



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CALL-2019/00016

In the matter between:

DIRK COETZEE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Coetzee v State* (CC 2019/00016) [2019] NAHCMD 275 (2 August 2019)

Coram: NDAUENDAPO J et UNENGU AJ

Heard: 21 June 2019

Delivered: 2 August 2019

Flynote: Criminal procedure – Appeal to the High Court – Against convictions – Pleas of guilty – Convictions in terms of s 112(1)(a) and s 112(2)(1)(b) – Possession of dagga and mandrax tablets containing methaqualone – Appellant – Unrepresented – No evidence that substances were dagga and mandrax tablets containing methaqualone – Appellant had no knowledge that substances were indeed dagga and mandrax tablets containing

methaqualone – Court could not have been satisfied of guilt of appellant-
Misdirection - Convictions set aside – Matter remitted back.

Summary: The appellant was convicted, on his own guilty pleas, of possession of dagga and mandrax tablets containing methaqualone. On possession of dagga, he was summarily convicted in terms of s 112(1)(a) of Act 51 of 1977 and on possession of mandrax tablets containing methaqualone, he was convicted in terms of s 112(1)(b) of Act 51 of 1977. No evidence was led to prove that the substances found on the appellant were indeed dagga and mandrax tablets containing methaqualone. Appellant noted an appeal against the convictions.

Held, that the court should not have been satisfied of the guilt of appellant, without evidence being led about the nature of the substances.

Held further, that the court misdirected itself by accepting the *ipse dixit* of the appellant that the substances were dagga and mandrax tablets containing methaqualone without evidence.

Held further, that the convictions are set aside and the matter is remitted back to the magistrate's court, sitting at Rehoboth to start the matter afresh.

ORDER

1. Condonation for the late noting of the appeal is granted.
2. In respect of count 1, the conviction and sentence are set aside.
3. In respect of count 2, the conviction and sentence are set aside.
4. The matter is remitted back to the control magistrate, Rehoboth to assign a magistrate to deal with the matter.
5. The magistrate so assigned must in respect of count 1 request the prosecutor to lead evidence that the substance found in possession of appellant was dagga and in respect of the second count enter a plea of not guilty in terms of s 113 of Act 51 of 1977 and request the prosecutor to lead evidence.

JUDGMENT

NDAUENDAPO J (UNENGU AJ concurring):

Background

[1] On 28 November 2018 the appellant appeared in the magistrate court sitting at Rehoboth and charged with two counts.

Count 1

[2] The state alleged that “In that upon or about the 26 of November 2018 and at or near the Rehoboth police station in the district of Rehoboth the said accused did wrongfully and unlawfully have in his possession or use a prohibited dependence-producing drug or a plant form which such a drug can be manufactured, to wit 3 x ballies of pure cannabis valued at N\$50.00.

The appellant, who was unrepresented, pleaded guilty and the magistrate summarily convicted him in terms of sec 112(1)(a) Act 51 of 1977 and sentenced him to N\$1000 or three months imprisonment.

Count 2

[3] The state alleged that “In that upon or about the 26th day of November 2018 and at or near the Rehoboth police station in the district of Rehoboth the said accused did wrongfully and unlawfully have in his possession or use dangerous dependence producing drugs or a plant from with such drug can be manufactured namely 1x full and 1x half Mandrax Tablets containing Methaqualone and valued at N\$180-00.”

The appellant pleaded guilty and the learned Magistrate then proceeded to question him in terms of Sec. 112(1) (b) Act 51 of 1977 as follows:

QUESTIONING OF THE ACCUSED PERSON i.t.o. S112 (1) (b) OF THE CPA FOR COUNT 2.

Court: Do you understand the charges against you?

Accused: I understand.

Court: Are you today in your sound and sober senses?

Accused: Yes.

Court: Accused did any one force or threaten you to plead guilty today?

Accused: No.

Court: Then why do you plead guilty? What did you do wrong?

Accused: I plead guilty because I was in possession of Mandrax tablets.

