1996/09/20

Strydom, J.P.

CRIMINAL LAW

Drugs - State must prove that tablets contained prohibitive substance - where theft occured and evidence doubtful whether tablets were still the same accused convicted of an attempt to deal.

CASE NO. CC 27/96

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

ANDRe MAJIEDT

CORAM: STRYDOM, J.P.

Heard on: 1996.02.27; 1996.03.05; 1996.09.16 - 20

Delivered on: 1996.09.20

JUDGMENT

STRYDOM, J.P.: The accused was charged together with one Dorothy Mhlontlo with:

5. The theft of 23 899 Mandrax tablets and

6. A contravention of section 2(a) of Act 41 of 1971 namely dealing in the same Mandrax tablets containing methaqualone ;

and alternatively of being in possession of the said Mandrax tablets.

Dorothy was only charged in respect of the second charge and its alternative. Both accused pleaded not guilty to all the charges.

Accused no. 1 was represented by Mr van der Merwe and accused no. 2 by Mr Oosthuizen. Mr Du Pisani appeared on behalf of the State.

At the end of the State's case a successful application was launched for the discharge of accused no. 2. A similar application on behalf of accused no. 1 was dismissed. To avoid confusion I will continue as far as possible to refer to the remaining accused still as accused no. 1.

Initially there were three accused persons. However one of them, Johannes Husselmann, pleaded guilty and after a separation of trials the said Husselmann was convicted of theft of the tablets and was sentenced to 6 years imprisonment.

Further, as part of the background history of this case, it was common cause that accused no. 1, until the time of his arrest, was a Lance Sergeant in the Drug Enforcement Bureau.

The main witness testifying on behalf of the State was the said Husselmann. He testified that he and accused no. 1 were very good friends. On 12th June, 1994 at a barbecue at Goreangab Dam he was approached by the accused and involved in the scheme to steal some 25 000 Mandrax tablets from the forensic laboratory in Windhoek. These tablets were previously confiscated by the Drug Enforcement Bureau from a person arrested in an operation of the unit at Bagani. This occurred on 11th May, 1994.

Thereafter and on 19th May, 1994 these tablets were handed to the laboratory for analyses. When handed in it was registered in the books of the laboratory under the number 613 and was described as being contained in 2 boxes. Because of the quantity of tablets it was not possible to count them individually. It was however weighed and the weight was recorded as 19kg.

Husselmann sketched to the Court the preparations made by him allegedly on the instructions of accused no. 1. He was instructed to borrow another car with which to undertake the trip to the laboratory. For this purpose he borrowed a white two-door Ford Escort from a friend, one Farmer. The night before he was due to steal the tablets his long hair was cut short and accused no. 1 also showed to him, and he practised, how and in what sequence to write the name "R Nel - Warrant Officer" and the member number. According to the witness they also visited one Dorothy Mhlontlo who would buy the tablets from them. Negotiations took place between accused no. -1 and Dorothy and the witness could therefore not say what

was discussed.

The scheme to obtain the tablets was a simple one. According to Husselmann he was to masquerade as a policeman, one Warrant Officer R Nel, obtain the tablets from the laboratory and hand them to accused no. 1. He was also informed by accused no. 1 that prior to the visit of the witness to the laboratory he, accused no. 1, would phone the director and would inform her that he was Myburgh, the prosecutor of Katima Mulilo, that he needed the exhibits and would send Warrant Officer Nel around to the laboratory to collect them. On the day in question, that is 15th June, 1994, Husselmann went to the offices of the Drug Enforcement Bureau where he met accused no. 1 shortly after 08:00. Accused no. 1 went into the offices to collect some exhibits and from there they drove in the borrowed white Ford Escort to the laboratory. Husselmann did not know where the laboratory was and drove there on the directions of accused no. 1. On arrival they parked in an open parking lot and the agreement was that Husselmann would watch the accused so that he would know where to go when it was his turn to collect the tablets. Accused no. 1 was not long and on his return they drove to his house. At the house the witness remained in the car and the accused went into the house to phone the laboratory in order to pave the way for Husselmann's entrance to collect the tablets. From the house they drove to the court, presumably the magistrate's court, where they went into a restaurant to drink coffee. When it was 09:00 accused no. 1 said the witness now had to go to the laboratory. He was told that he had to ask for Ms Nkomo. Inside the laboratory he asked for and was directed to Ms Nkomo. The witness introduced himself as Warrant Officer Nel from Katima Mulilo and she, Ms Nkomo, told him that a Mr Myburgh had already phoned in connection with the tablets which were then already standing on her desk. Husselmann was taken to reception where he was required by another lady to sign for the

tablets. This was done in a big book. The witness then signed as Warrant Office R Nel and added the other information as he was taught previously.

