



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NO: 01/08

In the matter between:

ANDREW AUGUST

1ST APPELLANT

EUGENE DAVIDS

2ND APPELLANT

AND

THE STATE

RESPONDENT

Coram: Tlaletsi j et Pakati AJ

Date of hearing : 01 August 2011

Date of judgment : 26 August 2011

JUDGMENT

TLALETSI J

Introduction

[1] The appellants appeared before the Regional Court, Kimberley on a charge of contravention of Sec 5(b)¹ read with sec. 1.13, 17 to 25 and 64 of Drugs and Drug Trafficking Act 140 of 1992 in that they dealt in 299 tablets of Mandrax (Methaqualon) valued at R12 000.00. They were found guilty as charged. The first appellant was sentenced to three (3) years imprisonment two (2) years of which was ordered to run concurrently with the sentence he was serving on the date of sentencing. Second appellant was sentenced to twelve (12) months imprisonment. The present appeal is against the convictions of the two appellants only.

[2] Before dealing with the factual background there is one matter that is worth mentioning. The appellants were arrested on 15 November 2004. Their first appearance at the Regional Court was on 15 September 2006. It would appear that between these two dates the matter was on the District Court roll. It is not apparent from the record why it took that long before the matter was placed on the Regional Court roll.

[3] The trial commenced only on 18 September 2007 and was finalised on 10

1 Sec 5 Dealing in drugs- No person shall deal in –

(a) any dependence-producing substance; or
 (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance,...

December 2009. The delay in this regard is understandable. The appellants had in the early stages of the trial elected to conduct their own defence despite the advice of the Regional Magistrate that they have legal representation. They at a later stage heeded the advice and used the services of legal representatives. The proceedings had to be transcribed to enable the legal representatives to acquaint themselves with the proceedings that far. Some of the witnesses were recalled to enable the legal representatives to cross-examine them. At some state the tapes got missing and the record had to be transcribed, leading to further delay. There was also an opposed application for discharge at the close of the state case which was at the subsequent appearance refused.² The appellants thereafter applied for the recusal of the presiding officer. The application was opposed and was unsuccessful.

- [4] The appeal record consists of seven volumes and is not in a satisfactory state. The evidence is not placed in proper sequence; there is a substantial number of “*onhoorbaar*” (inaudibles) and the pagination is not properly done. It was a strenuous record to read in preparation for the hearing. However, in the interests of avoiding further delay we agreed to entertain the appeal based on what had been presented to us. We have been assured

2 . Sec. 174 of the Criminal Procedure Act of 1977.

and we were satisfied that none of the parties would be prejudiced thereby.

Factual background

[5] The appellants pleaded not guilty to the charges and denied each and every allegation against them. The respondent tendered the evidence of the following witnesses. Constable Tromp, Mr Makokong, Captain Swanepoel, Captain Botha, Inspector Louw, LJ Nel, Captain Veli Ruthenavelu and Superintendant G L Topkin.

[6] The case presented by the respondent is as hereunder.

[6.1] During the year 2004 Superintendant GL Topkin (“Sup. Topkin”) was a captain in the Organised Crime Division of the South African Police Services (“SAPS”) in the Northern Cape Province. He was also a co-ordinator of traps and undercover operations conducted in terms of sec. 252 (A) of the Criminal Procedure Act (“the CPA”). During November 2004 Sup. Topkin received a report from a certain Captain Botha from

Crime Intelligence Unit in De Aar relating to alleged unlawful activities by First Appellant (alias Babes). Capt. Botha requested that First Appellant be added as a suspect in an operation that was in progress in Hopetown relating to investigation of drug related offences. Sup. Topkin's request to the Director of Public Prosecutions (DPP) Northern Cape to accede to the request by the Crime Intelligence Unit, De Aar, was turned down. It was then decided on the advice of the DPP to rather conduct an *ad hoc* operation for First Appellant. Authority for the trap to be conducted against the first appellant and those who might be involved was authorised by Sup. Topkin in terms of sec 252(A) of the CPA.

