

112/88

CASE NO. 366/87
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

F DE VRIES

APPELLANT

and

THE STATE

RESPONDENT

CORAM: JOUBERT, HOEXTER JJA et NICHOLAS AJA

HEARD: 22 SEPTEMBER 1988

DELIVERED: 28 SEPTEMBER 1988

J U D G M E N T

NICHOLAS, AJA:

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Over the period between October 1984 and February 1985 three men were tried together in the Durban Magistrates' Court: Fuad de Vries, aged 48 years, as accused No 1; Ebrahiem Mayman, aged 40 years, as accused No 2; and Leon Jaftha, aged 22 years, as accused No 3. The main charge against them was dealing in a prohibited dependence-producing drug (methaqualone) contained in 9 860 mandrax tablets in contravention of s.2(a) of Act No 41 of 1971. Each pleaded not guilty, but was found guilty. De Vries and Mayman were each sentenced to 7 years' imprisonment, and Jaftha to imprisonment for 5 years. De Vries and Jaftha appealed to the Natal Provincial Division against their convictions and sentences, and Mayman appealed against sentence only. At the hearing of the appeal on 11 December 1986, Jaftha failed to appear and his appeal was struck off the roll. The court (LEON J, with whom

DIDCOTT J concurred) dismissed the appeals of de Vries and Mayman. With the leave of the court a quo, de Vries now appeals to this court against his conviction.

The main witness for the State was Det W/O J C Engelbrecht of the South African Narcotics Bureau (SANAB) in Cape Town, who, together with other policemen, had one or more of the accused under surveillance in Cape Town and Durban on various dates during February 1981. In summary, the police evidence was this.

At about 5 p m on 7 February 1981, Mayman and Jaftha took off in an aircraft bound for Durban from D F Malan Airport in Cape Town. The counterparts of their air-tickets showed that they were booked to travel on to Mauritius and Bombay.

At about 3 p m on 15 February 1981, de Vries left D F Malan Airport on a flight to Durban.

Upon his arrival at the Louis Botha Airport in Durban at 5.45 p m he claimed his suitcase and then wandered aimlessly about the entrance hall of the terminal building until 8.25 p m when the flight from Mauritius landed. De Vries walked to the foreign arrivals hall. It was clear to the man who had him under observation that he was waiting for someone, but he did not make a contact. At 9.05 p m he left the terminal building and departed by taxi. On the following morning, 16 February, he returned to the airport and took the 9.05 a m flight to Cape Town.

At about 5 p m on 22 February 1981, de Vries arrived at the Louis Botha Airport in a Chevrolet motor car CA 240235, which was parked in the parking area. The driver was Joseph Hercules. The flight from Mauritius landed and Mayman and Jaftha, who was carrying a large brown suitcase, disembarked. They

were met by de Vries and together the three of them walked to the Chevrolet motor car. The luggage carried by Mayman and Jaftha was placed in the boot, and the car drove off. It was followed by Engelbrecht and other policemen in a police car. In a street in Berea the Chevrolet drew up outside the house of Hercules. The occupants got out. The police surrounded the car, and arrested the three accused and seized the luggage. They were all taken to the offices of SANAB in Durban.

There the luggage was searched and the brown suitcase, which had been carried by Jaftha, was found to contain 9 860 mandrax tablets. At about midnight, Engelbrecht sent a detective to fetch de Vries's wife, Aza de Vries, who was at Hercules's house, and she was also detained. After questioning, the four suspects were locked up at various police stations in Durban. On 24 February they flew to Cape Town. Again

they were taken variously to different police stations. On 25 February, each of the three men made a statement before a magistrate, Mr Schrock, at the Cape Town Magistrates' Court. Mrs de Vries was released on the morning of 25 February.