The tablets were in two boxes. From there the witness went to collect accused no. 1 at the court premises and they together went to his house. They took a bag and drove into the veld where the tablets were put into this bag. They then left for the house of accused no. 1 where the bag with the tablets was put in the garage. The witness again saw accused no. 1 after work. That evening they took about half of the pills to Dorothy's house. They drove there on the directions of accused no. 1 where it was handed over by accused no. 1. Still on the same evening the rest of the pills were placed in a trailer belonging to accused no. 1 which in turn was then taken to the house of a nephew of the accused on the pretext that there were building operations at his house and he was afraid that the trailer might be damaged. Later accused no. 1 informed the witness that they should count the rest of the tablets still in their possession. On the Saturday they collected the tablets and drove up to the bridge near Katutura hospital where they then proceeded to do the counting. Accused no. 1 had a number of bank bags and they established that such a bag could take about 200 tablets. They filled 34 of these bags.

The witness further related another meeting with Dorothy at Wernhil Park and the subsequent handing-over of R9 000 by accused no. 1 to him. He was also informed that Dorothy had given the accused R18 000. Because Dorothy complained about broken pills it was decided to again count the pills in their possession. This took place on the Saturday at Arebusch Lodge. The witness was not present but he was later informed by accused no. 1 that there were 6 000 pills of which 4 00 were damaged. On the night of the same Saturday these pills were taken and handed over to Dorothy.

The accused gave evidence under oath and denied the allegations made by Husselmann. He confirmed that he and Husselmann were good friends and he also confirmed that Husselmann visited him at the office early the morning of 15th June, 1994. Accused however said that the purpose of the visit was to get from him a recommendation to an attorney to assist Husselmann in his coming maintenance case. Husselmann admitted this conversation but said that it was only a pretext to get together. Accused no. 1 further said that after their conversation Husselmann left in a white Ford Escort vehicle. Accused no. 1 took one of the Sierra Drug Enforcement Unit vehicles and left for the forensic laboratory. At the laboratory he handed in his exhibits and asked the name and telephone number of the director. Accused said he wanted this information to see whether he could not get a copy of the report in his Grootfontein case without having to write a letter which would have caused delay. As the accused had to be at the magistrate's court he was in a hurry. He further said that when he asked the name of Ms Nkomo she was also not in her office. At the Court he was told by the prosecutor, who he thinks was one Adams, to return at 11:00. He tried to phone Ms Nkomo on two occasions from the police at the Court but because her number was engaged it was not possible to talk to her. Thereafter the accused again returned to his office. He took the Grootfontein file and on going through it found the lost report where it was filed under the B section instead of the A section. He corrected the situation and made the necessary entry in the C section. This discovery made ' it unnecessary for him to phone Ms Nkomo. Accused no. 1 denied that he saw Husselmann again during that day but said that he could have seen him that evening. He however denied that he, Husselmann and Maritza were together that evening or that they visited accused no. 2 .

On the morning of 16th June, 1994 accused no. 1 saw Husselmann at the magistrate's court where the latter was due to appear on a maintenance charge. Husselmann then informed him that he was going away on leave and as he was worried about his tools, which he usually kept at his work bench in his open yard, he asked whether he could store the tools in the trailer of the accused. Accused no. 1 was not sure whether he saw Husselmann again. He denied however that if they met, that it was in connection with the tablets or that he handed him money. Accused said that he was at Arebusch Lodge on the Saturday, the 26th, but he attended a party which was arranged by a friend of his who was interested in Maritza. Accused no. 1 confirmed that he visited Morkel on the night of the 26th to get his firearm which he had left in the cubby hole of the vehicle which Morkel, who was on stand-by duty, was using. Accused denied that he also visited accused no. 2 on this occasion.

Many other witnesses also testified and I will deal with their evidence where necessary. The two main witnesses undoubtedly were Husselmann for the State and the accused for the defence.