[6.2] Captain Botha instructed his informer, Mr Makokong, who was then known to First Appellant, to phone First Appellant and inform him that he had someone from Victoria West who was interested in buying Mandrax tablets. First Appellant is said to have agreed and suggested that they should meet in Kimberley for him to meet the buyer and for the transaction to be concluded. The reason why Mr Makokong was used to contact First Appellant is that he had been used to "infiltrate" a certain Mr Willem Casper ("Mr Casper") who was at the time a suspect in an undercover operation referred to above code named "*Operation*

Empimpi”. Mr Casper was known to be a friend to First Appellant and there were allegations that they were both instrumental and involved in drug trafficking. “*Operation Empimpi*” is the operation that the DPP declined authority for First Appellant to be included as a suspect for investigation purposes. They were of the opinion that the inclusion of First Appellant could prejudice “*Operation Empimpi*”.

[6.3] On 03 November 2004 Capt. Botha and Const. Tromp travelled to Kimberley. Const. Tromp who was at the time stationed at Hanover was introduced to Sup. Topkin as a proposed “*agent*” to be used for the operation. Mr Makokong was also introduced to Sup. Topkin as the informer who would facilitate contact with First Appellant. In the presence of Sup. Topkin on the same day, Makokong and Const. Tromp spoke to First Appellant, about the possible transaction referred to above. He told First Appellant that he wanted to purchase drugs. The first appellant told him to phone him the following day on Thursday. The following day at about 16h00 Const. Tromp phoned First Appellant as arranged. First Appellant offered to sell to Const. Tromp 300 tablets at a cost of R40.00 per tablet. Const. Tromp accepted the offer. First Appellant then told Const. Tromp to phone him the following day on Friday. Const. Tromp agreed and reported all the discussions and

arrangements to Capt. Botha. Capt. Botha in return reported to Sup. Topkin who was supposed to arrange money for the transaction.

[6.4] On Friday 05 November 2004, at ±10h15, Const. Tromp phoned First Appellant. The latter suggested that they should meet on the road next to Horseshoe Motel in Kimberley and further that he should phone him immediately on arrival at the agreed meeting place. Sup. Topkin withdrew an amount of R12 000.00 from “*Uistande Voorskot Staatskas*” for use in the proposed trap.

[6.5] On 05 November 2004 Sup. Topkin went to the local Police Station to request assistance in the handling of the docket and investigations since he was operating at Provincial level. Capt. Swanepoel, Sup. Vermeulen and Insp. Louw were tasked to assist in the operation. Const. Tromp, Mr Makokong, Sup. Topkin and Insp. Botha met at a local hotel/guesthouse specially booked as part of the operation. According to Sup. Topkin, Insp. Botha and Mr Makokong, Insp. Botha searched both Const. Tromp and Mr Makokong to ensure that they did not have any money or drugs in their possession. Having found nothing of that kind in their possession, Sup. Topkin handed over an amount of R12 000.00 to Const. Tromp for

him to use for the trap transaction. Insp. Botha conveyed Const. Tromp who had a bag (rugsak) containing his clothes, together with Makokong to the area next to the Horseshoe Motel as arranged with First Appellant. Whilst on this aspect, I have to mention that Const. Tromp testified that he was searched but that did not take place in the presence of Mr Makokong who was according to him not present. He mentioned further that he was initially conveyed alone by Insp. Botha and they picked up Mr Makokong somewhere in town on their way to the proposed meeting place. Mr Makokong on the other hand further mentioned that when they arrived at Horseshoe Motel being conveyed by Insp. Botha, it was warm and he also put his jersey in the bag that Const. Tromp was carrying. Const. Tromp's version is that it was only his clothes that were in the bag that he carried. I will return to these contradictions in due course since these aspects together with the others referred to later, form the basis of the grounds of appeal.

