

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

Case no: AR: 264/11

In the matter between:

DONALD DAVID VETTER

versus

THE STATE

APPEAL JUDGMENT

Delivered: 13 March 2012

MBATHA J

[1] The appeal before us emanates from the Magistrate Court, Pietermaritzburg.

[2] The Appeal is against both conviction and sentence. The Appellant was convicted of contravening section 5(b) read with sections 1, 13(f), 17(e), 18, 19, 25 and 6 of the Drug Trafficking Act no. 140 of 1992 (Dealing in cocaine) and also of contravening section 5(b) read with sections 1, 13 (d), 17(d), 18, 19, 25 and 64 of 1992 (dealing in ecstasy tablets).

[3] The accused was sentenced to four (4) years imprisonment in respect of each count. The sentences running consecutively.

[4] The Appellant who was legally represented had tendered a Plea of not guilty to all the charges. The Accused tendered an explanation in terms of

section 115 of the Criminal Procedure Act 51 of 1977, as amended, indicating the basis of his defence.

[5] The basis of his defence being that:

- (a) He lives in an outside room or wendy house at the back of his brother's house in number 33 Greyling Street, Pietermaritzburg.
- (b) On the day of his arrest he had received a telephone instruction from his brother, Hilton Vetter, to remove drugs under Hilton's bed in the main house and bury them in the back yard.
- (c) He complied with his brother's instructions.
- (d) Having done that he left for the Polo Traven, where he was confronted by police officers who took him back where he had just buried the drugs.

[5] The grounds of his defence are as follows:

- (a) That he was neither dealt in drugs nor was he in possession thereof as he lacked the necessary intention in this regard;
- (b) That the Accused should have faced a single count of dealing in both cocaine and ecstasy as the drugs were packaged and buried, and found together by the police. It was submitted that this led to the unnecessary splitting of the charges to the prejudice of the Appellant;
- c) That there should have been an alternative charge to the single main count of dealing in drugs, being the contravening of section 4(b) of the Drug Trafficking Act 140 of 1992 (possession) and;
- d) That the learned Magistrate misdirected himself by drawing an inference that the Appellant was dealing in drugs, irrespective of all the evidence placed before him in the trial, which indicated that this is not the only inference that can be drawn from the facts of the case.

[6] The following issues are common cause:-

- (a) The policemen acted on the information given to them. The information being that the Appellant's brother, Hilton Vetter, had drug money in his (Hilton Vetter's) bedroom.
- (b) The Appellant was observed by the police officer's burying something in the backyard, which was eventually found to be drugs.
- (c) The money referred to was found in a pillowcase in Hilton's bedroom. The person who removed the stash of cash from the pillow case and handed it to the policeman was Hilton's wife and not the Appellant; and
- (d) That the Appellant acted on his brother's instructions to bury the drugs in the garden.

[8] Application of the law:-

8.1 A dealing charge can be proved in a number of ways. In this case the Court relied on the basis that the Appellant was found in possession of a huge amount of drugs and it drew an inference that the Appellant was dealing in drugs.

8.1 Constitutionally it is no longer acceptable to rely on presumptions, like quantity, alone to prove intent to deal. Certain other factors indicating the intent to deal must be present to draw an inference that there is an intention to deal in drugs, for instance, presence in an area known for drug dealing, possession of weighing gadgets, approaching persons to sell drugs or the actual sale of drugs.

[9] The Court accepts that the Appellant knew that it was unlawful to possess drugs. He buried the drugs in the garden at the instruction of his brother with the intention of protecting his brother. Section 1 of the Act, extends the definition of possession to include keeping drugs on behalf of someone else. He knew where they were buried and possessed the necessary intention. There is no evidence on the trial record to indicate that such intention extended beyond that

of possession. The Court has to consider all the evidence as a whole to determine whether the State has excluded a reasonable possibility that the Accused is not guilty, even if there is a possibility that the Accused's version regarded in isolation is true. Evidence may overwhelmingly establish his guilt, as was held in **S v Bruiners en v Ander 1998** (2) SACR 432 (SE). The same should apply in the opposite, the possession of drugs by the Accused in isolation from other factors that indicate his guilt, should not have been taken in isolation as an indication that he is guilty of dealing in drugs.

[10] The learned Magistrate, with respect, should have been mindful of the application of the basic legal principles and that no inference could have been drawn from the possession by the Accused that he is dealing in drugs. Culpability in the form of intention is required for this offence as stated in **S v Collett 1991** (2) SA 854 (A).

[11] The Appellant's role and possession came only in the hiding of the drugs, for a very short of time period, on behalf of his brother.

[12] There is sufficient evidence on the trial record that the Appellant was in possession and in full control of the drugs at the time of his arrest; that he had knowledge that it is unlawful to possess drugs and that he knew that what he was burying were drugs, irrespective of that he had no knowledge that it was ecstasy and cocaine. The Court is satisfied that the State fully established all the elements for possession of drugs in this matter. The trial Court should, therefore, have found him guilty of possession rather than dealing in drugs.