When de Vries's statement was tendered in evidence at the trial its admissibility was challenged. His attorney informed the court that it had been made by de Vries as a result of threats made regarding his own person and that of his wife, Aza de Vries, by Engelbrecht. This issue was accordingly tried in a trial within the trial, and evidence was given by de Vries and his wife Aza, and by Engelbrecht for the State.

In the course of his evidence in chief, de Vries described the circumstances leading up to his arrest and detention on 22 February, and his

transfer to Cape Town on 24 February. He said that Engelbrecht told him in Cape Town on 25 February that if he did not come out with the truth he and his wife would be detained under s.13 of the Act, and that they would rot in gaol until de Vries did make a statement. If, however, de Vries agreed to make a statement, Engelbrecht would release Aza de Vries, and would consent to de Vries's release on bail of R1 000. Mrs de Vries was in poor health and had already spent 4 days in the cells, and so de Vries agreed to make a statement. Engelbrecht told him to say in the statement that de Vries sent Mayman and Jaftha to Bombay for mandrax and that it was destined for Cape Town. De Vries made the statement on the same afternoon and he was released on bail of R1 000.

De Vries was cross-examined at length. The cross-examination covers pp 87 to 180 of

the record. It was not until p 130 that the question of the voluntariness of de Vries's statement was broached by the prosecutor, and this part of the cross-examination covered only six pages of the record. The prosecutor then went on to other topics and returned to the real question again on p 179. For the rest, the cross-examination relates to de Vries's work, occupation and activities; his acquaintance with Mayman and Jaftha; a loan of R2 700 which de Vries said he had made to Mayman before the latter's departure to Mauritius in February; the purpose and circumstances of his visit to Durban on 15 February; and the reason for his meeting with Mayman and Jaftha at Louis Botha Airport on 22 February.

At one stage (p 123), de Vries's counsel objected to the tenor of the cross-examination: the inquiry, he submitted, was limited to the

admissibility of de Vries's statement; what the prosecutor was doing was testing "the accused's version in relation to the merits of the case". The prosecutor did not seek to justify the cross-examination on the principle dealt with in S v Lebone, 1965(2) S A 837(A) (namely, that where an accused says in a trial within the trial that the contents of his confession were false and told to him by the police, the prosecutor is entitled to cross-examine the accused on the contents of the confession to show that the accused himself was the source of the contents.) And that was not the tenor of the cross-examination. The prosecutor's submission was that the cross-examination was aimed at credibility - "in the end when the Court decides on the admissibility of the statement, the Court is going to take into account whether the accused is a credible witness or not, and ... to that extent my evidence is relevant".

The magistrate directed that the cross-examination could proceed.

In his evidence in the trial within the trial Engelbrecht said that de Vries was taken to the magistrate in order to make a statement because he had already told Engelbrecht, in Durban, that he wanted to make a statement before a magistrate. No threats had been made to him. Engelbrecht did not tell him that he and his wife would be detained until they rotted. The statement was entirely voluntary. Mrs de Vries had been arrested because there appeared to be a possibility that she could be connected with the crime. She was released on the morning of 25 February when Engelbrecht ascertained that he had no case against her.

Engelbrecht did not fare well under cross-examination. He was hard put to it to explain why he had arrested Mrs de Vries at all; why, if he had

information against her, he had not arrested her when he arrested the three men; and why, if de Vries was willing while in Durban to make a statement before a magistrate, the statement was not taken until 25 February in Cape Town. In giving judgment at the conclusion of the trial within the trial, the magistrate said baldly that on the evidence before the court, he was satisfied that the statement was made freely and voluntarily and he admitted it in evidence.

After the State case had been closed, de Vries was again called to give evidence. His evidence in chief was limited to the amount of R2 700 which de Vries had admittedly given to Mayman and which de Vries said was a loan; and to a denial that he was associated with Mayman and Jaftha in the purchase of mandrax. The prosecutor said that he was not going to thoroughly cross-examine de Vries, because he had

already been cross-examined on all aspects of the case. He only wanted to put it to him that he had sent Mayman and Jaftha to buy the Mandrax in India. This de Vries denied. De Vries was asked in cross-examination by Mayman why, if he had lent him the R2 700 in Cape Town, he had come to Durban. Was Mayman to repay him there? De Vries's answer was:

"Jy was gevertel van my of dat ek op vakansie sal hier wees. Toe het jy aan my gevra om vir dit te kom optel by die 'airport' op die 22ste."

