

13/87

EBRAHIM HOOISAIN

APPELLANT

and

THE STATE

RESPONDENT

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLANT DIVISION)

IN THE MATTER BETWEEN

EBRAHIM HOOISAIN

APPELLANT

and

THE STATE

RESPONDENT

CORAM: RABIE ACJ, HEFER JA et KUMLEBEN AJA

HEARD: 6 MARCH 1987

DELIVERED: 24 MARCH 1987

J U D G M E N T

KUMLEBEN, AJA:

The/

The appellant was one of three accused charged in the regional division of the Magistrate's Court at Wynberg with contravening sec 2(a) of Act 41 of 1971.

The charge proffered was that during the period from July 1981 to May 1982 he unlawfully dealt in 94 055 Mandrax tablets containing methaqualone. The alternative count alleged that during the same period he illegally possessed them. He was convicted on the main charge and sentenced to a period of twelve years' imprisonment. (The other two accused were acquitted). His appeal to the Cape Provincial Division failed, as did his application for leave to appeal to this court. Such leave was however granted on petition to the Chief Justice.

Appellant's/

Appellant's conviction was based largely on a statement he made to a magistrate on 14 May 1982. Its admissibility was contested on the ground that he had been unduly influenced to make it. This led to a "trial-within-a-trial". At its conclusion the magistrate, relying on the presumption in sec 217(1)(b)(ii) of the Criminal Procedure Act, 51 of 1977, ruled that appellant had failed to prove that he had been unduly influenced to make the statement. It was accordingly received in evidence as exhibit C.

Its substance was that during July 1981 appellant was approached by one Solomons who asked him whether a closed trailer could be stored for him in a yard at appellant's home. He agreed without knowing

what/.....

what it contained. At some later stage he became suspicious and on enquiring was told by Solomons that in it were two suitcases containing Mandrax tablets. This made him anxious to see it removed from his premises but on being paid R30 000 by Solomons he agreed to its remaining there. Having made this arrangement, Solomons left for India. In December 1981 appellant visited him there. When they met he asked appellant to remove the trailer from his yard and place it in a locked garage where it would be secure and its contents protected from the weather. A further amount of R4 000 was paid to him. On his return to this country he carried out this instruction. The trailer was taken from his home at 98 Halt Road, Elsie's River and stored in a garage on the premises of one of his

dry/.....

dry cleaning businesses, "Quick Dry Cleaners" situated at Victoria Road, Grassy Park. There it remained until it was discovered by the police in the early morning of 14 May 1982.

Certain other facts, which bear upon the issues to be decided in this appeal, were indisputably proved by the evidence of two State witnesses: Mr Sheik Adam Hoosain and Det.Sgt Slabbert. The former is a nephew of appellant and lived with him at his home. He was also the manager of "Quick Dry Cleaners". He was not present at these premises when the trailer was brought and placed in the garage by appellant or by someone on his instructions. In due course he saw it in the garage and was told by appellant that he was to look after it and see that no

one/.....

one tampered with it as it belonged to someone else.

Appellant did not disclose its contents to him. He

merely said that it contained a fridge and other "valuables".

It remained there for a week or two before it was dis-

covered by the police. When they arrived at the premises

that morning at about 6:30 am they were met by an employee,

Mrs Ethel Davids, who let them in. At his request she

gave Det.Sgt Slabbert the key of the gate giving access

to the fenced enclosure within which the garage is sit-

uated. On entering the garage he found the trailer,

the lid of which was secured with two padlocks. These

were forced open to reveal the two suitcases containing

94 packets of Mandrax tablets. The other two accused

were/

were at the premises that morning and were arrested.

No 2 accused was an employee, who slept in a room in the back yard close to the garage. Sheik Adam Hoosain had instructed him to keep an eye on the trailer at night and at other times when he (Hoosain) was not there. No 3 accused was a friend of No 2 accused and happened to be spending that night in the room with him. That morning soon after the discovery of the Mandrax appellant and members of his family were also arrested.