[6.6] Sup. Topkin testified that he followed the Isuzu Bakkie driven by Insp. Botha conveying Mr Makokong and Const. Tromp until they alighted at the intersection controlled by traffic lights next to the petrol filling station and Horseshoe Motel. The two walked towards a "hicking spot" in front of the Horseshoe Motel. Insp. Botha parked his motor vehicle in one of

the parking bays of the then Spar Supermarket next to the Horseshoe Motel in such a way that he would be able to observe Mr Makokong and Const. Tromp. Sup. Topkin also took up position where he could keep watch on the two. In the meantime Insp. Louw and Insp. Loubsher who are attached to the Organised Crime Unit, took up positions next to the Kalahari Lodge along the same road leading towards Cape Town. The purpose of their posting there was for them to stop the suspect(s) in case they tried to escape in that direction.

[6.7] Const. Tromp phoned First Appellant and told him that he had arrived at the meeting place. According the Const. Tromp First Appellant told him that he would arrive in half an hour's time. Const. Tromp phoned Insp. Botha and reported what First Appellant said to him. After about 15 minutes a white Ford Sierra motor vehicle approached from the direction of Kimberley Central Business District (CBD) and stopped where Capt. Tromp and Makokong were standing. This motor vehicle was driven by the appellant. Const. Tromp was seeing him for the first time. First Appellant was alone in the motor vehicle. He indicated to the two to embark the motor vehicle. Const. Tromp embarked on the front left passenger seat and Mr Makokong on the rear left side. First Appellant introduced himself to Const. Tromp as "Babes" and exchanged greetings

with Mr Makokong. First Appellant requested Const. Tromp to allow him to drive a few metres back towards the CBD as he had off loaded a person next to the road with tablets. Const. Tromp agreed.

[6.8] First appellant made a u-turn and drove towards the CBD. Sup. Topkin followed them in his motor vehicle unnoticed. He phoned Insp. Louw and told him that he could move towards the direction of the CBD. Insp. Botha also followed in his motor vehicle. He reported to Sup. Topkin that he was also following slowly. First Appellant stopped the vehicle off the Memorial road next to the concrete chairs and table under a big tree next to the Formula 1 Hotel. They found Second Appellant seated on one of the chairs. He was wearing a Yellow – T shirt and also had a yellow plastic bag between his legs. Second Appellant stood up and walked towards the motor vehicle. Sup. Topkin drove past this area. He also saw Second Appellant walk towards the motor vehicle. He, however, could not notice the yellow plastic bag in his possession. He mentioned that he may not have noticed the plastic bag as he was driving and had to pay attention on to the road and traffic. Members of the Organised Crime Unit also started to advance to the scene where First Appellant had stopped.

[6.9] Second Appellant entered the motor vehicle on the left rear side. Mr Makokong who was seated on that side moved towards the middle of the rear seat to give way to Second Appellant. Inside the motor vehicle, First Appellant instructed Second Appellant to take out the box and hand it over to Const. Tromp. He complied. Const. Tromp opened the box and found six shiny packs containing tablets. First Appellant mentioned to Const. Tromp that each packet contained 50 tablets. Const. Tromp opened one packet and counted the tablets. There were 50 tablets in this packet. Const. Tromp was satisfied and handed over the money to First Appellant. The money was made up of R100 notes. According to Const. Tromp First Appellant started to count the notes one by one putting those he counted on the panel between the two front seats next to the gear lever.

[6.10] In the meantime Sup. Topkin received a call from Insp. Botha reporting that the transaction was in progress in First Appellant's motor vehicle. Sup. Topkin phoned Capt. Swanepoel, Sup. Vermeulen and Insp. Louw and reported that the transaction was in progress and that they could now carry out the arrest.