Mayman then gave evidence. He said that he knew de Vries very well. He approached him for financial help, because he was in a predicament with his house. De Vries said that he would assist him, but that Mayman should go to India on his behalf. De Vries indicated that he would make all arrangements in connection with air tickets and that all that Mayman had to do was to ensure that his passport was in order. It

was also arranged that Jaftha should go with Mayman. De Vries gave him R2 700 in cash and arranged for him to pick up the tickets at Flywell Travel Agency. Mayman and Jaftha went to India and by arrangement they met a man at the Gemini Guest House in Bombay and were handed a package against which they made a payment. Mayman did not know what the package contained. They returned to South Africa. They should have come back on 15 February, but missed their plane connection. As a result, they returned only on 22 February. They were met at Louis Botha Airport by de Vries, and were later arrested in the circumstances described by Engelbrecht.

Jaftha also gave evidence. He accompanied Mayman to India. He knew that there was to be an unlawful transaction, but all that he did was to carry the brown suitcase at the request of Mayman.

In his oral judgment at the end of the trial, the magistrate found all three accused guilty without giving reasons. Written reasons were furnished after the appeals had been noted. In the course of these reasons, the magistrate said that he was satisfied that Engelbrecht was a credible witness. In regard to de Vries, however, he said:

"(sy) getuienis wemel van leuens en weersprekings. Sy weergawe is geheel en al verwerp as vals."

He said that of the three accused, Mayman was the most honest, although it was clear that he had tried in his evidence to protect himself by minimizing his part.

In de Vries's notice of appeal it was averred that the magistrate erred (1) in finding that the guilt of the appellant had been proved beyond a reasonable doubt; and (2) in admitting his statement as evidence against him.

In the judgment on appeal : LEON J dealt first with the question of the admissibility of the confession. He said of Engelbrecht's evidence relative to de Vries's statement that it "reads extremely badly". Although de Vries was a bad witness, neither he nor his wife appeared to the learned judge to have been discredited at all on the material points relating to why this confession was made. The objective evidence proclaimed loudly and boldly the probability that the holding of Aza de Vries in custody was used as a deliberate lever to induce de Vries to confess. The court accordingly held that the onus which rested on de Vries to show that he was unduly influenced to make the confession had been discharged.

The learned judge then proceeded to consider the question whether on the evidence apart from the confession there was proof beyond a reasonable doubt

that de Vries "was part of this gang dealing in mandrax on a large scale". He agreed with the finding of the magistrate that de Vries was a lying witness whose evidence was full of contradictions and lies. De Vries gave lying explanations for his visits to Louis Botha Airport. The learned judge was persuaded on the evidence as a whole, including the lying evidence of de Vries and his complete inability to give any kind of reasonable explanation for his conduct, that his guilt was proved beyond a reasonable doubt.

On appeal before us, the main argument was on a point not taken in the court a quo, namely, that the evidence adduced during the trial within the trial should not have been taken into account in deciding the issue of guilt.

S.217(1) of the Criminal Procedure Act, 51 of 1977, provides for the admissibility of

evidence of a confession made by any person in relation to the commission of any offence

"if such confession 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 ..."

There had been similar provisions in s.273(1) of the Criminal Procedure and Evidence Act, 1917, and in Act 56 of 1955. In Rex v Gumede & Another, 1942 AD 398 at 412 - 413, FEETHAM JA mentioned that the provision first appeared in South African legislation as part of s.28 of Cape Ordinance No 72 of 1830 and added:

"There can, I think, be no doubt that the proviso as included in the 1830 Ordinance was intended to apply to the Cape Colony the common law of England as then understood in regard to the burden of proof resting on the prosecution when asking a Criminal Court to admit a confession alleged to have been made by an accused person."

