

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION)**

*KIMBERLEY
CASE NO.: CA&R 75/06
DATE DELIVERED: 02-03-2007*

In the Appeal of:

VUSI RADEBE

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: MOLWANTWA AJ et MOKGOHLOA AJ:

<i>JUDGMENT: APPEAL</i>

MOLWANTWA AJ:

INTRODUCTION

1. The appellant was convicted of the contravention of section 5(b) of the Drug Trafficking Act 140 of 1992, dealing in drugs in the Magistrate district of Kimberley on 4 August 2005. He was represented during the trial. He pleaded not guilty to the charge. Despite his plea he was convicted as charged. He was sentenced to 4 years imprisonment.

He is now appealing against both his conviction and sentence.

THE STATE CASE

2. Inspector Willem Albertus Van der Westhuizen testified that on 9 February 2005 in the morning and around 13h00 a person purported to be the appellant was contacted telephonically to arrange to buy cocaine from him. All steps necessary as set out in section 252A of the Criminal Procedure Act 51 of 1977 (the Act) were followed. This included procuring R600, 00 to be used for the entrapment.
3. Between 16h00 and 17h00 as part of the operation and as agreed with the dealer , the appellant and Constable Theron who acted as "*the agent*" met in Kimberley at a place agreed upon. The Inspector remained in his vehicle within 10 to 20 meters from both Theron and the appellant when they met in one street. They sat down talking to each other and then crossed over to another street. He saw the appellant point to a dustbin to which the agent walked and took out something.
4. Van der Westhuizen testified that he kept them under observation at all material times and never lost sight of them except the odd occasions when cars were passing by. However he did not see when the appellant received the money from the agent. Soon thereafter the appellant walked away.

Theron informed him telephonically that he received 10 rocks of cocaine. He followed the appellant in his vehicle and saw him enter John Craig Store. Not long thereafter , the appellant walked out of John Craig apparently knocking off. Nonetheless he took a photo of the appellant when he came out of the Store .He was certain that the man who was with Constable Theron, "*the agent*" earlier on was the same man that walked into John Craig and came out a few minutes later. This same man was the appellant. Theron handed over the cocaine to the investigating officer for further investigations.

5. The evidence of "*the agent*", Constable Theron, is significant. He testified that he met the appellant in a street in Kimberley as arranged earlier during the day. They spoke and sat on a bench. The appellant first gave him a small quantity of cocaine to taste. He tasted it and was satisfied that it was indeed cocaine. He then paid the appellant R600, 00 as agreed. The appellant then showed him the dustbin in which he found the cocaine. The cocaine was wrapped separately in plastic packets, 10 in number. The appellant walked away. Theron also took his own direction and immediately informed Van der Westhuizen telephonically that the transaction was a success. They met with the investigation officer of the case, Constable Topkin, and handed him the cocaine in the 10 plastic packets for further investigations. The cross-examination of Theron was

perfunctory. At no stage was it put to him that he was not in a position to identify the appellant. Nor was it put to him what would have made it difficult for him to be able to identify the appellant.

6. Constable Topkin testified that Theron handed him the 10 rocks of cocaine bought from the dealer on 9 February 2005. He took the same to the police station. As is procedure he clearly identified the items with the case number of this case, Kimberley Mass number 143/3/2005 SAP13, 9/2005. He locked them up in a safe in which exhibits for the Specialised Crimes Unit are kept. The safe is in the office of the Specialised Crimes Unit separate from the general exhibit safe. On 19 February 2005 he removed the same items marked as indicated above from the safe specified and took them to the forensic laboratory in Pretoria for analysis. The results confirmed that the substance tested was indeed cocaine. A certificate from the laboratory was then handed in as exhibit.

THE APPELLANT'S EVIDENCE

7. The appellant's case was that he was not the man who met the police trap and sold him cocaine on 9 February 2005. He reported on duty at John Craig Store and never left the shop until he knocked off in the afternoon. He never met the two police officers prior to his arrest.

THE DEFENCE ARGUMENT

8. Mr. Nel for the appellant has made these submissions:

8.1 The Court erred by not taking into account material discrepancies, improbabilities and unsatisfactory aspects in the evidence of the State.

