the accused.

[8] The Magistrate also conceded that an expert statement in terms of section

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[1] *1986(3) SA 733 (C).985(2) SA 32 (N)*

[2] *1986(3) SA 733 (C).*

[3]Section 212 (4) *(a)* Whenever any fact established by any examination or process requiring any skill—
(i) in biology, chemistry, physics, astronomy, geography or geology;
(ii) ...;
(iii) ..;
(iv) ...;
(v) ...; or
(vi) ...,
is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the *Gazette*, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.

212 of the CPA was required to assist the court in coming to such a conclusion and no such certificate was shown to him to have concluded that the accused were in possession of an undesirable dependence producing substance as listed in the DDTA. He further submitted that he "erroneously failed to request this evidence from the state".

[9] This is not the first matter with similar charges that came before me on automatic review where the Magistrate failed to adequately appraise him/herself as to the correctness of an admission made by the accused. In view of the latter, it is perhaps necessary to restate the law on this issue. In *S v Adams* supra, this court said the following in respect of a plea of guilty on the charge of contravention of section 2 (a) of act 41 of 1971 (the predecessor of the current Act 140 of 1992):

> *"Where an accused is charged with contravening s 2 (a) of Act 41 of 1971 in respect of a prohibited dependence-producing substance such as mandrax, and he pleads guilty and makes the admission that the substance is indeed mandrax, the court will normally be entitled to convict him where he is represented by a legal representative. Where, however, the accused is an inexperienced person who is unrepresented, the position is different. In such an event, the court may not simply accept his admission of an unknown fact. There would have to be additional grounds on which the court could rely that the admitted fact is true before the court can be satisfied that the accused is guilty. The assurance concerning the acceptance of a fact which is admitted but which is beyond the personal knowledge of such an accused can be obtained in different ways, for example, by closer questioning of the accused in order to determine the strength of the knowledge on which he has made the admission, or what his knowledge of the matter and the surrounding circumstances are, or by examining the relevant certificate of analysis of the substance. Whether there is then sufficient evidence for the Magistrate to convince him that the accused is guilty will depend on the facts of the particular matter. What however must still be borne in mind, is that it is the court's duty to convince itself of the accused's guilt and that the court is not*

relieved of this duty in this regard merely by such an unrepresented and inexperienced accused admitting a fact which is beyond his knowledge."

The decision of *S v Adams* (supra) was based on the decision of *S v Naidoo 1985 (2) SA 32 (N)* where *Thirion J* at 37 G – H said:

"But before it can convict the accused, the court has to be satisfied, on the facts stated by the accused, that the accused is indeed guilty. The court therefore not only has to ascertain whether the admitted facts, if accepted as correct, would establish all the elements of the offence but it also has to pass judgment on the reliability of the admissions. Only if the court is satisfied as to the reliability of the admissions of fact and that they are sufficient to establish all the elements of the offence may the court convict the accused. Where an accused admits facts which are within his personal knowledge, no difficulty ordinarily arises. In such a case the presumption of fact that what an accused admits against himself may be accepted as the truth would operate and, provided the accused makes the admission with full knowledge of its implications, there would be no reason why the court should not be satisfied about its correctness and reliability."

And in *S v Chetty*[4] this court held:

"In the ordinary course the State can and should hand in a certificate of an analyst which proves itself and causes no problems that what has been found is what it is alleged to be. There may of course be other methods by which the questioner could satisfy himself that the accused had good reason to accept that the pills he intended dealing in were what they purported to be or did contain the drug in question - perhaps because he had purchased them from a "reliable" source, or had tried one himself, or that some of his own experienced customers were satisfied with their purchases from the batch in question."

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[4] *1984 (1) SA 411 (C)*

[10] The learned authors Du, Toit, DeJager, Paizes, Skeen and Van der Merwe states the following in this regard at RS64 Ch 17 page 21-22[5]

