



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CALL-2018/00044

In the matter between:

STANLEY DAUSAB

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Dausab v S* (HC-MD-CRI-APP-CALL-2018/00044) [2019]
NAHCMD 19 (8 February 2019)

Coram: NDAUENDAPO J et LIEBENBERG J

Heard: 19 October 2018

Delivered: 8 February 2019

Flynote: Criminal procedure – Appeal – Conviction and sentence – Dealing in dangerous dependence producing drug – Methaqualone – Appeal – No evidence of sale or transaction – Fair trial denied – Refusal to remand to engage lawyer – Misdirection – No evidence of dealing in; rather possession –

Guilty of possession –Appellant chose to conduct own defence – No misdirection.

Summary: The appellant was convicted of dealing in dangerous dependence producing substance, to wit, 3 x halves and 7 quarters of mandrax tablets containing methaqualone valued at N\$325.00. He was sentenced to 4 years' imprisonment of which 6 months were suspended. He appealed against conviction and sentence. He complained that he did not get a fair trial because the magistrate refused a postponement in order for him to get a lawyer to represent him and that no evidence of sale or transaction was adduced to convict him of the offence of dealing in potentially dangerous dependence producing substance.

Held, that, appellant was fully aware of his right to legal representation and further, that he never asked for a postponement to engage a lawyer and he chose to conduct his own defence.

Held, further, that there was no misdirection when the magistrate allowed appellant to conduct own defence.

Held, further, that the magistrate misdirected herself by concluding that the only reasonable inference to be drawn from the way the mandrax tablets containing methaqualone were cut and wrapped was that the appellant dealt in dangerous dependence producing substances.

Held, further, that no evidence of dealing was adduced before court.

Held, further that the drugs were found in possession of the appellant and he should have been convicted of possession.

Held, further, that the appeal against conviction succeeds and the conviction is set aside and substituted with: the appellant is convicted of possession of dangerous dependence producing substance, to wit, 3 x halves and 7 quarters of mandrax tablets containing methaqualone valued at N\$325.00.

Held, further, that the appellant is sentenced to two years' direct imprisonment. The sentence is antedated to 14 June 2018.

ORDER

In the result, I make the following order:

1. The appeal against conviction succeeds and the conviction is set aside and substituted with:
The appellant is convicted of possession of dangerous dependence producing substance, to wit 3 x halves and 7 quarters of mandrax tablets containing methaqualone.
2. The appellant is sentenced to two years' direct imprisonment.
3. The sentence is antedated to 14 June 2018.

JUDGMENT

NDAUENDAPO J (LIEBENBERG J concurring):

Introduction

[1] The appellant was convicted in the magistrate's court at Karibib of contravening section 3(a) read with sections 1, 3(i), 7, 8, 10 and 14 of the schedule of Act 41 of 1971. He was sentenced to 4 years' imprisonment of which 6 months were suspended on the usual conditions. The allegations by the state were that on 12 January 2018 at Karibib the appellant wrongfully and unlawfully dealt in dangerous dependence producing substance to wit 3 x halves of mandrax tablets and 7 quarters of mandrax tablets containing methaqualone valued at N\$325.00.

[2] Disenchanted with the conviction and sentence, he noted an appeal against conviction and sentence. The grounds of appeal are stated as follows:

1. The court erred in law and or fact by finding that the appellant dealt in dependence producing substances where no evidence of any sale or transaction exists.
2. The court erred in law by refusing the appellant a further remand whilst it was clear that the appellant had a legal practitioner appointed for him. He was not legally represented and the absence of the legal practitioner of record was not as a result of the appellant's conduct.
3. The court further erred in fact by finding that the packaging of the mandrax indicated it was for sale purposes whilst this is not the only inference to be drawn.
4. The imprisonment term imposed by the court in the prevailing circumstances are shockingly inappropriate.
5. The court unjustifiably overemphasised the seriousness of the offences at the expense of mitigating circumstances.'

The State's case

[3] Detective Sergeant Nishidimba testified that on 12 June 2018, they (together with Sergeant Beukes) raided the house of the appellant at no. 7 Kasinga Street, Karibib. The appellant and his girlfriend were in bed. He introduced himself to the appellant and informed him that they were there to search for drugs as they had received information that he was still dealing in drugs. They asked permission to search the house. Whilst searching, he found cash in the amount of N\$1 050 which belonged to the appellant. He searched the cupboard and the room and found no drugs. As he was about to search the surrounding of the bed, he got a call from his superior and he asked his colleague, Sergeant Beukes, to take over the search. He observed Sergeant Beukes as he was searching. On the bed where the appellant was sleeping when they entered the room, Sergeant Beukes found a small black bag under the pillow. Sergeant Beukes opened the bag and found mandrax tablets cut in 3 halves and 7 quarters that were wrapped in a foil. He testified that according to his experience, mandrax tablets are always wrapped in foil to protect them before they are sold. He further testified that he knew that they

were mandrax tablets because of his experience and training in identifying drugs. They were greyish or creamish in colour. They sealed the drugs in the evidence bag and arrested the appellant. The appellant informed him that the drugs belonged to him, but during cross examination, the appellant put to him that he told them that the drugs belonged to Jerome. The witness denied that.