[6.11] As First Appellant was busy counting the money Sup. Vermeulen and

Capt. Swanepoel arrived. On seeing them First Appellant threw the money that was still in his hand between the seats of the motor vehicle. Sup. Vermeulen and others introduced themselves as police officers and explained that they were arresting the appellants. They explained to them their rights. Const. Tromp also identified himself to First Appellant that he is a police officer and that he was arresting him for dealing in drugs. The tablets were confiscated and counted in the presence of the appellants. The tablets were 299 in total. Sup. Topkin arrived during the process of the arrest and confiscation of the tablets and the money.

[6.12] The version of Mr Makokong is slightly different from that of Const. Tromp about the event in the motor vehicle. According to Mr Makokong, after Second Appellant got on to the motor vehicle, First Appellant requested the “*goods*” and Second Appellant handed over the parcel to First Appellant. First Appellant took out a box from the plastic bag and handed it over to Const. Tromp, keeping the plastic bag on him. Const. Tromp thereafter handed the money over to First Appellant by counting the notes one by one into first appellant’s hands. When the police arrived and asked what was happening and ordering them to get out of the motor vehicle, Const. Tromp placed the money he was still to count in the area between the two front seats and First Appellant alighted the motor vehicle

with the money that had already been counted onto his hands. The police took the money that was in First Appellant's possession as well as the notes that were placed between the two front seats.

[6.13] Insp. Botha mentioned that when he was nearing the scene of the arrest he noted that Mr Makokong was still present at the scene contrary to their arrangement with him that he must run away from the scene when the arrest was being carried out. The reason why he had to run away was that the police did not want to use him as a witness in this case in order to protect his identity as their informer. Insp. Botha mentioned further that Mr Makokong suddenly ran away. He cannot recall whether he ran away on his own as arranged or he indicated to him to run away. However, he followed him pretending to be chasing him. He later met Mr Makokong at a place where he was waiting and picked him up.

[6.14] On 05 November 2004 at about 14h30, Insp. Louw handed over the following items to Insp. Lourens who was responsible for safe keeping of exhibits at the Kimberley Police Station. 1 x yellow plastic bag written "Vermeulens", 1x box, 6 x plastic packets; 299 tablets; 1x Red Nokia Cellularphone, with Battery and Sim-Card. He entered these items on the

registers and kept them in a safe. Insp. Lourens was the only person who kept the key to the safe.

[6.15] On 08 November 2004 Insp. Lourens handed over the items referred to above to Insp. Louw. These items were handed over to Insp. JA Nelson of the Criminal Record Centre in Kimberley. Insp. Nelson took photographs of the items. He prepared an album as well as a key thereto. The photo album as well as the key thereto were handed in as exhibits during the trial during Insp. Nelson's testimony. Insp. Nelson returned the photographed items to Insp. Louw. The latter returned the items to Insp. Lourens on the same day who locked them in the safe.

[6.16] On 17 November 2004 Insp. Lourens handed over the tablets to Insp. Louw. Insp. Louw prepared the necessary packaging of the tablets for purposes of sending them for analysis at the forensic laboratory. He marked them FSB 15337 and thereafter returned them to Insp. Lourens for safekeeping. Insp. Lourens kept the items in the safe until 01 December 2004. On this day he handed the items over to Insp. Lourens. On 02 December 2004 Inspector Louw arrived at the Forensic Laboratory in Cape Town where he handed in the package for analysis. He received

acknowledgment of receipt document with Kimberley Police Station, Case-Number 202/11/2004 and SAP13 number 72/2004. The person who received the package signed for it and marked it no: FSB 151137 and affixed a date stamp for 02 December 2004. This document was handed up as an exhibit.

[6.17] On 24 January 2005 Capt. Ruthenavelu, then sergeant, attached to the Forensic Science Laboratory in Cape Town, received evidence material bag with unique number FSB 151137 from the Administration Unit of the laboratory. The bag was marked *inter alia* “Georganiseerde Misdaad”, Kimberley MAS 2024/11/4/2004. SAP 13 1724/11/4/04, containing 299 tablets contained in plastic packets. She testified that the investigating officer brought to her attention that in her written statement /affidavit she had stated that she received 5 plastic bags instead of 6 and wanted her to verify it. She then recalled her case docket and all the exhibits relating to the case as she could not recall the correct position. She went through the docket as well as her notes and picked up that it was 6 bags. She believed that the mistake occurred when she transcribed the information to her typist. Furthermore, 5 of the 6 bags contained tablets of similar make, colour and size and the other was different and was as such separated from the rest.