Mr Du Pisani for the State submitted that the Court should accept the evidence of Husselmann and reject that of the accused. Mr Du Pisani conceded that the evidence of Husselmann should be approached with caution because of the fact that he was a co-perpetrator of the crime. He submitted, however, that there is corroboration for the evidence of Husselmann which would exclude the risk of accepting his evidence. On the first count counsel argued that the State proved the theft of two boxes containing Mandrax tablets. In regard to the second charge he submitted that the State at least proved that some of the tablets contained methaqualone and a conviction would therefore be in order. In the alternative and if the Court should be unable to find that the State has

proved that these tablets or some thereof, contained methaqualone, then the accused should be convicted of an attempt.

Mr Van der Merwe for accused no. 1 pointed out that Husselmann was in certain respects also a single witness, apart from the fact that he was also a co-perpetrator. Mr Van der Merwe further strongly criticised the evidence of Husselmann as well as that of Morkel and Ms Gloditzsch. The latter two were also witnesses who, to a certain extent, implicated the accused. Mr Van der Merwe further submitted that the State did not prove that the tablets contained methaqualone. He therefore argued that the Court should acquit the accused.

The parties were agreed that Husselmann did not act on his own when he stole the tablets from the forensic laboratory and that he must have had inside help from a member or members of the Drug Enforcement Bureau. This seems to me to be a correct inference drawn from all the facts. There were a lot of things which Husselmann could not have known about unless someone possessing that knowledge informed him about them. The following are examples thereof.

5. The fact that Inspector Mensah would be out of town during the relevant period.

6. The fact that the tablets were still in the possession of the laboratory at that stage.

3 . The quantity of tablets which would make a risky undertaking worthwhile.

4. The name of the prosecutor in Katima Mulilo.

7. The name of the director of the laboratory. According to her she only came there two days prior to the theft; and

8. The fact that he would be required to sign for the tablets and more particularly how he should sign not to raise suspicion.

Some of the issues mentioned above Husselmann could of course have found out for himself, such as the name of the prosecutor in Katima Mulilo. However, looking at all the evidence the inference is overwhelming that he had inside help. I must also say that Husselmann who was in the witness box for quite some time, did not strike me as the sort of person who could initiate such an undertaking on his own.

This brings me to the evidence given by Husselmann. As previously stated he pleaded guilty to theft and was sentenced to 6 years imprisonment. **I** agree with Mr Du Pisani that this factor to a certain extent decreased the risk of him implicating someone innocent but as a co-perpetrator of the crime he still had that special knowledge which would enable him to substitute the real culprit with the name of someone else and because of special knowledge still come over as genuine. **I** must also say immediately that there is merit in some of the criticism levelled at Husselmann by Mr Van der Merwe. In this regard counsel submitted that Husselmann was confused where and when certain discussions between him and accused no. 1, concerning the theft, took place. Some thereof was only mentioned during cross-examination. In regard to what had happened on the night of the 14th of June he omitted on two occasions during cross-examination to say that they on this night also visited Dorothy who, of course, played an important part in the whole scheme.

Other points of criticism were the evidence that accused no. 1 already on the Sunday knew that Inspector Mensah would be away from his office during the coming week. Mr Van der Merwe also referred the Court to the evidence of Husselmann which was to the effect that he was requested by accused no. 1 to collect the tablets already on Tuesday afternoon, i.e. at a time when they were not yet ready to do so. Husselmann, for instance, had not yet been shown how to sign the register, they did not have another car, etc.

Before dealing directly with the criticism of Husselmann's evidence, his evidence must also, in my opinion, be evaluated against all the other evidence including that of the accused. In my opinion there is support for the evidence of Husselmann in the evidence of Morkel and Ms Gloditzsch.

Morkel testified that on two occasions, namely the 10th and the 12th of June, he was approached by accused no. 1 who proposed to him that they should collect the tablets and sell them. On both these occasions Morkel indicated that he was not interested. He also warned the accused that it was dangerous and that he should forget about it. Mr Van der Merwe criticized the evidence of Morkel and especially in regard to the second occasion argued that that could not have been correct because Morkel said that that happened on a normal working day. The 12th was a Sunday. However, when cross-examined the witness conceded that he may have made a mistake regarding the date. Later he said as far as he could recall it was the 12th or around the 12th. From the evidence it is, in my opinion, clear that Morkel did not categorically state that it was on the 12th that he was approached the second time. That he may have been mistaken about the date cannot be excluded. He was however adamant about

the two occasions and what was discussed. The witness can be criticized for the fact that he did not immediately reveal this discussion to his superiors. However he, at a later stage, did inform them and he also explained why he did not in the first place come forward. He could of course have kept quiet and nobody would have been any the wiser. It was suggested by Mr Van der Merwe that Morkel, with his knowledge of the case, perfectly fits the role and that he cannot be excluded as a suspect. In those circumstances I think Morkel would have jumped at the opportunity to put blame on somebody else and to take away any suspicion which there may have been in regard to him. Morkel also testified that on one occasion he saw a lot of bank bags in the possession of the accused. That there was such an occasion was never put in dispute. In this regard the evidence of Husselmann is relevant, namely that at a stage he and accused no. 1 put the tablets in bank bags. It is so that the evidence of Morkel does not implicate the accused directly with the commission of the crime. However, within a matter of a few days after the proposals of accused, the tablets were stolen. In my view this raises a high degree of probability that it was indeed the accused who was involved.

