

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

CASE NO. AR 434/08

In the matter between:

MTHOKOZISI GAMEDE

1ST APPELLANT

NOBULA GAMEDE

2ND APPELLANT

NTENJANE MAKHANYA

3RD APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT Delivered on 04 September 2009

SWAIN J

[1] The appellants were convicted of a contravention of Section 5B of the Drugs and Drug Trafficking Act 140 of 1992 (the Act) in that during June 2004 on the farms Spitzkop and Mange, they dealt in 556 kilograms of methaqualone, an undesirable dependence producing substance, listed in Part 3 of Schedule 2 of the Act. Each

appellant was sentenced to twenty years' imprisonment and declared unfit to possess firearms.

[2] The appeal is against both conviction and sentence, with the leave of the Court *a quo*.

[3] The appeal was advanced on three main grounds:

[3.1] Whether the State had proved beyond a reasonable doubt, that the gas chromatographs used to determine the nature of the substances found on the farms Spitzkop and Mange, functioned correctly and reliably.

[3.2] Whether the State had proved beyond a reasonable doubt that the results of the analysis of these substances, reflected on the computer printouts produced by these gas chromatographs, were correct and reliable.

[3.3] Whether the State had proved that the appellants manufactured and/or dealt in methaqualone.

[4] Simply put, did the State prove beyond a reasonable doubt, that methaqualone was present in the samples removed from the farms Spitzkop and Mange and if so, was it proved that the appellants were involved in its manufacture, or dealt in it?

[5] Mr. Engelbrecht, S.C. who, together with Mr. Bam, S.C. and Mr. West appeared for the appellants, sought to persuade us that the State had failed in its endeavour to prove that the instruments utilised to detect the presence of methaqualone had “functioned correctly, accurately and reliably”.

[6] Mr. Engelbrecht, S.C., relying upon certain dicta in the following decisions

<i>S v Mthimkulu</i>	1975 (4) SA 759 (A)
<i>S v Strydom</i>	1978 (4) SA 748 (EC)
<i>S v Terblanche</i>	1981 (1) SA 791 (T)
<i>S v Dickenson</i>	1982 (3) SA 84 (A)
<i>S v van der Sandt</i>	1997 (2) SACR 116 (WLD)

submitted that it was incumbent upon the State to lead expert evidence, to explain how the automatic analysis in the instruments was done and the basis upon which it should be found that the analysis was correct and reliable. This is particularly so as judicial notice could not be taken of the reliability of gas chromatographs

van der Sandt *supra* at page 134 C

Mr. Engelbrecht, S.C also submitted that the evidence led by the State fell short of this objective, when compared with the nature of the evidence led in certain of these cases.

[7] The production of certificates by the State, in terms of Section 212 (4) (a) of the Criminal Procedure Act 51 of 1977 to furnish *prima facie* proof of the presence of methaqualone in the samples, did not achieve this goal, as they failed to include an explanation (as required in van der Sandt's case at page 134 D) as to why the process of analysis was reliable. The certificates did contain a description, albeit a cryptic one, of the process used to obtain the results.

[8] To cure this lack the State led the evidence of Insp. Twala and Sgt. Mapatoana who "evaluated" the gas chromatographs used to produce the results which are in issue. It is therefore necessary to examine their evidence at the outset.

[9] Insp. Twala stated that she evaluated the instrument described as HP3. This process entailed three distinct steps:

[9.1] Firstly, the instrument had to be "tuned" by opening the "Cam Station software" on the computer and pressing the "tune function" with the result that the instrument automatically tunes itself. By tuning the instrument the mass spectrum parameters are adjusted. The tuning takes place automatically and the witness said she had an understanding of how this was done "but I'm not comfortable like telling you step by step how the instrument does it". When the instrument has finished tuning, it produces a report which is checked to see whether it passes, or meets the criteria. If it does, then the next

stage is proceeded to. In the present case the instrument passed the tune report.

[9.2] The Grob test mixture is then run in the machine. This is a mixture of compounds that are used to evaluate the suitability of the instrument, which is bought from a supplier to an international standard. The compounds contained in this mixture are stipulated in the SOP (Standard Operating Procedure) manual utilised in the laboratory. The mixture contains the following chemicals (as appears from the record of the proceedings in the Court *a quo* parts of which it appears the transcriber was unable to transcribe).