The rule of the English Common Law had by 1830 become well-established and was of long standing. (See Gumede

at 413 in fin). It was described by INNES CJ in Rex v Barlin, 1926 AD 459 at 462:

"... the common law allows no statement by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made - in the sense that it has not been induced by any threat or promise proceeding from a person in authority."

The rule is a rule of policy. In Gumede (supra at 413)

FEETHAM JA quoted from the judgment of LORD SUMNER in Ibrahim v Rex 1914 AC 599 at 610:

"A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it. Rex v Warwickshall (1783, 1 Leach 263). It is not that the law presumes such statements to be untrue, but, from the danger of receiving such evidence, judges have thought it better to reject it for the due administration of justice. Rex v Baldry (1852, 2 Den. Cr. C.430, at p. 445)"

If the policy is to be effectuated,
it is of primary importance that an accused person should

feel completely free to give evidence of any improper methods by which he alleges a confession or admission has been extracted from him. Unless he gives evidence himself he can rarely challenge its admissibility. (Cf Reg v Brophy 1982 AC 476 G - H, at 481). See the judgment of LORD HAILSHAM of ST MARYLEBONE in the Privy Council case of Wong Kam-ming vs The Queen (1980) AC 247 at 261 B - C:

"... any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason it

is necessary that the defendant should be able and feel free either by his own testimony or by other means to challenge the voluntary character of the tendered statement."

It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial. In England the enquiry into voluntariness is made at "a trial on the voir dire", or, simply, the voir dire, which is held in the absence of the jury. In South Africa it is made at a so-called "trial within the trial". Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt. (See Rex v

Dunga, 1934 AD 223 at 226). The prosecution may not, as part of its case on the main issue, lead evidence regarding the testimony given by the defendant at the trial within the trial. See Wong Kam-ming (supra) at 257 - 258. Similarly, in a case where the trier of admissibility is also the trier of guilt (e g a magistrate or a judge sitting without assessors), evidence given by an accused person in the trial within the trial must be disregarded when the issue of guilt comes to be considered. In Chitambala v The Queen 1961 R & N 166 (FSC) at 169 - 170 CLAYDEN ACJ said in a passage quoted with approval in Wong Kam-ming (supra) at 257 F:

"In any criminal trial the accused has the right to elect not to give evidence at the conclusion of the Crown case. To regard evidence given by him on the question of admissibility as evidence in the trial itself would mean either that he must be deprived of that right if he wishes properly to contest the admissibility of a statement, or that, to

preserve that right, he must abandon another right in a fair trial, the right to prevent inadmissible statements being led in evidence against him ... To me it seems clear that deprivation of rights in this manner, and the changing of a trial of admissibility into a full investigation of the merits, cannot be part of a fair criminal trial."

(The question whether the accused may, at the main trial, be cross-examined in respect of statements made by him at the trial within the trial, does not now arise for consideration. But see Wong Kam-ming (supra) at 258 - 260).

In the present case the prosecutor, in his cross-examination of de Vries in the trial within the trial, crossed the boundaries of an enquiry into admissibility and entered upon an investigation of the merits. When objection was taken, the prosecutor claimed that his cross-examination was relevant to de Vries's credibility. It might have been so relevant, but the cross-examination was nevertheless improper and

irregular. Apposite in this regard is an extract from the judgment of HALL CJ in the Canadian case of Reg v Hnedish (1958) 26 WWR 685 at 688 which was quoted in Wong Kam-ming (supra) at 257:

"I do not see how under the guise of 'credibility' the court can transmute what is initially an inquiry as to the 'admissibility' of the confession into an inquisition of the accused. That would be repugnant to our accepted standards and principles of justice."