The following further facts, which were admitted or proved, are relevant to the issues to be considered. The Mandrax tablets in the packets were counted and the total number was 94 055. After Solomons

left/

left for India - as far as the evidence reveals - he at no stage returned to this country or exercised any control over the trailer. If the key or keys of the padlocks were found by the police - the evidence is not clear in this regard - they were not found in appellant's possession.

The appellant and the two accused closed their respective cases without tendering any evidence. The questions raised on appeal are thus to be decided on the State case. They are:

- (i) Whether, in deciding on the admissibility of the statement, the magistrate was correct in concluding that the onus was upon appellant to prove that he was unduly influenced to

make/

make it.

(ii) Whether the magistrate was correct in concluding that such onus of proof was not discharged.

(iii) Whether the facts proved that the appellant was "found in possession" of the Mandrax tablets within the meaning of that phrase as used in sec 10(1)(c) of the Abuse of Dependence - producing Substances and Rehabilitation Centres Act, 41 of 1971 ("the Act").

(iv) Whether, if the presumption in the said subsection of the Act is applicable, it was rebutted (notwithstanding the fact that the appellant failed to give evidence.)

(v) And/

(v) And lastly whether the sentence imposed was

excessive and ought to be reduced.

The first ground, which was raised for the first time on appeal to the court a quo, was thus formulated in the heads of argument:

"The Magistrate erred in ruling that the onus was on the Accused to prove that the statement which the Accused had made to MAGISTRATE PECKHAM had not been made freely and voluntary while in his sound and sober senses and without having been unduly influenced thereto, more particularly, in that it does not appear from the document in which the statement is contained that it was made freely and voluntarily by the Accused while in his sound and sober senses and without having been unduly influenced thereto."

The point taken has reference to the provisions of sec 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977

which/

which paraphrased states that where a confession is made to a magistrate it shall on its mere production be presumed, unless the contrary is proved,

"to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto."

A similar provision relating to an admission is to be found in sec 219(A)(1)(b) of that Act. Mr Seligson, who appeared with Mr Veldhuizen for the appellant, agreed that for the purpose of deciding this point it is immaterial whether the statement is regarded as a

confession/

confession or an admission. I shall, as the magistrate did at the trial, assume that it is a confession.

The circumstances in which the provisions of sec 217(1)(b)(ii) can be invoked to place the onus upon an accused were considered by this court in S v Mphahlele and Another 1982(4) S A 505 (AD) at 514H - 517B.

It was pointed out that the answers in reply to the stereotype and formal questions put before the actual statement is made will not suffice for the presumption to become operative if it appears that the accused was not permitted to make a further statement, which may have had the effect of contradicting or materially qualifying

his/

his answers. Thus, with reference to the facts of that case, Miller JA said at p 516:

"What 'appears' from exh.CC is that, although the deponent's answers to specific questions indicate that he was about to make a confession freely and voluntarily, his attempt to say something more was frustrated, with the result that the document was not complete. And there is nothing to show that the 'something more' that he wished and tried to say would not, had he been given a full opportunity of saying it, have vitiated or materially qualified what he had until then said."

Relying on this dictum it was submitted that similarly in this case the appellant was curtailed in explaining fully how he came to be before a magistrate to make the statement and that this is apparent from what is recorded on the exhibit C. The relevant

portion/

portion reads as follows:

"Do you understand the warning which has now been given you?

Yes sir.

Do you still wish to make a statement?

Yes sir.

Are you aware of the fact that you are in the presence of a magistrate, that you have nothing to fear and that you may speak frankly? Yes sir.

Have you been assaulted, threatened or influenced by any person with a view to making this statement? No sir, not at all.

Have you been encouraged by any person to make a statement?

No sir.

Have any promises been made to you by any person in order to influence you to make a statement? No sir.

Have you been influenced in any other way by any person to make a statement? No sir.

Do you expect any benefits should you make a statement?

Not really.