“COURT Do you want her to read it. Ja? --- The SOP says:

“The commercial Grob test mixture is solution of an indican
2.3 butane diol, dicyclo [?] hexane amine, two ether
hexanoic acid, one nonenal [?], one octanol [?] 2.6
dimethyl alanine, 2,6 dimethyl phenol, methyl anticanonate
[?], methyl neurite and methyl caproate.”

The function of the Grob mixture was to test the column performance of the instrument, namely the ability of the column to separate the compounds according to their mass to ratio. The results are retrieved from the instrument and a calculation is done on the results, to determine whether they meet the criteria set out in the system suitability report. In the present case, the instrument met the requisite criteria.

[9.3] Before the instrument can be certified as fit for use, a further solution, described as “decker flora tripe butyl amine” (DFTPP) has to be run through the machine to evaluate the mass “spectrophotometer”. This solution is obtained from a supplier and an instrument technician in the laboratory adds methaqualone to it. The results are retrieved from the machine and calculations are then done in respect of the mass spectrometer and the results are recorded in the systems suitability report. The purpose in completing the report is to check if the mass parameters meet the criteria. If this occurs then the instrument is declared fit for use. The report was handed in as Exhibit “J”. The instrument met the criteria and there were no limitations.

[10] Turning to the evidence of Sgt. Mapatoana. She stated that she evaluated the instruments described as HP2 on 08 September 2004 and HP4 on 09 September 2004. She confirmed the three steps described by Insp. Twala, to evaluate these instruments and added the following:

[10.1] The “tuning” procedure involved calibrating the mass spectrometer which is attached to the gas chromatography. The tuning is automatically done to a standard that comes with the mass spectrometer. By tuning, it aligns the electronics of the mass spectrometer, together with the voltages of the mass spectrometer. The results of the tuning then have to be checked to see if they meet the requirements. In the present case the witness was satisfied with the results.

[10.2] The Grob mixture was then run through the instruments. This is used to evaluate the gas chromatograph portion of the instrument. The Grob mixture consists of compounds which are specifically different in functional groups. In the present case the witness was satisfied with the results.

[10.3] The mixture of DFTPP with methaqualone added was then run through the instruments in order to check the sensitivity of the mass spectrometer, as well as the repeatability.

[10.4] The methaqualone which is added to the DFTPP, is purchased as a reference material and comes in a sealed ampoule with a certified reference material certificate, certifying that it is pure and has been tested. The results are then recorded in a systems suitability report, which in respect of the instruments HP2 and HP4 were handed in as Exhibits "L1" and "L2". She confirmed that the report and evaluation is then valid for two weeks.

[10.5] The results in respect of the instrument HP2 were that it passed for all of the components contained in the Grob, except for alcohol and acids. In other words, the instrument could not be used to detect the presence of alcohol and acids. As regards instrument HP4, the results were that it could not be used to detect acids, but derivative amines were allowed. The instrument passed in respect of the sensitivity and repeatability of methaqualone.

[10.6] The witness was unable to tell the Court exactly how the machine and the computer work.

[11] In developing his argument that the evidence in the present case fell short of its objective, Mr. Engelbrecht, S.C. compared this evidence with the evidence led in Dickenson's case. We were referred to the analysis carried out by the Appellate Division of the evidence placed before the Court *a quo* in that case, appearing at pages 92B to 93H of the report.

[12] In *State v Dickenson* (at page 94E – F) the Appellate Division distinguished the nature of the evidence led in that case, from the evidence led in *State v Strydom* and *State v Terblanche*, to establish the reliability and accuracy of the gas chromatograph used.

[13] However, what is important is that the Appellate Division emphasised that each case must be decided on the evidence before it.

***State v Dickenson supra* at 94G**

A comparison with the nature of the evidence led in other cases can only serve as a guide on this issue.

[14] An analysis of the evidence in *State v Dickenson* by the Appellate Division reveals the following steps were taken by the

analyst Muller in that case, to ensure the results were accurate and reliable.

[14.1] Four control samples containing different pre-determined percentages of alcohol, were placed in the instrument to determine whether it accurately detected the percentage of alcohol present in each sample. If there was a deviation falling outside certain fixed parameters, it indicated the instrument was not functioning properly. This was termed an “external standard”.