[6.18] Capt. Ruthenavelu testified that she was requested to conduct tests to examine whether the tablets contained any substances as listed in the Medicine and Related Substance Control Act, Act 101 of 1965 and or the Drugs and Drugs Trafficking Act, Act 140 of 1992. She testified that upon receipt of the exhibits from the Administration Unit she made sure that the seals were intact and that all the information on the exhibit bag matches the covering minutes. She was satisfied that everything was in order and signed for the receipt of the exhibits. She kept the exhibits in her personal safe to which she was the only person who kept the key and had access to it. Capt. Ruthenavelu's tests revealed that the exhibits contained methaqualone which is listed in Part III of Schedule 2 of Act 140 of 1992.

[6.19] On 17 February 2006 Insp. Lourens handed the cellular phone back to first appellant.

Appellants' case

[7] First Appellant's version is that he had known Mr Casper since his school days and were friends. During 2004 he used to travel from Kimberley to

Mr Casper's house in Hopetown to buy "full-kits" (sheep head, feet and intestines). Mr Casper further conducted a business of selling vegetables and repairing shoes. He met Mr Makokong at Mr Casper's house during his visits to buy "full-kits".

[8] On 05 November 2004 he received a telephone call from Mr Makokong who told him that he had something for him and that he was standing at the Horseshoe Motel. First Appellant testified that since he had met Mr Makokong when he went to Mr Casper to buy "full-kits" and vegetables, he thought that Mr Makokong meant that he had "full-kits" and vegetables for him. First Appellant mentioned further that the other reason why he thought Mr Makokong meant that he had "*full-kits*" and vegetables is that Mr Casper also used to bring his "*full-kits*" and vegetables to Kimberley and sell them and with the proceeds thereof he bought shoe hooks and soles in Kimberly town for his shoe repair business. First Appellant is the one who used to fetch Mr Casper from the Horseshoe Motel and transport him into town for that purpose.

[9] After receiving Mr Makokong's telephone call First Appellant took an amount of R430.00 with him to pay Mr Makokong for the "full-kit" and

vegetables and drove to the Horseshoe Motel. As he was on his way he heard someone who happened to be Second Appellant whistling on the side of the road. First Appellant looked and noticed Second Appellant who was making an indication with his hands that he requested a lift. In response, First Appellant took out his hand through the window to indicate with his finger that he will return to pick him up. According to him it was for the first time for him to see and have contact with Second Appellant on that day and further that he did not see any yellow plastic bag in Second Appellant's possession.

- [10] First Appellant testified that when he arrived at the Horseshoe Motel he noticed Mr Makokong who was in the company of a strange man. He stopped and Mr Makokong and Const. Tromp got into his motor vehicle. As it had happened before he made a u-turn and drove towards the CBD where Casper usually bought the hooks and soles. After passing the traffic lights intersection Const. Tromp mentioned to Mr Makokong that *"they could not make business there."* First Appellant noticed that Const. Tromp was in possession of a clothing bag. He did not know what Const. Tromp wanted or meant. He stopped on the side of the road where Second Appellant was. He noticed that Const. Tromp was doing something on his bag. He did not notice what he was doing. Second Appellant came, opened the left rear door and sat on the left side of the

motor vehicle. First Appellant looked to see whether the road was clear for him to get back onto the road. He noticed two motor vehicles, one in front and the other at the back, both blocking his motor vehicle from rejoining the road.