Q. What do you mean by 'not really'?

A. I mean what benefit can I derive by

making/

making a statement. If I make a statement, it is the truth I wish to tell. I have nothing to hide.

Q. Do you therefore expect any benefit?

A. No sir.

(If the answer is in the affirmative the deponent must be questioned and his statement noted. If he alleges that he was assaulted he must be asked whether he has any visible injuries, wounds, abrasions etc. which were received as a result of the assault, and the nature thereof must be noted).

Q. Do you have any injuries?

A. No sir. (No visible injuries)

(Investigate and describe carefully the circumstances which led to the appearance of the deponent before you)

When were you arrested? This morning 14.5.1982. This morning at about 8 am the police officers they came to my place and closed up my business and they asked us, me and my wife and my brother's wife and my nephews and their wives and they asked us to accompany them to the police station with our passports and books of life.

Q. I don't want to know how you came to be arrested, but how you came to be brought to a magistrate?

A. I/

A. I was sitting in Cpt. Smuts office after being called there. I was told if I wanted to make a statement it is entirely up to me. If I don't want to, I don't have to. I was not forced to make one. I said no, I want to make a confession and Capt. Smuts asked another officer to bring me down to the court.

A. How did you know you can make a confession to a magistrate?

A. The captain told me if I want to make a confession, he would have to have me brought to a magistrate. I myself did not know the formalities.

Q. Do you wish to make a confession to a magistrate?

A. Yes sir."

The question, which I have italicised, is said to be the offending one. It is actually a remark followed by a question. The remark, it is to be noted, does not appear to have been an interruption. On the face of it appellant had said all he wished to say on the subject

of/

of his arrest. Be that as it may, the question which follows makes it perfectly plain that the appellant was being invited to explain, as fully as he pleased, what led to his coming before the magistrate, which would clearly include any action on the part of the police impelling or influencing him to do so. Moreover this question ought not to be considered in isolation. If one has regard to those which precede and follow it, they confirm that he was given ample opportunity to furnish a full explanation and from his answers it appears that he did so comprehensively. Thus, in my view it does appear ex facie the document that the statement was voluntarily made and without the appellant having been unduly influenced. The presumption in sec

217(1)(b)(ii) accordingly applies. The magistrate was therefore correct in placing the onus on the appellant to prove the contrary on a balance of probabilities.

It was counsel's alternative submission that this onus was discharged. It was common cause that on the morning in question various members of appellant's family were also apprehended and brought to the police station. There was no indication that this was done for an ulterior purpose. Appellant said in his evidence at the "trial-within-a-trial" that Lt Smuts told him that unless he made a statement before a magistrate he and they would not be released. This weighed heavily with him, particularly since some of them managed branches of

his/.....

his business which would remain closed were they to remain in detention. His concern in this regard is understandable and it may have been the reason, or a contributing one, for his deciding to make the statement.

The crucial question however is whether Mr Smuts, who was at the time a lieutenant in the S A Police force, held out such an inducement. Appellant also alleged that Smuts said that if he refused to make a statement he would be detained indefinitely "under article 13" - a reference to the procedure permitted by sec 13 of the Act. Smuts gave evidence and denied having in any way threatened or persuaded the appellant to make the statement. He said that when the two of them were

alone/

alone in an office at the police station he put it to the appellant that he was no doubt aware of the reason for his arrest. Appellant confirmed this and was quite prepared to make a statement to him explaining how the Mandrax tablets came to be at his premises at Grassy Park. He was also prepared of his own free will to repeat his statement before a magistrate.

In his judgment the magistrate gave detailed reasons for concluding that the appellant had not discharged the onus of proving any threat or inducement. They were in the main that Smuts was a truthful witness and that the probabilities did not favour appellant's version of what took place. Before us Mr Seligson challenged the correctness of his reasoning in the following

respects/

respects.