8.2 The Court did not approach the evidence of identity of the appellant with the necessary caution.

8.3 The State failed to prove beyond reasonable doubt that the substance the appellant allegedly sold to the police officer was indeed the same as that analysed at the forensic laboratory.

EVALUATION OF THE EVIDENCE

9. The submissions made in the Heads of argument and orally on behalf of the appellant have to be considered in the context of the following evidence:

9.1 Trade in drugs in the Northern Cape was rife between 2004 and 2005. The police embarked on several covert operations in order to bring dealers who had come into Kimberley to book. These operations were made successful through the help of informers and some police officers operating under cover. This specific operation was named "*Operation Dragon*" emanating from "*Operation Candy*". It is undisputed that this particular operation was conducted properly and in terms of the prescripts, in particular section 252A of the Criminal

Procedure Act 57 of 1977 (the Act).

9.2 That the police had prior to this arrest received information about alleged drug dealers from an informer. Amongst others he gave them a name of an alleged dealer, “*Vusi*” who they contacted on the cell number he provided. They met this “*Vusi*” on 9 February 2005. That they bought 10 cocaine rocks at the value of R600, 00 thus selling at R60, 00 per rock from the same dealer.

9.3 That two police officers, Van der Westhuizen and Theron were directly involved in this whole operation. Van der Westhuizen kept the alleged dealer and Theron under observation from the moment the two met until the transaction was completed around 17h00 during the day.

9.4 Nowhere is it disputed that:

9.4.1 All the above in fact happened;

9.4.2 In particular that Van der Westhuizen was at a certain stage very close to the appellant and Theron. As he puts it on page 37 from line 17;

“ . . . die tweede keer waar hulle oorgestap het oor die straat, was hulle nie vêr van my af nie, seker 10 meter, 15 meter na die – van daar af na die – na die vullisblik.”

So, ek het hulle daar baie duidelik gesien (My own underlining)

9.4.3 That Theron and the appellant were in each other’s company for at most 15 minutes around 17h00 during the day in Kimberley in February and talking to each other for the entire period. It was common cause or an accepted fact that the month of February in the Northern Cape falls in summer. Ordinarily

at 17h00 the sun is still shining. I found it very strange and baffling that Mr. Nel should argue that the appellant was not properly identified in these circumstances.

9.4.4 That the 10 packets of cocaine were locked safely after they were handed over to the investigating officer and marked distinctively with the reference number of the case under discussion. No assertions were put to the witnesses, in particular Topkin that there was a possibility that the substance could have been tempered with or that there were other drugs in the same cabinet with the same reference number which could have created some confusion. In fact this was never the appellant's case

9.4.5 It is a trite principle of our law that if a dispute is left unchallenged in cross examination the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. See **S v P** 1974 (1) SA 581 (RA) at 582 para E-G; **President of the Republic of South Africa v Rugby Football Union** 2000 (1) SA 1 (CC) at para 61; **S v Boesak** 2001(1) SA 912 (CC) at 924 D-F

10. The argument of the defence goes further to say that we should reject the version of the State witnesses on the grounds of the discrepancies tabulated in the Heads of Argument. Such an approach in my view is incorrect and militates against any

notion of common sense for the following reasons:

10.1 When the appellant testified he said he did not know the two police officers, Van der Westhuizen and Theron, he had no knowledge about the alleged drug deal which took place on 9 February 2005 at 17h00. In fact from the time he reported on duty he never left John Craig Store. Yet two witnesses who did not know him prior to this incident gave unequivocal testimony that he was in the company of the agent for 10 to 15 minutes selling him drugs.

10.2 Visibility was good and both witnesses had the opportunity and a good vantage point to identify the appellant clearly. This was not a heist or situation under which both witnesses had no time to reflect and note all that was happening around them. This was a well planned operation. They knew they were to testify in court subsequent to the arrest. See **S v Mthetwa** 1972(3) SA 766(AD) at 678a-c; **S v Leburu** [2003] 2 All SA 531(NC)

11. The last aspect that was one of the grounds of appeal but not addressed persuasively is that the Magistrate did not ask the appellant whether he confirmed what his legal representative had accepted as correct .i.e. that the substance that was sent for analysis was indeed cocaine.

