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Case No 321/1986

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

DARRYL WAYNE SMITH — Appellant

and

THE STATE — Respondent

CORAM: VILJOEN, NESTADT JJA et STEYN AJA

HEARD: 25TH MAY 1987

DELIVERED: 26 August 1987

JUDGMENT

/STEYN AJA ...

STEYN, AJA:

On September 6 1985 appellant was found guilty in a Johannesburg Magistrate's Court of two offences, one of dealing in 3,369 kg of dagga in contravention of s 2 (a) of Act 41 of 1971 and the other of dealing in $30^{1}/2$ Obex tablets in contravention of s 2(c) of that Act. It was alleged in the charge sheet that the tablets contained Phendimetrazine, a dangerous dependence-producing substance. On the same day he was sentenced to two years' imprisonment on the dagga count and on the Obex count to the then minimum sentence of five years' imprisonment. It was ordered that the sentences run concurrently.

Both offences were committed at appellant's dwelling on the grounds of a School for Girls, Johannesburg. He was then groundsman at that school.

He appealed against both convictions and

/sentences .....

sentences to the Witwatersrand Local Division. The appeal was heard on May 26 1986 but dismissed on the same day in a judgment by KRIEGLER, J, LUDORF, AJ concurring. Still on the same day appellant was granted general leave by the learned Judges to appeal to this Court against the dismissal of the appeal.

The judgment of KRIEGLER, J on the appeal is learned and thorough. I agree with his conclusions of fact and of law relating to the convictions as well as to the sentences.

But I now have to deal shortly with two matters which were argued in this appeal by Dr Yutar on appellant's behalf but which had not been raised in the Local Division.

It was in the first place contended by learned counsel that the affidavit handed in by the State under sec 212 of Act 51 of 1977 relating to the presence of Phendimetrazine in the tablets was fatally defective in that it did not comply with the provisions of secs 212(4) and 212(8) (a) of the said Act, that it was

consequently inadmissible and, there being no other evidence as to the nature and contents of the tablets, that the State had failed to prove that the tablets contained Phendimetrazine or any other dangerous dependence=producing substance. Counsel relied for this contention on the recent and as yet unreported decision on appeal of the Eastern Cape Division in S v Wolmarans (a judgment by ERASMUS, AJ in which EKSTEEN, J concurred). Dr Yutar's concluding submission was that the conviction on the Obex count should consequently be set aside. Counsel's submission in this regard cannot be sustained.

The nature and contents of the tablets were formally admitted during the course of the trial by the attorney then appearing for appellant. The admission was in the following terms:

> "....the tablets in question in regard to Count 2, the Obex tablets, are in fact Obex and they do contain the substance which is prohibited in the Schedule....."

That substance is obviously the Phendimetrazine mentioned

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in the charge.

The State was thereby relieved of the burden of proving what the tablets were. The necessity for proof by means of the affidavit therefore fell away and it became irrelevant whether it was defective or not.

Dr Yutar sought to evade this consequence by contending that appellant's attorney had been misled by the affidavit into making the admission, not having realised that it was defective. There is no suggestion on the record that such was indeed the case. To find that it was would be speculation. But even if the attorney had been so misled it would avail appellant nought. There is no suggestion that any mistake was made in the analysis of the tablets or in describing the results thereof in the affidavit. There is consequently no merit in this additional onslaught on the Obex conviction.

In the second place Dr Yutar contended that

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the sentence on the Obex count can and should be ameliorated. He argued that by virtue of the amendment of s 2 of Act 41 of 1971 effected by s 1 of Act 101 of 1986 which did away with the minimum sentence of five years' imprisonment for that offence, a discretion was conferred upon this Court to impose a lesser sentence and that the circumstances of the case justified that being done.

The amendment came into force on September 24 1986, more than a year after appellant's conviction and sentence. But Dr Yutar submitted that the amendment had retrospective effect and consequently applied to this case. He sought to rely for that contention upon Steyn: Die Uitleg van Wette, 4th ed, at 100-101; R v Loots and Another 1951 (2) SA 132 (T); R v Mazibuko 1958 (4) SA 353 (A); R v Sillas 1959 (4) SA 305 (A); S v Ndlovu 1978 (3) SA 829 (T); S v Thekiso 1978 (4) SA 646 (O) S v Innes 1979 (1) SA 783 (C); and S v Mpetha 1985 (3)

/SA 702 ...

SA 702 (A). None of these authorities avail him. They are all distinguishable from the present case. The distinguishing feature is that here the ameliorating amendment only came into force after conviction and sentence. This Court dealt with such a situation in S v Crawford and Another 1979 (2) SA 48 (A) where RABIE JA (as he then was) said the following at 56 B-C:

> "Counsel drew our attention to the fact that in terms of an amendment introduced by s 1 of Act 76 of 1978 a court is no longer obliged to impose a sentence of five years' imprisonment for a contravention of s 2 (a) of the Act if such contravention relates to dagga only. Counsel for both parties suggested that a lesser sentence than the one imposed by the magistrate would meet the justice of the present case and that consideration should be given to the question whether the amending provision is applicable to the present case. It seems to be clear, however, that the provision is not of application to the present case, and this Court cannot on appeal impose a sentence which would at the time of the respondents' conviction not have been a competent sentence for the magistrate to impose."

Et vide S v Loate 1983 (3) SA 400 (T) at 402 B - 403 C.

/This ...

This Court is consequently not competent to interfere with the sentence on the Obex count.

The appeal is dismissed.

M T STEYN AJA

VILJOEN, JA)
NESTADT, JA) concur