[14.2] These tests were repeated every ten days, to ensure that samples were reliably tested in the interim.

[14.3] Tests of the blood sample in question were carried out on two separate instruments, under different conditions, to ensure that the results produced were consistent.

[14.4] It was ensured that the instrument had a “konstante basislyn” which meant “n lyn wat geen afwykings toon nie” and this was obtained when the instrument was operating, but without any sample for analysis, or when an analysis was done, which did not indicate any deviation. A constant base line was an indication that the instrument was operating correctly.

[14.5] An “internal standard” was also applied in terms of which a mixture of tertiary butanol of a defined concentration and volume, was added to both the blood samples and the alcohol control samples (referred to in paragraph 14.1 *supra*). If the results indicating the percentage of this mixture in both the blood samples

and alcohol samples remained constant, this was a further indication of the reliability of the results.

[15] Considering the above evidence, the Appellate Division was of the view that it indicated that the analyst was aware that the instrument had to be working properly before analysing samples. Of particular importance was the use of the “external standard” referred to above. In other words, results produced by the instrument were measured against a yardstick, which was prepared in accordance with a pure chemical method. Consequently, it could not be said that the instrument was used to determine its own accuracy.

S v Dickenson *supra* at page 95A- B

[16] Considering the evidence led in the present case, and in the light of the evidence led in S v Dickenson, I am satisfied that it establishes that sufficient evidence was led to prove the gas chromatographs functioned correctly and the results are reliable, for the following reasons.

[17] Central to the enquiry is whether the functioning of the instrument has been tested against an external reliable yardstick, repeated at regular intervals. In the present case, the testing of the instruments, utilising the Grob mixture fulfilled this important function. It cannot be said therefore that the instruments were used

to determine their own accuracy, in other words the so-called “external standard” was satisfied.

[18] As regards the so-called “internal standard”, I consider this standard was satisfied by the use of the mixture of DFTPP plus methaqualone. It seems to me that the object of this test was to ensure that the instrument was able to reliably detect methaqualone in a predetermined concentration and volume, in much the same way as tertiary butanol was utilised in a similar manner in *S v Dickenson*. In coming to this conclusion, I do not lose sight of the fact that Sgt. Moripe said the tests for methaqualone conducted on the samples in July 2004 were unreliable and had to be redone in September 2004. Mr. Engelbrecht, S.C. submitted that the witness had to speculate as to what the reasons were for this and consequently, an expert should have been called to testify about the reliability of the instruments used. I disagree. The witness said the unreliability of the results could have been caused by one of two reasons. Either the samples were too concentrated, or the sample was not tested within forty eight hours of the control sample. He agreed he would have to speculate as to which was the cause, but if he went back to the laboratory he said he would be able to find the exact reason by examining the saved dockets. What is clear is that neither of the possible reasons impinged upon the reliability of the instrument itself.

[19] A further submission of Mr. Engelbrecht, S.C. was that the evidence as to the nature of the Grob mixture and the DFTPP plus methaqualone mixture, was all hearsay evidence. As I understand the argument, it is that there was no evidence before the Court *a quo*, to prove the composition or purity of either of these mixtures, which were supplied by an independent supplier.

[20] In the field of evidence to prove the reliability, or correctness of a particular instrument, hearsay evidence is to some extent admitted and acted upon. The extent to which a court will insist upon, or relax, the standards of proof which theoretically apply when evidence involving the use of scientific instruments is presented, will depend upon:

[20.1] The nature of the process and instrument involved in the particular case.

[20.2] The extent, if any, to which the evidence is challenged.

[20.3] The nature of the enquiry and the *facta probanda* in the case

S v Mthimkulu 1975 (4)SA 759 (A) at 765 A – B

[21] The purity or composition of neither of these mixtures were challenged when Sgt. Mapatoana and Insp. Twala gave evidence.

They were never asked whether any problems had been experienced in this regard, nor whether they could express any views on the purity or composition of these mixtures. As stated by Zulman A J A in

S v Reddy & Others 1996 (2) SACR 1 (A) at 10 b – d

“In considering the effect of evidence, one need not be concerned with ‘remote and fantastic’ possibilities and that it is not incumbent upon the State to eliminate every conceivable possibility that may depend upon pure speculation”

[22] When regard is had to the nature of the enquiry, i.e. whether the mixture supplied by the independent laboratory was pure and contained the requisite elements, as well as the purpose for which they were used, namely to regularly test the functioning of the instruments, I am satisfied that in the absence of a specific challenge, the State was not obliged to lead evidence to prove these issues which were nothing more, nor less, than a remote possibility.