[11] The occupants of the two motor vehicles alighted and came to his motor vehicle. Sup. Vermeulen came to First Appellant's window and asked what was happening. First Appellant responded that nothing was happening. Sup. Vermeulen directed First Appellant's attention to the money which was between the two seats. It was the first time he saw this money. Sup. Vermeulen instructed him to alight. He complied. He was searched and his cellularphone and an amount of R430.00 was taken from him. He denied that he was at any stage found or had any drugs in his possession. He did see a yellow plastic bag written "Checkers" containing tablets. First Appellant testified that he knew Second Appellant. They are related and they reside in the same street.

[12] Second Appellant's version is that on 05 November 2004 he went to seek employment. He later walked along the Cape Town road on his way home towards the direction of the CBD. He saw First Appellant driving towards the opposite direction. He requested a lift from him by whistling and directing with his hands. First Appellant responded by indicating with his hand that he should wait and that he will come back to pick him

up. He was seeing First Appellant for the first time that day. It was also his first contact with him. He had nothing in his possession.

- [13] He testified that after a while First Appellant approached from the Horseshoe Motel direction and pulled out of the road. At this stage Second Appellant was seated under a tree on a concrete chair waiting for First Appellant. First Appellant had two passengers. Second Appellant walked towards the motor vehicle and boarded on the left rear side. After boarding, other motor vehicles arrived and parked in front and behind First Appellant's motor vehicle. People came out of the motor vehicles and ordered them to alight from the motor vehicle. They complied and they were searched. He did not see any R100.00 notes until the motor vehicle was being searched. He also saw tablets for the first time when the motor vehicle was being searched. He mentioned that the tablets were contained in a yellow plastic bag with the words "*Checkers*" written on it. It is not the same plastic bag that appears on the photo album. He denied that he possessed or dealt in any mandrax tablets. That concluded the evidence tendered on behalf of the appellants and the respondent.

- [14] The court below made the following remarks and findings in its judgment.

14.1 That Makokong was subjected to detailed cross-examination could not be destroyed and was able to stick to the theme of his evidence

despite the fact that he was told that he was not going to be used as a witness and testified five years after the incident.

14.2 Although the evidence of Const. Tromp differed in some respects from that of other state witnesses he also stuck to his evidence. On evaluation the court was of the view that Const. Tromp did not appear to be trying to hide something or lie to the court.

14.3 That the contradictions in the state case were not fundamental.

14.4 First Appellant's alleged conspiracy by the police to have him falsely arrested on dealing in drugs is unfounded.

14.5 That the appellants' versions are not reasonably possibly true and that the state had succeeded to prove the guilt of both accused beyond a reasonable doubt.

[15] The appellants were subsequently convicted as charged. They applied and were granted leave to appeal against their conviction by the court below.

The appeal

[16] The appellants have raised the following grounds of appeal. That the trial court erred in finding that:

16.1 The contradictions in the respondent's evidence are not material;

16.2 The evidence tendered by the respondent is reliable;

16.3 The appellants' versions were not reasonably possibly true;

16.4 By not paying sufficient consideration to the cautionary rules when evaluating the evidence of the police informer.

16.5 The appellants' version regarding the conspiracy against them falls to be rejected and thereby wrongly placing the *onus* on the appellants.

16.6 By finding that the exhibit bag that Louw sent for analysis and that received by Ruthenavelu was the same despite the fact that SAP 13 numbers differed.

[17] It is a trite principle of our law that in criminal proceedings the state carries the onus to prove the guilt of the accused person beyond reasonable. There rest no burden on the accused to prove his innocence. In determining whether the state has proved the guilt of an accused person beyond reasonable doubt, a court is enjoined to evaluate the evidence presented, weigh up all the elements which point to the guilt and innocence of the accused and take into account the inherent strengths and weaknesses, the probabilities and improbabilities on all the versions presented and consider whether the balance weighs so heavily in favour of the state as to exclude a reasonable doubt as to the accused's guilt.³

³ See: **S v Chabalala** 2003(3) SACR 134 (SCA), **S v Van Aswegen** 2001(2) SACR 97(SCA) at 101e, **S v Mbuli** 2003

Navsa JA in **S v Trainor** had the following to say:

[9] “A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong.”⁴

[18] In **S v Mavinini** the Supreme Court of Appeal explained the position as follows:

“It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have ‘moral certainty’ of the guilt of the accused. Though the notion of ‘moral certainty’ has been criticised as importing potential confusion in jury trials, it may be helpful in providing a contrast with mathematical or logical or ‘complete’ certainty. It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral

(1) SACR 97(SCA) at 110 para [57].