In my view, therefore, virtually the whole of the cross-examination of de Vries was irregular and none of the answers given were admissible in deciding the question of guilt. Similarly, when the magistrate on the basis of that cross-examination, took into account that

"(De Vries) se getuienis wemel van leuens en weersprekings. Sy weergawe is geheel en al verwerp as vals",

he misdirected himself.

This conclusion does not, however, necessarily lead to the setting aside of de Vries's

conviction. This was not a case where the irregularity was of such a nature (as in S v Moodie, 1961(4) S A 752(A)) as to amount per se to a failure of justice. The irregular cross-examination occurred, not in the main trial, but in a separate compartment - in the trial within the trial. Although de Vries gave evidence in the main trial, no attempt was made to cover any of the ground covered by the earlier cross-examination, but I do not think that if the irregularity had not occurred, de Vries would have fared any better under a full cross-examination at the later stage. The de facto position is no different from what it would have been if the irregularity had not occurred. De Vries's explanation for his conduct was rejected by the court a quo because he was a lying witness. If the irregular cross-examination is ignored, there is on record virtually no explanation by de Vries.

What the court of appeal has to do, therefore, is to decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there was proof of guilt beyond reasonable doubt. See S v Bernardus, 1965(3) S A 287(A); S v Tuge, 1966(4) S A at 565(A) 568 B - C.

Disregarding the cross-examination of de Vries in the trial within the trial and the magistrate's finding on de Vries's credibility, the residue of the State case against de Vries can be briefly summarized:

1. On 7 February 1981, Mayman and Jaftha, who lived in Cape Town, left D F Malan Airport by air for Durban, Mauritius and Bombay. It is plain that they went to fetch a consignment of mandrax.
2. They were due to return via Mauritius on 15

February, but were delayed in consequence of a failure to make a necessary aircraft connection.

On the afternoon of 15 February, de Vries flew from Cape Town to Durban, arriving at Louis Botha Airport at 5.45 p m. He wandered about aimlessly until the aircraft from Mauritius arrived at 8.25 p m. He then went to the foreign arrivals hall and was obviously waiting for someone, but he made no contact. He booked his return flight to Cape Town and left Louis Botha Airport by taxi at 9.05 p m. He came back the following morning and took an aircraft to Cape Town.

3. On the evening of 22 February, de Vries was again at Louis Botha Airport having come in his motor car from Cape Town. He waited for the

arrival of the aircraft from Mauritius. When it landed, he met Mayman and Jaftha who had disembarked from it. He escorted them to his motor car, where their luggage was placed in the boot. They all drove to Hercules's house in Berea, Durban. When they stopped outside the house, and got out of the car, they were confronted by the police and arrested, and the luggage was seized. A large brown suitcase which had been carried by Jaftha was found to contain nearly 10 000 mandrax tablets.

This was not the ordinary case of a man going to meet friends at an airport. The circumstances clearly called for an explanation by de Vries. De Vries went to the trouble and expense of flying to Durban on 15 February with the purpose of meeting the aircraft from Mauritius. On 22 February he was again at the Louis Botha airport,

with the purpose of meeting Mayman and Jaftha on their return from Mauritius. He drove them, not to a hotel or to friends of Mayman and Jaftha, but to a house in Berea, where Hercules, the driver of the car lived. They all got out of the car - this was apparently journey's end.

De Vries gave no explanation. In these circumstances, any hypothesis consistent with his innocence should be discarded as not reasonably possible. Cf R v Padhla 1948(1) PH H87(A); S v Essack, 1974(1) S A 1(A) at 11 G. The inference is clear that de Vries participated with Mayman and Jaftha in the importation of the mandrax into South Africa.

In my opinion, de Vries's guilt was, on the case unaffected by the irregularity, proved beyond a reasonable doubt.

The appeal is dismissed.

JOUBERT JA)
) CONCUR
 HOEXTER JA)

NICHOLAS AJA