[23] A further challenge aimed by Mr. Engelbrecht, S.C. at the reliability of the results, lay in the accuracy of the weighing scale used by Sgt. Moripe. The basis of the complaint was that the printout from the scale reflected a total weight of 556.3 kilograms and several dates, namely in 2002 and 2003. The witness said he had weighed the solid substance and powder found at the farm Spitzkop and he had done this in September 2004. He said he was

aware of the error in the printouts, but it did not make a difference to the weight and the representatives of Methla, who calibrated the instrument, would have to rectify this.

[24] Any error in the weight reflected would have no bearing upon the reliability of the result that methaqualone was detected in the weighed samples. When the photographs are considered, a considerable quantity of samples were collected, which does not suggest any improbability in the total weight produced by the scale. In any event the mere fact that the printouts contained incorrect dates, does not lead to a reasonable inference that the scale did not perform its primary function of weighing samples, accurately and reliably. I regard the drawing of such an inference as a remote possibility, which did not require the State to lead the evidence of an expert, that it was functioning accurately at the time. In any event, a Section 212 statement by Johan McDonald (Exhibit "H") indicated that the scale was calibrated on 05 October 2004 and found to be in order.

[25] A final challenge raised by Mr. Engelbrecht, S.C. was that no evidence was adduced that the samples in the other matters, which were run simultaneously with the samples in this matter did not, after having been loaded into the instruments, contaminate each other. Having considered the evidence, I am satisfied that this is again a remote possibility, such that it was not incumbent upon the State to eliminate such a possibility, by leading the evidence called for.

[26] In the light of the above I am satisfied that the State proved beyond a reasonable doubt that the gas chromatographs used to determine the nature of the substances found on the farms Spitzkop and Mange, functioned correctly and reliably.

[27] Turning to the second main ground of appeal, namely whether the computer printouts produced by the gas chromatographs were correct and reliable. The learned Magistrate dealt with this issue by reference to Section 15 (4) of the Electronic Communications and Transactions Act No. 25 of 2002. I agree with his reasoning and conclusion in this regard.

[28] The remaining main ground of appeal is whether the State proved beyond a reasonable doubt, that each of the appellants manufactured and/or dealt in the methaqualone discovered on the farms Spitzkop and Mange.

[29] Dealing with the first appellant. The sole reason of the Magistrate for convicting the first appellant was the following:

“Accused 1 pinned his colours to the mast of accused 2 and relied upon her evidence being accepted. Unfortunately for him, that did not happen. It can be accepted that accused No. 1 knew what was being conveyed on the motor vehicle in which he was a passenger, and that he assisted in the removal”.

On this basis the Magistrate found the first appellant guilty of dealing in methaqualone.

[30] The Magistrate clearly misdirected himself in this regard. A rejection of the second appellant's evidence could not have as its inevitable consequence, a finding that the first appellant knew what was being conveyed on the motor vehicle, and also assisted in its removal.

[31] No evidence was led to show that the first appellant had been seen previously on either of the farms, nor that he had been seen in the company of the individuals who were dressed in gloves, boots and gas masks and who were clearly involved in the drug manufacturing process. This evidence was of decisive significance in linking appellants 2 and 3 to the drug making activities on the farm.

[32] As regards the arrest of the first and second appellants, according to Insp. Khumalo they spoke with the driver, being the second appellant. Second appellant, when asked what was at the back of the vehicle, said it was food for the cows. She then said that the kids who were left behind at the farm had sent "her" to discard these things. Insp. Khumalo said it was Insp. Madonsela who had addressed the second appellant. Insp. Madonsela, when giving evidence, stated that he had asked both the first and second appellants what was in the motor vehicle and neither had responded

to his question. He searched the vehicle, found certain items, warned both appellants and then arrested them. Both appellants gave him their names and the second appellant then said that two male persons at the farm had told "them" to take "these things that were at the back of the bakkie to go with them and discard them because the policemen were coming".