12. It is trite that an accused is bound by what his legal representative had done in presenting his/her client's case in court. See **R v Matonsi** 1958 (2) SA 450 (A) at 456C-D

whereat **Schreiner JA** stated:

“Once the client has placed his case in the hands of counsel the latter has complete control and it is he who must decide whether a particular witness, including the client, is to be called or not. So in **Swinfen v Lord Chelmsford**, 157 E.R.1436 at p.1449, **POLLOCK, CB.**, states the Court’s view that,

‘a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it – such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial.’” See also unreported judgment of **KGOMO J** (as he was then) of **S v David Hercules Brits and Another** Case No CA&R 41/99 delivered on 26/10/99 pp 6-11, and cases cited therein. The thrust of these cases cannot be overemphasised. This submission is without substance.

13. The State’s witnesses’ version is convincing by far and the more acceptable than that of the appellant. They all gave a step by step account of how they conducted the entrapment, what Van der Westhuizen observed and what was Theron’s role. The discrepancies referred to are not material in my view and actually confirm the lack of collusion or conspiracy between the witnesses to falsely implicate the appellant. See **S v Mkohle** 1990(1) SACR 95(A) at 98f-h.
14. Weighing the entire evidence and applying the approach in **S v Chabalala** 2003(1) SACR 134(SCA) at 139i-140 b, I am of the view that all elements which point towards the guilt of the appellant against all those which are indicative of his innocence, taking into account the inherent strengths and weaknesses, probabilities and improbabilities on both sides, the balance weighs heavily in favour of the State and excludes any

reasonable doubt about the appellant's guilt .His version that he does not know the State witnesses and did not deal in drugs on 9 February 2005 is so improbable that it cannot be reasonably possibly true.

15. None of the arguments and submissions raised by the defence indicated that the trial court acted irregularly or misdirected itself in any manner or material respect with respect to the conviction, which would entitle this Court to interfere with its decision. See **R v Dhlumayo**. 1948(2) SA 677AD at 705-706 whereat **Greenberg JA** said:

“3. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.”

See also **S v Hadebe & others** 1997(1) SACR 64 (SCA) at 645e-f. This conviction should in my view stand.

AD SENTENCE

- 16 It is a trite principle of our law that a Court of appeal will not alter the sentence of the trial court unless it is shown that a reasonable person ought not to have imposed such a sentence or that such a sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence voices a feeling of shock or outrage, that the sentence is grossly excessive or insufficient, to indicate that the trial judge had not exercised his discretion properly, or that it was in the interest of

justice to alter it. See **Director of Public Prosecutions** **Kwazulu Natal v P** 2006(1) SACR 243(SCA) at 254c-f.

17. The appellant's personal circumstances are that he is 28 years old, not married but has one child. He was a first offender and was employed at John Craig Store for the past 4 years. Mr. Nel, in his submission stated that a fine coupled with imprisonment would have been appropriate.
18. The Magistrate remarked that the society must be protected from people who commit this type of offence, that many projects have been embarked upon to curb the commission of these offences, that this type of offence leads to drug addiction. That in general in this division the courts impose up to 6 years direct imprisonment, even in the case of first offenders.
19. In my view the Magistrate over-emphasised the seriousness of the offence as well as the interests of the society. Little weight was attached to the appellant's personal circumstances. Punishment should fit the crime as well as the individual. The conclusion that 4 years imprisonment is the only appropriate sentence is in my view incorrect.
20. None of the other options of sentence as set out in section 276 of the Act were considered by the Magistrate. The appellant

was simply sacrificed at the alter of deterrence in line with the what the State strongly argued for . This is a case in which a term of imprisonment coupled with a fine suspended wholly or partially should have been considered.

ORDER

In the result I make the following order:

- 1. The appeal against the conviction is dismissed and the conviction is confirmed.**

- 2. The appeal against sentence succeeds and the sentence imposed by the Magistrate is set aside and substituted with the following:**

“The accused is sentenced to R10000, 00 (ten thousand) rand or 2 (two) years imprisonment. In addition the accused is sentenced to 2(two) years imprisonment wholly suspended for 3 (three)years on condition that the accused is not convicted of contravention of section 5(a) or (b) of the Drug Trafficking Act 140 of 1992 committed during the period of suspension.”

**B C. MOLWANTWA
ACTING JUDGE
NORTHERN CAPE DIVISION**

I concur.

F E. MOKGOHLOA
ACTING JUDGE
NORTHERN CAPE DIVISION