[13] We also conclude that there was an unnecessary splitting of the charges in this matter. There should have been only one count of dealing in drugs and one

alternative count to the main charge. This view was held in **S v Deidricks** 1984 (3) 814 (P) when the Court ruled that when an Accused is charged for dealing in both substances at the same time, same place, and the same occasion with the same intention, it would amount to a duplication of convictions, which is commonly referred to as splitting of charges.

We are satisfied that the Appellant has succeeded in proving that he did not deal in drugs and a more appropriate verdict would be that of being found in possession of drugs.

SENTENCE

[14] Having changed the verdict in this matter, we have taken into account the following factors in assessing sentence.

- (a) The conviction on possession of drugs is a very serious offence on its own. The Appellant's brother is not the only person who gets affected by the use of drugs, but drugs have an adverse on the entire community.
- (b) We have taken into account the personal circumstances of the Appellant, which are as follows: he is 45 years old, he is employed as a boilermaker's assistant, a widower, he only has a standard six (6) education, and has two children, both who are 21 years old
- (c) A pre-sentencing report has recommended correctional supervision due to his clean record, age and ill health due to the HIV infection.
- (d) It is submitted on his behalf that there is no need to remove him from society and that correctional supervision can be an appropriate sentence in the circumstances.
- e) The pre-sentencing report has revealed that the Appellant has a history of smoking dagga and has reframed from smoking same for the past two years.

[15] The HIV status of the Accused which leads to the development of the Acquired Immunodeficiency Syndrome (AIDS) reduces a person's life expectancy. This needs to be taken into account in the consideration of his sentence, as the Appellant has a low CD4 count.

[16] In **S v Cloete** 1995 (1) SACR 367 (W) and **S v C** 1992 (2) SACR 503 (T) it was held that a Court must take into account a convicted person's ill-health in considering an appropriate sentence and how it may relate to the effect of the completed sentence. We accept that a custodial sentence may be harsher for the Appellant in view of his illness.

[17] There is evidence which has been placed before this Court which strongly supports the application for correctional supervision despite the availability of such treatment in prison. However, the Court emphasises that HIV is not a slate to write crime off and that it does not enjoy a higher status than other illness.

[18] The pre-sentencing report recommends that he need not be removed from society permanently, he can serve the community which he owes a duty to, and it can assist in his rehabilitation.

[19] The Court accepts that the Appellant is a candidate for correctional supervision and makes the following order:-

1. The appeal is upheld and the conviction on dealing in drugs is set aside. It is substituted by the following order:

- (a) The Appellant is found guilty of possession of cocaine and ecstasy drugs:

2. The sentence of the lower Court is set aside and substituted by the following order:

2.1 The Appellant is sentenced to correctional supervision for a period of eighteen (18) months in terms of section 276 A (3) (e) (ii) Act 51 of 1977 on the following conditions:

2.1.1 The Appellant is sentenced to house arrest at his place of residence at no 33 Greyling Street, Pietermaritzburg between the hours 21h00 to 6h00.

2.1.2 The Appellant is confined to the Magistrate district of Pietermaritzburg.

2.1.3 The Appellant is ordered to perform community service for a period of sixteen (16) hours per month. The nature of service to be determined by the National Institution for Crime Prevention and Rehabilitation of Offenders (NICRO) in consultation with the Department of Correctional Services.

2.1.4 The house arrest referred to in paragraph 2.1.1 shall be subject to the Appellant's medical practitioner's assessment, should it be necessary that the Appellant is in need of hospitalisation.

2.1.5 The Appellant shall report to the supervising officer of the Department of Correctional Service in Pietermaritzburg once a month.

2.1.6 Any officer of the Department of Correctional Service shall have access to the Appellant's place of residence at any time during the period of house arrest for purpose of ensuring that the Appellant complies with the terms of this order. His movements will be monitored and supervised. Regular evaluation will ensure that he is upgraded for intensive to a less intensive degree of supervision

or vice versa.

2.1.7 The Appellant shall conduct himself properly at all times and shall not be convicted of any offence involving narcotics, alcohol or drugs.

2.2 The Appellant shall be involved in the following programmes as recorded in the pre-sentencing report:-

2.2.1 Orientation Programme – this will inform the Accused of his responsibilities pertaining to the conditions set out by the Court;

2.2.2 Life Skills Programme – to assist the Appellant improve his social functioning; and

2.2.3 Drugs and Alcohol Abuse Programme – to inform the Appellant of the detrimental effects of alcohol with the possibilities of him abstaining from the use of alcohol or drug. He such have two (2) hurly sessions over or four (4) weeks period.

MBATHA J

JAPPIE J

I agree, it is so ordered.

Date of hearing: 06 March 2012

Date of Judgment: 13 March 2012

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