[33] In the light of the obvious contradictions, very little weight can be attached to the evidence of Insp. Madonsela, that he enquired from "both" appellants what was in the bakkie, as opposed to Insp. Khumalo's evidence that the enquiry was only directed at the second appellant. There is consequently no cogent evidence to prove that the first appellant was directly asked for an explanation and failed to give one. In any event, it is trite that the first appellant was entitled to remain silent.

[34] The evidence against the first appellant is not direct, but circumstantial. The circumstances in which he was arrested are suspicious, and one would have reasonably expected that, if innocent, he would have given evidence to answer, or explain his presence in the bakkie. A failure to give evidence in such a case will strengthen any unfavourable inferences, which can properly be drawn from the prosecution evidence.

However, this form of reasoning can only apply when the prosecution case is strong enough to call for an answer. It must be sufficient in itself to justify, in the absence of explanation or answer, the inference of guilt.

Zeffertt *supra* at page 128

[35] In the absence of a *prima facie* case against the first appellant, his failure to testify cannot result in proof beyond a reasonable doubt that he is guilty of dealing in methaqualone. The fact that the circumstances surrounding his arrest are suspicious is not sufficient. His mere presence in the vehicle did not establish a *prima facie* case against the first appellant.

[36] As regards the second appellant, I agree with the finding of the Magistrate that she “was an exceedingly poor witness”. Her evidence of what she was doing on the night she was arrested when leaving Mange farm is grossly improbable. Her professed ignorance of the identity of the individuals on the farm, who had been there for some time, as well as her professed ignorance of what they were doing on the farm, is grossly improbable. In addition, the illogicality of her travelling ahead of the individuals who had to show her where to deposit her load, is apparent. Also, her attempt to explain why she drove at high speed, which was clearly to evade arrest, is equally improbable.

[37] Additionally, as pointed out by the Magistrate, the evidence of Insp. van Heerden placed the second appellant at Spitzkop farm shortly before her arrest. His identification of her is supported by his evidence that she was wearing a blue dress under a green one, as indicated in the photographs he took of the second appellant at the time of her arrest, being Exhibit "D".

[38] In short, when all of the evidence against the second appellant is considered, I am satisfied that her protestations of innocence and ignorance are not reasonably possibly true.

[39] As regards the third appellant, what is of decisive importance was his failure to testify. There was clearly a *prima facie* case established against him, by virtue of his arrival at Spitzkop with a black bag, labelled as "anthranillic acid", in the back of the vehicle he was driving. The evidence was that this was a necessary ingredient in the manufacture of methaqualone. Although no forensic evidence was led to establish what the contents of the bag were, when the presence of the bag labelled in this manner, is taken together with the evidence of Mchunu and Thusi, that the third appellant visited the farm Spitzkop on several occasions, an answer was called for from the third appellant. The *prima facie* evidence against the third appellant was sufficient in itself, in the absence of any explanation by him, to ensure his guilt.

[40] Turning to the issue of sentence. The challenge in respect of the sentence imposed upon the second appellant, was that no enquiry was made as regards the interests of her minor children, should the second appellant be incarcerated for twenty years.

S v M (Centre for Child Law as Amicus Curiae)
2007 (2) SACR 539

I agree however with the submission of M/s Franklin, who appeared for the State, that the trial court was aware that the second appellant had three minor children and that a consideration of their interests would not have altered the aggravating factors which were present. The appropriate sentence was clearly custodial and no issue was raised before the Magistrate, that the minor children would not be adequately cared for, while the second appellant was incarcerated. In addition, I do not agree that the cumulative effect of the personal circumstances of the second and third appellants, constituted substantial and compelling circumstances.

[41] In all of these circumstances I regard the sentences imposed as entirely appropriate.

[42] I would therefore propose the following order:

The appeal of the first appellant succeeds and his conviction and sentence are set aside.

The appeals of the second and third appellants are dismissed and their convictions and sentences are confirmed.

I agree

HOLLIS A J

It is so ordered

SWAIN J

Appearances/....

Appearances:

For the Appellant : Adv. J. Engelbrecht, S.C. with
Adv. B. Bam S.C. and
Adv. H.P. West

Instructed by : Eylers Attorneys
Centurion

For the Respondents : Adv. D. Franklin (M/s)

Instructed by : The Director of Public Prosecutions

Date of Hearing : 25 August 2009

Date of Filing of Judgment : 04 September 2009