Court: When did the incident occur?

Accused: At the Rehoboth Police Station on Monday night.

Court: Where did the incident occur?

Accused: At the Rehoboth Police Station.

Court: State is alleging that it was on 26 November 2018 at the Rehoboth Police Station, would you deny or dispute this?

Accused: I admit. I had 3 ballies of Cannabis and one and a half tablets of Mandrax.

Court: Does the Mandrax tablets found on you contain Methaqualone?

Accused: Yes.

Court: The State alleges that you wrongfully and unlawfully had in your possession or used a potentially dangerous dependence-producing drug to wit 1 and a half Mandrax tablets containing Methaqualone. Do you admit this is or deny this?

Accused: I admit this.

Court: The state alleges that tablets were valued at N\$180-00. Do you admit this or deny this?

Accused: I admit this.

Court: Accused, why were you in possession of the Mandrax tablets?

Accused: It was found in a cigarette packet that I had in my pocket.

Court: Accused, do you know that it is wrong and unlawful to be in possession of Mandrax tablets?

Accused: Yes I know that.

Court: Accused, did you have a permit or prescription from a medical practitioner that authorized you to be in possession of Mandrax tablets:

Accused: No.

Court: Accused, do you know that if you were found guilty you could be punished by a competent court of law for your actions?

Accused: Yes I knew.

Court: What happened to the tablets?

Accused: The police seized them.”

“P.P: The state accepts the plea.

Court: The court is satisfied that the accused has admitted all the allegations contained in the charge and is therefore guilty as charged on count 2. The appellant was sentenced to eighteen (18) months imprisonment of which six months were suspended on the usual conditions.

Disenchanted with the convictions, the appellant filed a notice of appeal with the following grounds:

[4] Grounds of appeal

- ‘1. That the learned magistrate erred in law and or fact in respect of count 1 by convicting appellant on his bare plea of guilty, thereby accepting that appellant knew that the substance found on him was cannabis without enquiring from him on what basis he knew it was cannabis.
2. That the learned magistrate erred in law and or fact by questioning appellant as to whether he was forced or threatened to plead guilty without enquiring also whether he was persuaded or unduly influenced to plead guilty.
3. That the learned magistrate erred in law and or fact by accepting appellant’s *ipse dixit* that the tablets found on him contained methaqualone in the absence of a certificate confirming the presence of methaqualone in the tablets found on him.
4. That the learned magistrate erred in law and or fact by not enquiring from appellant whether he was aware that the cigarette packet found in his pocket contained prohibited dependence producing substances.

Condonation

[5] The appeal was filed out of time. The appellant was sentenced on 28 November 2018 and his notice of appeal was only filed on 28 December

2018. He filed a condonation application accompanied by an affidavit. He explained that he intended to appeal and asked his relatives to engage the services of a lawyer as he was in detention at Hardap prison. After a while his relatives informed him that they contacted a lawyer who advised them that they need to pay a deposit of N\$20 000, money which they did not have. He then applied to the Directorate of Legal Aid and Mr. Christians was appointed who then filed the notice of appeal on 28 December 2018. That explanation is acceptable and reasonable. The appellant also has prospects of success on appeal. The state did not oppose the condonation application. In the result condonation was granted and the parties argued the appeal on the merits.

Appellant's submissions

[6] Mr. Christiaans in his written heads argued that the questioning by the magistrate was insufficient with regards to the alleged facts to ascertain that appellant can be convicted of the offence charged in his plea of guilty alone. He further argued that the questioning was insufficient to eliminate a possible defence or indeed leaves room for a reasonable explanation other than appellant's guilt. He further argued that questioning was insufficient to establish that the appellant committed the offence unlawfully and with the necessary *mens rea* and that he appreciates the meaning of his admission. He further argued that the questioning was insufficient to establish the presence of the prohibited substance methaqualone beyond reasonable doubt especially since appellant was undefendant and the state failed to prove the presence of methaqualone.