> *"The general rule in our law of evidence is that a court may accept and rely upon an admission of an accused despite the fact that the fact admitted falls outside the personal knowledge or experience of the accused ... It would seem, however, that the High Court has adopted a more cautious approach with regard to the plea procedures in terms of ss 112 and 115 where admissions are made by undefended accused...*
> *It should further be borne in mind that s 112(1)(b) does not provide for the conviction of the accused merely because he himself believes that he is guilty...*
>
> *In S v Nixon 2000 (2) SACR 79 (W) 86f–g Wunsh J accepted the need for a cautious approach to s 112 where admissions are made by an undefended accused.*
> *The weight of authority favours the view that an admission that does not have its factual foundation in the personal knowledge of the accused can be accepted if the court is satisfied that the admission is a reliable one...*
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> *In S v Naidoo 1985 (2) SA 32 (N) 37G–H a full bench held that with regard to s 112(1)(b) the court 'not only has to ascertain whether the admitted facts, if accepted as correct, would establish all the elements of the offence but it also has to pass judgment on the reliability of the admissions'. The court treated admissions in terms of s 112(1)(b) as admissible informal admissions which, in terms of our common law, can be given such weight as the court may consider appropriate in the light of the circumstances of the case. The 'enquiry' remains a factual one—the sufficiency and probative value of the admission depending on the circumstances of the particular case' (at 37J–38A). The source from which the accused derives his knowledge is an important factor (at 36H). In this case—which was a prosecution under s*

[5] Commentary on the Criminal Procedure Act

140(2)(a) of Ordinance 21 of 1966—the prosecutor furnished the accused with the certificate relating to scientific analysis of the blood sample taken from the accused. Thirion J concluded (at 40J):

'In my view this is a case where the accused was constrained to plead guilty by the force of the evidence available to the State. The Magistrate satisfied himself of the accused's guilt on an examination of the sources of the accused's knowledge on the strength of which the accused had made his admissions and the probative force of those sources was sufficient to establish the reliability of the admissions.'

In S v Adams 1986 (3) SA 733 (C) a full bench adopted the approach in S v Naidoo (supra)…

It is evident from the above that the prosecution can facilitate matters by timeously allowing the accused to have access to certificates pertaining to scientific analyses. In S v Goras 1985 (4) SA 411 (O) 412F Brink J took the view that in prosecutions under s 140(2)(a) of Ordinance 21 of 1966 an accused should be given the opportunity of studying the certificate concerning the concentration of alcohol in his blood before he is asked whether he admits the alleged concentration of alcohol in his blood."

[11] It is clear from the authorities cited that where an accused pleads guilty to a charge where one of the elements of the crime can only be proven by scientific means, the court must request the prosecutor to hand up the analysis certificate[6] in terms of the provisions of section 212 of the CPA to satisfy itself that during the s 112 (1)(b) admission was correctly made. In this case, the accused admitted to being in possession of an undesirable dependence producing substance, in contravention of section 4 (b) of the DDTA, and the court convicted the accused without satisfying itself by means of the scientific evidence in the form of the section 212 certificate that such an admission was correctly made.

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[6] This would also be applicable in cases where there is a guilty plea by an undefended accused charged with contravening of section 65(2) of the Road Traffic Act 93 of 1996; driving with an excessive amount of alcohol in one's blood.

[12] There may well be cases where a court may convict a person without the production of such a certificate, if from the questioning of an accused, and the subsequent admissions made, the court can come to such a conclusion. See *S v Adams* in this regard. Where for example, an accused person during the section 112 (1)(b) questioning states:

1) that such an accused is a regular user and is addicted to the undesirable dependence producing substance;

2) that the accused on a previous occasion acquired the alleged undesirable dependent producing substance from a particular source which had the desired effect on such an accused.

3) that such an accused had already used some of the substance that was found the possession of such an accused at the time of the arrest.

In this particular case, the court had no such information from which he could safely conclude that the accused were in possession of a dependence producing substance as prohibited by the act.

[13] This in my view, is not an exhaustive list of circumstances and factors that can be used to test or confirm the reliability of an admission that an accused had knowledge that the substance in his or her possession was an undesirable dependence producing substance. The most reliable source of information would always be the section 212(4) certificate and Magistrates are under a duty to request that it be produced before them, before convicting an accused during the section 112 (1)(b) questioning as pointed out in Adams and the other cases.

[14] In view of the number of cases that had been sent on automatic review where Magistrates had great difficulty in applying the guidelines as laid down in S v Adams, it is herewith directed that the Chief Registrar forward a copy of this Judgment to the Chief Magistrate of Cape Town as well as Wynberg to bring this Judgment to the

attention of the Magistrates in their respective administrative regions of the Western Cape.

[14] In the absence of any further information or evidence to satisfy itself that the accused were indeed in possession of an undesirable dependence producing substance as listed in Part 2 of schedule 3 of the DDTA, the conviction in the respect of both charges were improper and falls to be set aside.

[15] In the result therefore, I would make the following order:

"*That the conviction and subsequent sentence in respect of both charges are set aside*".

R. C. A. HENNEY
Judge of the High Court

I agree.

A. LE GRANGE
Judge of the High Court