4 2003 (1) SACR 35 (SCA) at 41 para[9]

responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights-remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system”⁵

- [19] Where there are contradictions in the evidence presented by the state witness a court must keep in mind that not every contradiction or deviation affects the credibility of a witness because contradictions and deviations which are not material are not necessarily relevant. The court must consider all the evidence and decide whether the truth, despite the shortcomings, has been told. The position was authoritatively set out as follows in **Sithole v The State**.⁶

“It is trite that not every error made by a witness will affect his or her credibility. It is the duty of the trier of fact to weigh up and assess all contradictions, discrepancies and other defects in the evidence and, in the end, to decide whether on the totality of the evidence the state has proved the guilt of the accused beyond reasonable doubt. The trier of fact also has to take into account the

⁵ 2009(1) SACR 523 (SCA) at 529(para 26)

⁶ 2006 SCA 126 RSA at para: 7; **S v Bruiners** en Ander 1998(2) SACR 432 (S) at 439 C-F.

circumstances under which the observations were made and the different vantage points of witnesses, the reasons for the contradictions and the effect of the contradictions with regard to the reliability and credibility of the witnesses.”

- [20] It is also an accepted guideline that an appellate court shall not lightly interfere with the factual finding of the trial court in the absence of cognisable misdirection by the trial court. Where however a court of appeal is satisfied that the trial court made an incorrect factual finding it is bound to correct.⁷
- [21] In this court, Adv Setouto who appeared on behalf of the appellants submitted that the appellants do not challenge the fairness or lack thereof of the process of the trap but only the finding of the court *a quo* that the contradictions in the evidence of Mr Makokong and Const. Tromp that they are not material. He contended that such contradictions are material such that it cannot be said that the respondent had proved its case beyond reasonable doubt. Secondly Adv Setouto contended that since the SAP numbers on the forensic packages and those referred to by Capt. Ruthenavelu differed, doubt exists as to whether it is the same exhibits that were analysed by the forensic laboratory.

⁷ **S v Mafaladiso** en Others (supra) at 595; **President of Republic of South Africa v South African Rugby Football Union** 2000(1) SA 1(CC) at 42E-44A; **S v Toubie** 2004 (1) SACR 530 (W) at 535 H. **R v Dhlumayo** 1948(2) SA 677(A); **S v Robinson** 1968(1) SA 666(A). **S v Nkosi** 1993(1) SACR 709(A) at 711 e-g.

- [22] On behalf of the respondent, Adv Mokone contended that the magistrate was correct in finding that the contradictions in the evidence of the two witnesses were immaterial. He further contended that the magistrate's finding that the tablets that were analysed at the forensic laboratory are the same tablets that were confiscated by the police at the scene.
- [23] The court below's conclusion that the contradictions relating to the searching of Mr Makokong and Const. Tromp and how they travelled to the Horseshoe Motel where they were to meet First Appellant are immaterial is in my view incorrect. The searching and observation of the people to be used for the trap is one of the guidelines developed by the courts to make the trap's evidence more acceptable. In this case such evidence is made more material because of the alleged conspiracy by the police to have First Appellant arrested by the police. It must however be emphasised that failure to take these steps does not necessarily lead to the evidence being totally rejected.⁸
- [24] In my view it was incumbent upon the court below to consider the contradictions together with the entire evidence presented on the issue and decide whether the respondent's evidence is acceptable. Topkin and Capt. Botha corroborated the evidence of Mr Makokong that the two were searched simultaneously. Const. Tromp may be mistaken that he