Ms Gloditzsch testified that accused no. 1 visited the laboratory shortly after 08:00 on the 15th of June when he handed over three parcels containing exhibits. He also enquired about a Grootfontein case. He then enquired also about the 25 000 Mandrax tablets case and asked whether

these tablets had already been collected. The witness said that she then opened, presumably, the register and informed him that the tablets were not yet removed. Thereafter the accused left and the witness said it was between 08:30 and 09:00. Before he left, however, accused also asked her who their new chief was. She said she showed him where Ms Nkomo was

sitting in her office. He asked her name and asked her to write it down for him. He also asked for a telephone number which he then also wrote down. After the accused had left Ms Nkomo came to her and informed her that somebody had phoned her in connection with the 25 000 Mandrax tablets and that a person would come to collect them.

When Husselmann came to collect the tablets he asked for Ms Nkomo and Ms Gloditzsch then directed him to her. Husselmann testified that after accused no. 1 came out of the laboratory they drove to the house of the accused. Accused no. 1 then informed him that he was going to phone the laboratory to tell them that he was Myburgh and that a Warrant Officer Nel would come to collect the tablets. He also said to Husselmann that when he got at the laboratory he should ask for Ms Nkomo. He, that is Husselmann, asked for Ms Nkomo and he was directed to her by a coloured lady. Ms Nkomo informed him that she was already contacted by Myburgh in connection with the tablets.

It is common cause that accused no. 1 was on the morning of the 15th at the laboratory and that he enquired about the name of the director and her telephone number. He denied, however, that he also enquired about the Katima Mulilo case or that Ms Nkomo was in her office and was pointed out to him by Ms Gloditzsch. He testified that the reason why he wanted the name of Ms Nkomo and her telephone number was to phone her and to ask her for a copy of the report which he urgently needed in his Grootfontein case. He said that he and Morkel were at the laboratory on the 14 th. He to enquire about his Grootfontein case and Morkel about the Katima Mulilo case. On this occasion the accused was then informed that he should write a letter before he could get a copy of the report. Because he urgently needed the report and the writing of a letter would cause delay he was going to phone the director.

After the tablets were stolen Ms Gloditzsch remembered her discussion with accused no. 1 and she phoned him. She said he then explained to her that he needed the name and the telephone number of Ms Nkomo because she was new and he wanted to phone her and tell her about the change of an Act mentioned in the affidavits. This was more or less also the explanation -which the accused gave Inspector Becker when Becker had an interview with him. This explanation is, in my view, a far cry from the one he gave in Court.

The accused further explained that he did phone Ms Nkomo on two occasions but her phone was engaged. He then further explained that when he returned from Court to his office he again went through his file and discovered the report where it was wrongly filed. It then became unnecessary to phone Ms Nkomo. Accused said he made the necessary changes in the docket. The docket reflected that this was only done at 16:00 on the afternoon of the 15th which left it rather late for him to obtain another report if it had become necessary. His evidence also created the impression that all this occurred as soon as he came into his office from Court that morning.

Mr Van der Merwe criticised the evidence of Ms Gloditzsch and referred to the two statements that she had made. In the first statement she said that on the enquiry of the accused she told him that there was not yet a report from the laboratory. That was on the 15th of June. This was a mistake and she thereafter made another statement saying that she informed him that the tablets had not yet been collected. The first statement was clearly incorrect and Ms Gloditzsch could not really explain how it came about that she had made such a mistake.

In this regard there is another issue which is also relevant. Morkel testified that he, together with the accused, visited the laboratory between 10:00 and 11:00 on the morning of 15th June, 1996. By then the tablets had already been taken and anybody looking at the register would have seen this.

Accused testified that he and Morkel visited the laboratory on the 14th of June and that they were together when they made their enquiries. On probabilities this seems to me what had happened.