Respondent's submissions

[7] Counsel argued that the magistrate did not err on the facts or law when he convicted the appellant of count 1 as the offence did not merit punishment of imprisonment without an option of a fine exceeding N\$6000.

In respect of count 2, counsel argued that the magistrate cannot be faulted in accepting that the appellant fully appreciated the meaning of his admission given the response that he gave when he was questioned and that he acted with the necessary *mens rea*. Counsel further argued that the magistrate

cannot be faulted for accepting that considering that the appellant was asked on two separate occasions if he admits or denies that he had Mandrax tablets his answers were 'yes', it showed that the presence of methaqualone was established.

[8] In terms of s 112(1)(b) the court must be satisfied about the guilt of the accused before convicting him or her. In the *State v Benjamin Maniping*¹ and the *State v Khanyse Thwala*² the court held that:

"The court is enjoined by section 112(1)(b) to satisfy itself of the guilty of the accused before convicting and I fail to see how any court can properly be so satisfied on the basis of a bare admission of a fact which the court know must be outside the personal knowledge of the accused. It must, in my view, have material before it from which it can properly determine the dependability of the admission.'

The court further stated: 'And it follows from this that in such cases the state should be in a position to produce an analyst's certificate or adduce other acceptable evidence of the nature of the substance. For example, where possession of dagga is alleged the state should be in a position to call a police officer to testify that he is familiar with dagga and that the substance found in possession of that accused is indeed dagga.' (my underlining)

"To summarise, where an accused who pleads guilty makes an admission when questioned pursuant to section 112(1)(b) of a fact which is palpably outside his personal knowledge –

- (a) the court has a duty to satisfy itself of the reliability of that admission where the accused is not legally represented;
- (b) if there appears to be any real risk that the exercise of testing the reliability of such an admission will result in the accused having to admit to previous criminal conduct the court should refrain from asking further questions;
- (c) instead, the court should simply record the admission and invite the prosecutor to present evidence on that aspect of the charge and, if the

¹ *State v Benjamin Maniping* (review case 282/94)

² *State v Khanyse Thwala* (Review case 333/94)

- prosecutor declines to do so, the court should record a plea of not guilty and leave it to the prosecutor to prove that particular element;
- (d) where the charge is one of dealing in or possessing a prohibited drug the state should be in a position to produce an analyst's certificate and the accused should be given the opportunity of examining such certificate;
- (e) where the charge is one of dealing in or possession of dagga the state should be in a position to prove by any acceptable means that the substances in question is dagga; and
- (f) where the admission is made by the accused's legal representative more weight can usually be attached to such an admission and normally the court would be justified in accepting that the legal representative has satisfied himself that the admission can properly be made.'

[9] In the case before us, the appellant was summarily convicted of count 1 in terms of s 112(1)(a) of Act 51 of 1977 on his bare admission without any acceptable evidence being led that the substance in question was indeed dagga. In respect of the second count, there is no way that the appellant could have known that the mandrax tablets contained methaqualone without any scientific evidence such as the analyst's certificate and therefore the court should not have been satisfied about the guilt of the appellant. The court should have entered a plea of not guilty in terms of s 113 of Act 51 of 1977 and requested the state to lead evidence. In my respectful view the magistrate erred in convicting the appellant without evidence being led to prove that the substances found in possession of the appellant were indeed dagga and mandrax tablets containing methaqualone.

In the result, I make the following order:

1. Condonation for the late noting of the appeal is granted.
2. In respect of count 1, the conviction and sentence are set aside.
3. In respect of count 2, the conviction and sentence are set aside.
4. The matter is remitted back to the control magistrate, Rehoboth, to assign a magistrate to deal with the matter.

- 5, The magistrate so assigned must in respect of count 1 request the prosecutor to lead evidence that the substance found in possession of appellant was indeed dagga and in respect of the second count enter a plea of not guilty in terms of s 113 of Act 51 of 1977 and request the prosecutor to lead evidence.

N. G. NDAUENDAPO
JUDGE

E. UNENGU
ACTING JUDGE

APPEARANCES

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