[4] He further testified that the drugs were sent to the National Forensic Science Institute for analysis and the results came back positive. Exhibit "A" an affidavit in terms of s 212 (4)(a) and (8)(a) of the Criminal Procedure Act 51 of 1977 was admitted into evidence and handed in as an Exhibit "A". The exhibit confirmed that the drugs that were confiscated from the appellant were indeed mandrax tablets containing methaqualone. Sergeant Beukes testified and corroborated the evidence of Detective Sergeant Nishidimba in all material respects.

Appellant's case

[5] Appellant testified that on Thursday 11 June 2018 at around 20h00 they were drinking and playing dominos when his cousin, Gerald Dausab, handed him a bag and told him that he should hide it for him as he did not want his girlfriend to see it. They went to retire that evening and in the morning, the police raided their room and found the drugs in the bag handed to him by his cousin under the pillow. Him, his girlfriend, Gerald Dausab and his girlfriend were taken to the police station where they were informed that if no one takes responsibility for the drugs, they will all be locked up. He testified that because the drugs were found under his pillow, he took responsibility. He further testified that he did not know the content of the bag that was handed to him by his cousin and only came to know that they were drugs when the police opened it.

Submissions by counsel for the appellant

[6] Counsel for the appellant submitted that the appellant's right to a fair trial was violated when the magistrate denied the appellant a postponement to enable him to engage his lawyer to represent him.

[7] Counsel argued that on 8th of March 2018 the appellant informed the court that he has a lawyer, Ms Haufiku, and the court warned him that he must make sure that this lawyer was present at the next remand date otherwise the court may infer that he was merely attempting to delay the proceedings. On 25 April 2018 Mr. Tjetere appeared for the appellant and the matter was remanded to 22 May 2018 for trial. Mr. Tjetere did not appear on 22 May 2018. The learned magistrate then remanded the case for a week and informed the appellant that if his lawyer is not present the matter will proceed and he must conduct his own defence, she also stated that: 'if your lawyer is not present the matter will proceed on own defence for then it is clear that you are unduly trying to prevent the finalization of this matter blocking administration of justice and exceeding the limits of reasonableness.'

[8] On 31 May, Mr. Tjetere, appeared and the appellant pleaded not guilty and the matter was postponed to 13 June 2018 for trial and on that date Mr. Tjetere was absent. The appellant informed the court that the lawyer's fees were paid in a wrong account and that Legal Wise (his insurance company) had appointed Mr. Appolus to represent him but he could not be there as the appointment was at short notice. The court then informed the appellant 'that his lawyer agreed to this remand date and the matter was set down for trial today so how do we proceed today?' The appellant then informed the court that he will conduct his own defence. Counsel argued that the court misdirected itself when it found that the appellant's legal practitioner was present and had agreed to the date. I agree that the court indeed misdirected itself when it stated that appellant's lawyer agreed to the date, however in my respectful view that was a *bona fide* mistake as the new lawyer was clearly not at court and could not have agreed to the date. Counsel argued further that there is no evidence on record that there was docket disclosure and in 'the absence of a legal representative and further in the absence of any evidence on record showing the appellant had received the docket disclosures it is hereby respectfully submitted that the conduct of the magistrate to compel the appellant to proceed in his own defence was a gross misdirection.'

[9] Counsel for the respondent argued that the appellant was aware of his constitutional rights and the different choices that he could make and he chose to conduct his own defence. The appellant was informed of his constitutional entitlements and it is apparent that he chose to abandon them knowingly, voluntarily and intelligently. Counsel further argued that the appellant's lawyer was served with disclosure before the trial date. On 25 April 2018 the prosecutor informed the court that disclosure was going to be ready on that day. The s 119 plea was taken on 31 May 2018 with the assistance of his lawyer and had disclosure not been done, the lawyer could have raised that.

[10] The appellant was informed of his rights to legal representation at the commencement of his trial and he was aware of it throughout the trial. He was asked what he wanted to do seeing that his lawyer was not present and he informed the court that he wanted to conduct his own defence. The court again asked him whether he wanted to defend himself and he said yes. This is not a case where the appellant informed the court that he wanted another postponement to engage a lawyer and the court refused. The appellant was fully aware of his right to be represented by a lawyer or to conduct his own defence. That right was explained to him at the commencement of his trial; he waived that right and chose to conduct his own defence. In *S v Shipanga*¹, the Supreme Court relying on US Supreme Court decision of *Miranda v Arizona*² held that: 'The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.' In this case, similarly, the appellant waived his right to be represented voluntarily, knowingly and intelligently. I find no misdirection on the part of the magistrate when she granted the appellant's choice to defend himself. It is common practice that before an accused pleads the docket is disclosed to him or her to enable him or her to know the charges preferred against him/her. In this case there is evidence on record that the prosecutor informed the court that the disclosure was to be made and the appellant when he pleaded with the assistance of his

¹ *S v Shipanga and another* 2015 (1) NR 141 (SC).