Ms Gloditzsch said that she did not see Morkel and accused together but this may have happened at a time when she was out. Because of what had happened on the 14th accused would have known that the tablets were still at the laboratory and Ms Gloditzsch may have been mistaken when she said that on that morning, that is the morning of the 15th, accused also enquired after the Katima Mulilo case.

When Ms Gloditzsch testified about the telephone conversation she had with accused no. 1 after the theft, she said that she had asked him whether he was the person who wanted the name and telephone number of Ms Nkomo. She was certainly suspicious and would also have asked him whether he was the person that enquired after the Katima Mulilo case if that had happened. This she did not do.

It was of course necessary for the thieves to ensure that the tablets were still at the laboratory because it could have been disastrous if Husselmann, masquerading as a police officer, came to fetch tablets which had already been fetched by the police. Mr Van der Merwe also referred to the evidence of Ms Nkomo who stated that the telephone call concerning

the Katima Mulilo case came shortly after 08:00. Counsel pointed out that by then it was impossible that the call could have come from the accused. She was cross-examined on this issue and she stated that she could actually not remember but it was just after they started work or a few minutes later. In this regard the evidence of Ms Gloditzsch is, in my opinion, more reliable. She stated that they were informed by Ms Nkomo of the telephone call after accused had already left the premises. According to her he left it about 08:30.

The fact of the matter is, however, that accused gave two explanations why he wanted the name and telephone number of Ms Nkomo. Asked why he did not simply phone the number of the laboratory and ask to be put through to Ms Nkomo he stated that he hates to be told to hold on. It was further submitted that Husselmann's evidence that he and the accused left the police offices together on the morning of the 15th in the white Ford Escort, was false. In this regard Mr Van der Merwe relied heavily on the evidence of Morkel who testified that as far as he could recall accused left the offices in a Ford Sierra, that is one of the vehicles belonging to the Drug Enforcement Bureau.

On Morkel's evidence it seems to me that his evidence that accused left in a Sierra was based on a conclusion he drew because he, at a later stage saw the accused returning with the Sierra. He testified that he saw accused and Husselmann talking outside. He was in his office and after a while the two just disappeared. He could also not say whether they had left the premises together. It seems that he came to the conclusion that they had left separately on the basis that he later saw accused returning with this vehicle.

The evidence of the accused on this issue was not convincing. To

Inspector Becker he said that he left there in the Ford Husky but we know this vehicle was out of order. In evidence accused stated that he did not go with Husselmann but left in one of the Ford Sierras. He could however not say in which one. During cross-examination he became certain that it was the Sierra number 3786. On the log of this vehicle, Exhibit B.3, there is however no indication that the vehicle was taken by the accused at that stage. The explanation of accused no. 1 was that he was in a hurry and therefore did not complete the log when he left. However, on his return he brought the keys to the log book where it is kept and still did not make any inscription in the book. It may be that accused was negligent because we know that the accused used the Sierra some time during that morning. However, that it was when he left the premises shortly after 08:00, the Court has only the evidence of the accused.

Looking at all the evidence I am satisfied that the Court can accept the evidence of Husselmann. It is so that his evidence is not above criticism but bearing in mind that he was testifying about an incident which happened almost two years ago it would be surprising to find that he would not confuse happenings and dates. There are, in my opinion, however, no material inconsistencies or even conflicts in his evidence. Mr Van der Merwe's criticism of this witness must also be placed in perspective.

Husselmann, for instance, never testified that he was already told on Sunday the 12th of June that Inspector Mensah would be away from office on the 14th or 15th. The witness testified that he was informed by the accused that Mensah would be away during the week and it was only during their telephone conversation on Tuesday, the 14th, that he

was told that Mensah had left. It could have been known that Mensah would

be away during the week but accused was not certain when this would happen. It seems that Mensah went to Katima Mulilo to oppose an application for bail of the accused arrested in the Mandrax case. He himself could not come up with any specific date when he informed his office when precisely he would be away. Also the fact that accused no. 1 wanted Husselmann to go to the laboratory already on the Tuesday, did not necessarily mean that there would be no planning. Any planning that was necessary as far as Husselmann was concerned, was to know how to sign as Warrant Officer Nel. It would not have taken long to show him how to do it. It is however clear that on this Tuesday Husselmann was still in two minds. On the one hand there was the temptation of the money they would get but on the other hand there was the risk involved and his own future, should things not work out.