Appellant said in his statement (Exhibit C) . that Smuts had asked him whether he knew a certain
Zambian air hostess, the implication being that she had
been involved in bringing the Mandrax tablets into this
country and perhaps to him. Counsel argued that this
allegation (which incidentally was not put to Smuts in
cross-examination for him to deny or explain) indicated
that appellant was interrogated before he made his state-
ment to Smuts and refutes the evidence of the latter that
"virtually" nothing was said by them before appellant ex-
pressed his willingness to make a full disclosure.

Assuming that Smuts did raise this question with him,
this is not inconsistent with his evidence and there is
no reason why Smuts should not at some stage have put

that/

that question to him without it in any way amounting to
interrogation.

It was also submitted that at the time
Smuts interviewed him there was little or no evidence
implicating the appellant and it is therefore likely that
Smuts would have exacted a confession or admission from
appellant. Smuts was not cross-examined in this regard.
In the light of appellant's statement no other evidence
was necessary at the trial to implicate him. There is
no evidence indicating whether at the time of the inter-
view with Smuts other evidence was available or was
likely to be obtained. In the circumstances this con-
tention is based on conjecture.

It was unlikely, so it was submitted, that

appellant/

appellant would make the statement if Smuts had not induced him to do so. But, as I have said, there were pressing reasons why he should make a statement which would have the effect of exonerating other members of his family and releasing them from custody. As to the alleged threat of detention in terms of sec 13, this is emphatically denied by Smuts and there are no grounds for doubting the truthfulness of his denial.

Finally it was argued that the magistrate, when assessing the credibility of appellant on this issue, erred in criticising him for not having told the magistrate during the questioning that he was not acting voluntarily and that inducements had been held out to him. The magistrate commented adversely on the fact

that/

that appellant had raised these issues for the first time at the trial. There is substance in the criticism of this particular reason given by the magistrate.

Whenever undue influence in truth prompts the making of a statement, it is to be expected that false answers to the relevant prefatory questions will be given.

(Cf S v Mbonane 1979(3) S A 182 (TPD) 187H - 188B). For this reason the mere fact that such answers contradict an accused's evidence in court in a "trial-within-a-trial" should not necessarily be held against him. However, this is not to say that the answers themselves are not relevant and ought not to be closely examined in deciding whether they are true or false. Those given by the appellant have been quoted earlier in this judgment. Had they been

intended/

intended to be deceptive rather than truthful, it is, to my mind, unlikely that they would have been as explicit and apparently spontaneous.

In the result, despite the fact that the reasoning of the magistrate is in one respect open to criticism, I am satisfied that he had good grounds for concluding that the appellant had failed to discharge the burden of proof placed upon him by the provisions of sec 217(1)(b)(ii) of the Act and that his statement was rightly ruled admissible.

Turning to the third question - whether the appellant was "found in possession" - it has recently been re-affirmed in this Court that:

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"In general the concept of 'possession' ('besit'), when found in a penal statute, comprises two elements, a physical element (corpus) and a mental element (animus). Corpus consists either in direct physical control over the article in question or mediate control through another. The element of animus may be broadly described as the intention to have corpus, ie to control, but the intrinsic quality of such animus may vary, depending upon the type of possession intended by the statute.

S v Adams 1986(4) S A 882 (AD) at 890. (See too R v

Binns and Another 1961(2) S A 104 (TPD) 107.) It was

common cause that appellant in this sense was in possession

of the trailer and its contents when it was discovered

by the police. And it is to be noted that by virtue

of the definition in sec 1 of the Act a person may

"possess"/

"possess" a prohibited drug as possessor, holder, storer, custodian, controller or supervisor and that the same drug can, at the same time, be possessed by more than one person in a different or in the same capacity. (See S v Mkize 1971(1) S A 517 (AD) 523).

It is against this background that one must consider whether the appellant was "found in possession" within the meaning of those words as they appear in sec 10(1)(c) of the Act. If so, in terms of the sub section, appellant is presumed to have "dealt in" the drugs in question.