⁸ See: **R v Omar** 1948(1) SA 76(T)

was searched alone since the incident happened almost five years before he testified in court. It is common cause with Const. Tromp that Insp. Botha is the person who conducted the search and is able to recall that they were searched simultaneously. Const. Tromp's written statement which was made on 05 November 2004 is not helpful. The statement seem to have been made on the basis that Mr Makokong would not be called to testify and his identity was being concealed. No reference is made to Mr Makokong in the statement. Neither is any reference made to the search by Insp. Botha and handing over of the money to be used for the trap. All details some of which are common cause between the respondent and the appellants came out during the trial. The trial court's finding that the contradictions are not material may be wrong, however the conclusion that the respondent has proved its case beyond a reasonable doubt on these aspects is not wrong as it is supported by the evidence.

- [25] First Respondent's claim that the police conspired to falsely implicate him in the case must be considered in light of the entire evidence presented. His own version has a number of improbabilities. He has never bought "*full-kits*" or vegetables from Mr Makokong on previous occasions and yet when he phones him and tell him that he has something for him, he does not enquire exactly what he has or means. Instead he

makes an assumption that it must be “*full-kit*”. He decides to take an amount of R430-00 without establishing what price is Mr Makokong going to charge him.

- [26] In addition, First Appellant when he arrives at the Horseshoe Motel he does not ask Mr Makokong what is that that he has for him, or where he has kept what he has for him as he did not have anything in his possession. He instead, load Mr Makokong into his motor vehicle with a stranger and on his own decides to make a u-turn and proceed to the CBD without asking whether Mr Makokong had any business to do there. He allows the stranger to occupy the front seat when he had no business to do with him. He then steps at Second Appellant who the police did not know that he was waiting for him under a tree. It is also a coincidence that the police who, if they conspired, would also foresee that First Appellant would assume that he was offered a “*full-kit*” and vegetables when he was not specifically told, and that his relative, Second Appellant would wait for him under a tree where the false transaction would be carried. On First Appellant’s own version, it was on his own initiative that he picked up Mr Makokong and Const. Tromp and drove towards the CBD and stopped where Second Appellant was. On the contrary, the police put their stoppers on the opposite direction next to the Kalahari Lodge and change their position when First Appellant drove towards the CBD. The

court *a quo* in my view, was correct in rejecting First Appellant's version on the conspiracy to have him falsely arrested. The police may have wanted to have him away from the "*Operation Empimpi*" but what they did by setting the trap for First Appellant was not improper and was within the law.

[27] It was further contended that the respondent had not proved beyond reasonable doubt that the tablets that were analysed by Cpt. Ruthenavelu were the same as those that were sent by the police for this case. This contention was based on the differences in the SAP 13 numbers. In this regard Cpt. Ruthenavelu testified that they do not identify the exhibits according to the SAP numbers but by a unique FSB numbers (FSL-nommers). In this case there was nothing wrong with the FSB number. As regards the argument whether she received 5 packets or 6 packets of tablets, the trial court correctly in my view, accepted her explanation as to the mistake that she committed which she rectified in her testimony. There was no evidence presented to gain say her version.

[28] In my view it has not been shown that the court *a quo* committed any misdirections warranting interference by this court. The court *a quo* critically and holistically considered the evidence presented, applied the cautionary rules in evaluating the evidence where applicable and committed no errors warranting interference by this Court. The appeal

against conviction falls to be dismissed.

In the result the following order is made:

“The appeal against conviction is dismissed.”

L P TLALETSI

JUDGE

I concur.

B PAKATI

ACTING JUDGE

Appearances:

On behalf of the Appellant : Adv L Setouto

Instructed by : Kimberley Justice Centre

On behalf of the Respondent : Adv Mokone

Instructed by : Director of Public Prosecution

TLALETSI JA

I agree.

ZONDO JP

I agree

SANGWENI AJA