Husselmann testified about a sequence of events which took place over a week or more. He was cross-examined by two experienced counsel over a period of some two days. He stood up well under this cross-examination and, as previously stated, was not shown up to be a liar. Insofar as it was possible to check his evidence with other evidence his version was either supported or was found to be highly probable. In this regard reference can also be made to the trailer of accused which it was shown to have been at the house of the nephew of the accused during the relevant time.

The difference between the evidence of Husselmann and that of accused is that, in my opinion, it was shown that the accused either lied in certain respects or did all he could to cover up his tracks. In this regard reference can again be made to the different explanations he gave when he was asked to explain his interest in Ms Nkomo and her telephone number. There was the question whether he was on stand-by duty during the week ending on the 12th of June. He first denied it, later he was shown that

Morkel signed for both of them on the night of the 10th of June. Accused did not accept this and said that Morkel could not sign for them. Later, however, it was shown to him that on the 25th of June he did the same thing where he signed for Morkel. His explanation in regard to the trailer seems to be unlikely. Why would Husselmann have taken all the trouble to get a trailer to store his tools in when all that was necessary was to put them in his house and lock it. It seems to me also unlikely that a man, as a matter of routine, swims in winter time. Here accused also changed his venue from the municipal bath to that of the University at the old WOK to explain that he was not on the 12th of June at a barbecue with Husselmann.

These are some of the inconsistencies and unsatisfactory aspects in the evidence of the accused. If somebody fits the role it was the accused. He and Husselmann were friends. He had the inside information and he, because of his work, had the outlet for the merchandise.

In the circumstances I have come to the conclusion that I

can accept the evidence of Husselmann and the other State witnesses insofar as I have not herein before indicated that I do not accept a particular version or part thereof. I also have no hesitation to reject the evidence of the accused in regard to his involvement in this case.

In regard to count 1 Mr Du Pisani submitted that I should convict the accused of theft of two cartons of Mandrax tablets. I was initially sceptical whether there was evidence that the tablets were Mandrax tablets. However, witnesses of the Drug Enforcement Bureau such as Morkel and Mensah said it was Mandrax. These tablets were also referred to as Mandrax

tablets by Mr Shomeya, the scientist of the forensic laboratory in Windhoek. This evidence, namely that the tablets were Mandrax, was never attacked. What was attacked was that it contained methaqualone. Conceivably there are Mandrax tablet not containing this harmful drug. However, for the reasons set out herein later, I am unable to find that the tablets that were stolen were Mandrax-.

On the second count the accused was charged with a contravention of section 2(a) of Act 41 of 1971 in that he dealt in 23 899 Mandrax tablets containing the substance methaqualone. In this regard the report by Mr Shomeya of the forensic laboratory in Windhoek was handed in and he himself gave evidence.

Because of the conclusion to which I have come on this part of the case it is not necessary to deal extensively with his evidence. Mr Shomeya testified that there were 806 brown and approximately 23 093 greyish tablets. He, in a prescribed method, picked 3 0 brown tablets and 152 grey tablets at random from the two groups. The 30 and the 152 tablets were then, also in separate groups, pulverised, that is all 3 0 tablets in one group and the 152 in another group. Thereafter samples were taken from the powdered tablets and dissolved in methanol to extract the organic active ingredients which in this case were methaqualone and diphenhydramine. Mr Shomeya further explained that he conducted two tests, namely the thin layer chromatography test which he described as a presumptive drug test and the infra-red spectroscopy test. He also explained these tests. This explanation was later on repeated by Mr Theron, a scientist with many years experience in this field and who was called by the defence. From the evidence it was confirmed that the tests performed and described by Mr Shomeya were the tests necessary to detect

the presence of methaqualone. Although Mr Theron expressed some criticism in regard to. the lack of a fuller description in regard to the interpretation of the thin layer test and the keeping of records, he most certainly did not.conclude that the tests were not properly done or that the results obtained by Mr Shomeya were questionable. He expressed some doubt about Mr Shomeya's experience to operate the infra-red spectroscopy but I am satisfied, bearing in mind that the result obtained is tantamount to a fingerprint which is then classified by a computer which also identifies the drug, that in the circumstances the Court can accept the results of Mr Shomeya. However, one point of criticism raised by Mr

Theron deserved consideration. Mr Theron had no problem with the way in which Mr Shomeya selected these samples. He however testified that tests performed to detect the substance of methaqualone is so sensitive that if one out of the 3 0 tablets, or one out of the 152, contained methaqualone, the test would be positive although all the other pills may not contain methaqualone. What it then amounts to is that there was proof that one out of 3 0 brown tablets and one out of 152 tablets contained methaqualone. According to the witness Mr Shomeya should have tested each tablet of his samples individually to obtain statistically an acceptable result. This statistical answer in regard to the grey tablets would, in the circumstances, as tested by Mr Shomeya, amount to some 133 tablets containing methaqualone. That is worked out on a contingency figure of 95%.