The predecessor of this sub-section was sec 90 bis (a) of Act 13 of 1928, as amended, in

which/

which the words "found in possession" appeared in the same context. Their meaning was discussed in The State v Wilson 1962(2) S A 619 (AD). The court pointed out that it is the relationship between the prohibited substance and the person charged, rather than the physical presence of an accused at the time of finding, which is significant; and that the phrase "found in possession", as opposed to "possession", was used to stress that the possession must be proved at that point of time. Ogilvie Thompson JA at page 624 went on to say that:

"In my judgment, it is neither necessary nor desirable to attempt the formulation

of/

of any universal rule as to when a person charged may rightly be said to be 'found in possession' of dagga within the meaning of sec. 90 bis (a). (Cf. Rex v Moosa and Others, supra at p. 530 A). It is sufficient to state two propositions. First, that the possession as at the time when the dagga was found, of 'the person charged' must always be established. That will ordinarily be an issue of fact depending upon the circumstances of the particular case, although in certain instances it may be a question of mixed fact and law. Secondly, it is not an essential element of being 'found in possession', as that expression is used in sec. 90 bis (a) of the Act, that 'the person charged' should have been physically present at the time the dagga is found."

In as much as possession on the part of an accused

at/

at the time the drug is found is stated in the above-quoted passage to be an essential requirement, but not necessarily the sole or decisive one, the possibility is recognised that the degree of control (corpus), or the nature of the intention to possess (animus) may in a particular case be such that the inference that a possessor was "found in possession" may not be justified. It is thus a matter of fact and degree.

I have no doubt that in this case the inference that appellant was "found in possession" is the correct one. Accepting that the Mandrax in

the/

the trailer was initially in the possession of

Solomons, there is no suggestion that he exercised

any control over the trailer or its contents from

the time he left for India or at the latest after he

gave appellant the instruction when they met there.

It was suggested in argument that it was under the

immediate control of Mrs Davids because she had the

key to the front door of the building and of the yard

at the back. But there is no evidence that the trailer

was entrusted to her care or as a matter of fact that she

even knew of its existence. It was also said that because

accused No 2 was instructed to "guard" the trailer it was

under his immediate control. But he, and for that matter

Shaik/.....

Shaik Hoosain, were no more than caretakers of the trailer.

Neither of them possessed the trailer or its contents in

any realistic sense of the word. It was appellant who

decided to remove the trailer from his home to his business

premises. It was he, not they, who could decide for how

long it should remain there and what was to be done with

it. He, and no one else, exercised effective control over

it.

In the result, whether or not it may be said

that others at some stage "possessed" the Mandrax tablets,

I consider that the magistrate was correct in holding that

the appellant was "found in possession" at the relevant

time and that the presumption in sec 10 (1) (c) of the

Act applied.

Counsel/.....

Counsel next submitted that the presumption has been rebutted because, though appellant possessed the Mandrax for the purpose of sale, according to his statement the tablets were not to be sold by him but by Solomons at some future time. The fact that the Mandrax was not to be sold by him, so it was argued, rebutted the presumption.

Assuming that appellant was not to be the actual seller, such a restrictive interpretation of possession is unwarranted. By definition in sec 1 of the Act "deal in" includes "performing any act in connection with the sale thereof." "Sell" in turn is defined inter alia as "possessing for sale" and "sale" has a corresponding meaning. Appellant is therefore presumed to have dealt in Mandrax tablets in that he possessed them for sale, whether or not he personally

intended/

intended selling them. (Cf S v Batshise 1982(1) S A 966

(AD) at 970H and 971G and S v Solomon 1986(3) S A 705 (AD)).

The latter decision at 712 quoted with approval the following passage from S v Morgan 1979(2) S A 609 (OPD) at 614H:

"(d) aktiwiteite vervat in die uitgebreide betekenis van handeldryf soos uitgebrei deur die insluiting van die definisie van verkoop, behels almal verskaffingsaktiwiteite of aktiwiteite wat bereken is om hierdie aktiwiteite te bevorder."