² *Miranda v Arizona* 384 US 436 (1960).

erstwhile lawyer never raised non-disclosure. There is no merit in this argument as well.

[11] Counsel for the appellant further contended that the court in 'its ruling found that there existed no evidence from the record to find that there existed a sale of some form of transaction. If we accept this finding then it is our submission that the court thus subsequently misdirected itself alternatively contradicts itself by convicted the appellant on dealing in mandrax/dependence producing substance. This finding is primarily based on the finding that the items found were packaged in a particular way which infers a sale. This we submit is not the only inference to be drawn from the circumstances and thus the court should not have drawn such inference.'³

[12] Counsel further argued that: 'if we are to accept that based on packaging the court was allowed to draw such inference that would then create a reverse onus for the accused to now prove otherwise relieving the state of its duties to prove an allegation beyond a reasonable doubt.'

[13] Counsel for the respondent submitted that the collection of the substances by the appellant amounted to dealing and that the appellant admitted to have collected the drugs he was found with. I disagree. The appellant testified that his cousin 'handed' a bag to him with the instruction to hide it and that amounted to taking possession (handed) and could not be equated to collection. Counsel further argued that the manner in which the drugs were wrapped showed that they were meant for sale. I differ with that submission as dealing is clearly defined in the act and it does not in any way say that the manner in which the drugs are wrapped constitute dealing. The Medicine and Medical Professions Abuse of Dependence – Producing Substances and Rehabilitation Centres Act 41 of 1971 defines 'deal in' as: 'in relation to dependence-producing drugs or any plant from which such drugs can be manufactured, includes performing any act in connection with the collection, importation, supply, transshipment, administration, exportation, cultivation, sale, manufacture, transmission or prescription thereof.'

³ See *S v Naftali* 1992 NR 299 (HC).

In *S v Paulo and Another (Attorney-General As Amicus Curiae)*⁴ the Court held that in terms of Act 41/1977, 'deal in' has an extended meaning and said that:

'This is so when regard is had both to the ordinary meaning of 'deal in' and its extended meaning as defined in the Act. The conventional meaning of 'deal in' is to buy and sell, but it may denote a wider meaning of 'doing business' or performing a transaction of a commercial nature.'

No evidence was adduced before court to prove that what the appellant did conform with the definition of dealt in.

[14] In convicting the appellant, the learned magistrate reasoned that

'Therefore the inference created to me does not indicate that accused was just keeping these mandrax tablets for his brother's cousin but that they were kept for sale because of the halve and quarter sizes they were already broken into whilst having been wrapped in foil and the easily assessable (sic) hiding place they were hidden in.'

I disagree that is the only inference to be drawn. What about the inference that they were cut in halves and quarters for the convenient use by the appellant himself? That possibility cannot be excluded, the court therefore misdirected itself by concluding that the only inference to be drawn from the way or manner the mandrax were cut and wrapped was for sale.

[15] In my respectful view the prosecution did not prove any act of dealing and the appellant should have been convicted of possession as the mandrax tablets containing methaqualone were found under his pillow.

[16] The appellant was charged with contravening s 3(a) read with sections 1, 3(i), 7, 8, 10 and part III of Act 41 of 1971, that is incorrect. The correct charge should have been contravening s 2(c) read with sections 1, 2(ii), 7, 8,

⁴ *S v Paulo and Another (Attorney-General As Amicus Curiae)* 2013 (2) NR 366 (SC) at page 377.

10 and 14 and Part II of the schedule Act 41 of 1971, as amended, as methaqualone falls under part II of the schedule Act 41 of 1971. Notwithstanding the wrong charge, the state as per exhibit 'A' produced evidence showing that the drugs found with the appellant contained methaqualone.

[17] In the result, I make the following order:

1. The appeal against conviction succeeds and the conviction is set aside and substituted with:
The appellant is convicted of possession of dangerous dependence producing substance, to wit 3 x halves and 7 quarters of mandrax tablets containing methaqualone.
2. The appellant is sentenced to two years' direct imprisonment.
3. The sentence is antedated to 14 June 2018.

N. G. NDAUENDAPO
JUDGE

J.C. LIEBENBERG
JUDGE

APPEARANCES:

FOR APPELLANT

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FOR RESPONDENT

Ms Ndlovu

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