Mr Du Pisani did not quarrel with this evidence of Mr Theron. It seems to me that Mr Shomeya also in the end conceded this. To me it makes sense. It would have been impracticable and almost impossible to test all 23 000 tablets but to be able to say that the sample was statistically representative and acceptable in order to cover the quantity of tablets

it follows, in my opinion, that each tablet would have to be tested separately. To put them all into one mixture is to statistically reduce the number of samples again to one.

This is, however, not the end of the matter. Two mysteries surround these tablets. When the tablets were confiscated

they were counted and it was found to be 25 823. When the tablets were handed to the forensic laboratory the two boxes with tablets were weighed and found to weigh 19kg. (See Exhibit C.l.) When Mr Shomeya weighed the tablets he came up with 17,19kg. (See Exhibit B.) It is so that he weighed the tablets without the boxes but it is clear that that does not explain the difference. The approximate total sum of tablets calculated by Mr Shomeya was now 23 899.

After the tablets were stolen, Husselmann testified that he and accused no. 1 then roughly divided them into two groups and one half was handed to Dorothy. Later the other half was counted by counting the quantity which went into one bank bag. This was found to be 200. Some 34 bags were filled. That gives roughly a total of 6 800 tablets. The tablets were then again counted by accused no. 1 and he said that they were 6 000 of which some 400 were broken.

However one looks at the picture it seems that by the time the tablets were taken a substantial amount had disappeared which shows that the tablets were tampered with. The second mystery is that when the tablets were handed in they were described as 25 823 brownish tablets. (See also the evidence of Mr Tibinyane.) When Mr Shomeya took his samples he divided the tablets into two groups, namely brown tablets which were 806 and greyish tablets which he calculated to be 23 093. Although therefore,

when he did his exercise, there were some brown tablets, the vast majority was greyish. When Husselmann described the tablets he said they were brown with a few grey or blue ones in between. Mr Kongeli who carried one of the boxes to the car of Husselmann, said that he peeped into one of the boxes and he saw that the tablets were brown. It seems therefore the only dissenting voice is that of Mr [1] Shomeya but bearing in mind that he divided the tablets on their colour and some of the others mostly took a cursory glance, there is no real basis to find that Mr Shomeya was mistaken. It could perhaps be argued that the other witnesses repeat an impression which they had. If that is so then I would have expected them to say all the tablets were grey because, according to Mr Shomeya, this was so by an overwhelming majority. Then Morkel and Husselmann were also involved in a sort of counting process where they had to look at the tablets and in fact handled them.

In all these circumstances I cannot say whether the tablets tested by Mr Shomeya were the tablets stolen. Opportunities to substitute the real tablets with others certainly existed during the days that these tablets were out of the safe and kept in the office of Mr Shomeya. It seems that they were even kept there overnight.

On the strength of R v Davies, 1956(3) SA p. 52 (AD), both counsel agreed that if the Court should find that the accused was involved in the crime but could not find that the State has proved that the tablets were Mandrax containing methaqualone, that in that event the accused would still be guilty of an attempt to contravene section 2(a) of Act 41 of 1971. I agree. The accused certainly had the necessary mens rea to deal in Mandrax tablets containing

methaqualone. These tablets were handed to the person Dorothy to sell and

according to Husselmann they received at a stage R18 000. The impossibility in the instance to commit the crime was a factual one in that accused thought that the tablets were Mandrax containing the prohibited substance and a conviction for an attempt would therefore be in order.

In regard to the handling of the tablets in the forensic laboratory, that is apart from the fact that samples taken of tablets should henceforth be tested separately, I think it would, for identification purposes and security, be better if the register in which the exhibits are written also have a column wherein the fact whether or not the exhibits were sealed when received, and if so, in what way, is also noted down. Furthermore, no tablets should be left in an office. As soon as the scientist has taken his samples for analysis, the tablets should immediately again be locked up in the safe and when he has them in his possession they should not be left unguarded and especially not left overnight. With a street value of at least N$5 per tablet and bearing in mind the tablets are small and big quantities can easily be concealed, to leave them lying around is as good as leaving $5-pieces lying around unguarded.