And Solomon's case concludes by stating at page 713A that the question whether a period is a "dealer" must be answered

"aan die hand daarvan of die betrokke persoon deel gehad het, hetsy as dader of medepligtige, aan die verskaffing van die verbode stof".

The inference is inescapable that appellant possessed the Mandrax in the knowledge that it was destined for sale. Thus, far from rebutting the presumption, the

facts rather indicate that there was really no need to rely on it.

The magistrate carefully and comprehensively considered all the relevant factors relating to sentence. The personal circumstances of the appellant, notably the fact that he was a first offender, were taken into account. On the other hand, the magistrate had regard to the seriousness of the offence. Though this did not appear clearly from the record, counsel confirmed the evidence that the retail selling price of one Mandrax tablet was at the time R10. Thus, the value to the retailer of the Mandrax involved was almost R1 000 000. The appellant was prepared to play a vital role in its sale and distribution by keeping the tablets on behalf of Solomons. For doing so he received R34 000. These facts, and the far-reaching

social/

social evils resulting from the distribution of this harmful drug, led the magistrate to conclude, rightly in my view, that it was "a very serious offence".

In argument on sentence before us, the question whether the magistrate had misdirected himself was raised for the first time. Counsel submitted that when it came to sentence the magistrate did not accept the role played by Solomons and sentenced appellant on the basis that he possessed the Mandrax in his own right and that it was to be sold by him, or on his behalf, for his own profit. For this submission counsel relied on the following passage at the conclusion of the remarks on sentence:

"It is so that there is no evidence to the effect that you seduced other people in buying the tablets. You did not acquire

them/.....

them to deal in it. (sic) Of course, although there is no evidence to that effect, there is also an explanation from your side through the statement which you made, which of course could not be tested. It is no use to make a statement and to put the thing on record and then hand it in to the Court and then want the Court to accept it blindly. That statement of yours, there was no opportunity to test the correctness of it, and as far as this Court is concerned and as far as the evidence from the police, the Court is satisfied that you were found in possession of these tablets and you received an amount of R30 000 to keep it and that is as far as it goes.

It is very difficult to understand or to accept that a person would leave such an amount of tablets to such a big value unattended, if the Court can put it in this way, worthless for a period of approximately ten months to a year, and that makes your story very difficult to accept, that you just kept the pills or the tablets for this Issie Solomons. I can hardly believe that he would have left it there. It is money which he left with you; he lost a lot of money by

leaving/.....

leaving it in your possession, and that is why the Court says it is very hard and very difficult to blindly accept your statement and to what you have said or told the Magistrate in your statement." (My italics).

This passage considered in isolation lends some support to this argument, though it is to be noted that in it the magistrate finds as a fact that the appellant did not acquire the tablets to sell them but was the custodian for Solomons (as appears from those portions which I have italicised). Earlier in his judgment on the merits the magistrate found as a fact that appellant "assisted Mr Issie Solomons in his evil practice" and inferentially that appellant was not "the actual dealer". Thus, although the magistrate drew attention to inherent improbabilities in the appellant's statement and was sceptical of its truthfulness in certain respects/.....

respects, I do not consider that it can be said that he misdirected himself as alleged. In the light of this conclusion it is unnecessary to decide: firstly, whether it was open to appellant to argue this point having regard to the ground of appeal on sentence (which simply alleged that it was excessive and unduly severe); and secondly, whether the magistrate was not entitled to reject those portions of an extra curial statement which were improbable and not confirmed on oath by the appellant during the trial or in mitigation of sentence. (Cf Rex v Valachia and Another 1945 AD 826 at 837.)

In the absence of any misdirection I am unable to conclude that the sentence, though severe, is disturbingly inappropriate and that the magistrate consequently

failed/.....

failed to exercise a proper discretion in deciding on what
he considered to be a proper sentence.

The appeal against the conviction and sentence
is dismissed.

M.E. KUMLEBEN AJA

RABIE, ACJ	)	
	)	
	)	CONCUR
	)	
HEFER, JA	)	