In the result the accused is convicted as follows: Count 1

Theft of two boxes containing an unknown quantity of tablets.

Count 2

An attempt to contravene section 2(a) of Act 41 of 1971 by dealing in two boxes containing an unknown quantity of tablets.

ON BEHALF OF THE STATE: ADV L DU PISANI

ON BEHALF OF ACCUSED NO. 1 : MR VAN DER MERWE

Instructed by: J Smith Attorneys

Johannesburg

ON BEHALF OF ACCUSED NO. *2:* & Van Wyk

Instructed by:

ADV G H OOSTHUIZEN Theunissen

CASE NO. CC 27/96

1996.03.05;

1996.09.16 - 20

Delivered on:

1996.09.20

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

ANDRe MAJIEDT

CORAM: STRYDOM, J.P.

Heard on: 1996.02.27;

SENTENCE

STRYDOM, J.P.:

The accused was convicted of the theft of an unknown quantity of tablets from the forensic laboratory and in

regard to the same tablets of an attempt to contravene section 2(a) of Act 41 of 1971, i.e. dealing in a prohibited substance, in this case, of course, the tablets.

It is so that on the evidence the Court has found that it was not proved that these tablets were Mandrax or that they contained methaqualone. This is a factor which the Court must of course consider in coming to an appropriate sentence. However, bearing in mind the background of this case, and the fact that the accused was an officer of the Drug Enforcement Bureau when he committed these crimes, it cannot be denied that the accused was convicted of serious crimes.

In the light of all the circumstances I would fail in my duty if I impose a sentence of a fine or a suspended sentence or one of community service on the accused. Sentencing, always a difficult task, is aimed at deterrence as the element representing the public interest but also at rehabilitation of the specific accused. For this reason the personal circumstances of an accused and his character is relevant when the Court must determine the correct sentence.

The accused is 26 years old and is a first offender. He was a policeman earning N$2 700 per month. He is the youngest of seven children and the task has fallen on him to look after and to support his parents. He is unmarried, but has four illegitimate children whom he maintains at a rate of N$250 per month per child. Mr Van der Merwe also submitted that the accused, because he is no longer a policeman, will never again be in a position to commit a similar crime.

From the above it seems that the accused had a good position and that he was willing and indeed did fulfil his obligation to his family and illegitimate children. However, in this latter respect one detects some irresponsibility on the part of the accused, namely to be the father of four illegitimate children at the age of twenty six. The fact that he is a first offender is always relevant and important when the Court must determine an appropriate sentence.

As previously stated there are also aggravating factors which the Court must consider. The first is that the crimes were planned. They were not committed on the

spur of the moment. In this regard Husselmann was coached, a car was obtained and a person, Dorothy, was lined up as an outlet for the stolen merchandise. Secondly, the accused abused his trust as an officer of the Drug Enforcement Bureau to use his knowledge he obtained as a member of the force to plan and execute the crimes. Thirdly, as a member of this force who was charged with the duty to combat crime, he committed crime. The one, namely the attempt, precisely the sort of crime which he was called upon to fight. If there is someone who should know the effect and destruction caused by drugs such as methaqualone on people, it is you. However, you had no scruples once these tablets were stolen, to dump them again on the market, thereby to a certain extent, setting at nought the efforts of your fellow officers to combat this terrible crime. I am saying this mindful of the fact that I have convicted you of an attempt and that it was not proven by the State that these were Mandrax tablets, however, that was your intention and therefore the degree of your moral blameworthiness is high and must be taken into account when an appropriate

sentence is determined. You were indeed lucky that this Court could not find that these tablets contained methaqualone because then the sentence of this Court would have been quite different.

Mr Du Pisani submitted that in regard to the theft charge the accused should at least receive the same sentence as Husselmann. Husselmann was convicted of theft of 23 899 Mandrax tablets. The accused, although there are certain aggravating circumstances, was convicted of a lesser crime than Husselmann. The Court must also further consider the cumulative effect of sentencing the accused on the two charges.

In my opinion the following sentences would be appropriate in all the circumstances.

Count 1

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m	Four (4) years imprisonment.

ON BEHALF OF THE STATE:
ADV L DU PISANI

1:

MR VAN DER MERWE

Instructed by:

J Smith Attorneys

Johanne sburg

ON BEHALF OF ACCUSED NO.

ON BEHALF OF ACCUSED NO. 2:

Instructed by:

ADV G H O

OSTHUIZEN Theunissen & Van

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