

Bib  
156/88

LL

Case No 292/1987

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

DYLON NAIDOO

Appellant

and

THE STATE

Respondent

CORAM:

BOTHA, EKSTEEN JJA et NICHOLAS AJA

HEARD:

18 NOVEMBER 1988

DELIVERED:

29 NOVEMBER 1988

---

JUDGMENT

---

BOTHA JA: -

The appellant was charged in the Magistrate's Court, Durban, on two main counts of dealing in a prohibited dependence-producing drug in contravention of section 2 (a) of Act 41 of 1971. In the first main count it was alleged that, on 1 February 1984, and at Chatsworth, the appellant had dealt in 30 grams of dagga. In the second main count it was alleged that, at the same time and place, the appellant had dealt in "methaqualone as contained in 6 Mandrax tablets". To each of the main counts was appended an alternative count of a contravention of section 2 (b) of the same Act, it being alleged that the appellant had been in possession of the drugs mentioned above.

When the appellant was asked to plead to the charges, on 3 February 1984, he was unrepresented. He pleaded guilty on both of the main counts. The presiding Magistrate thereupon questioned the appellant in terms of section 112 (1) (b) of the Criminal

Procedure Act 51 of 1977. The Magistrate's questions and the appellant's replies to them give rise to the issue in this appeal. I shall defer a quotation of the relevant part of the record until a little later. At the conclusion of the questioning the Magistrate noted on the record that he was satisfied that the appellant was guilty of the charges to which he had pleaded guilty. The appellant was accordingly convicted on both of the main counts. The case was then postponed for sentence.

The appellant (after a further intervening postponement) again appeared before the Magistrate on 27 March 1984. He then informed the Magistrate that he had instructed an advocate because he wished to plead not guilty. The case was postponed then, and on a number of subsequent occasions. When it came before the Magistrate on 28 June 1984, the appellant was duly represented by counsel. It appears from the

Magistrate's notes on the record that counsel for the appellant submitted to the Magistrate that "the facts admitted" by the appellant (sc during the questioning by the Magistrate on 3 February 1984) showed that the appellant was not guilty on the main counts, but guilty on the alternative counts; that the conduct of the appellant was related to the acquisition of drugs and not to the supply of them; and that, on the facts, the proper procedure would be to apply the provisions of section 113 of Act 51 of 1977 and to alter both pleas of the appellant to "not guilty" on the main counts. The prosecutor opposed these submissions and argued that the appellant had been correctly convicted. The case was adjourned to 11 July 1984 for judgment.

At the commencement of the proceedings on 11 July 1984 the Magistrate enquired from counsel for the appellant whether it was correct to assume that the appellant stood by the answers given by him when

questioned in terms of section 112 (1) (b) of Act 51 of 1977. Counsel replied affirmatively. The Magistrate thereupon announced that counsel's submissions (sc those that had been put forward on 28 June 1984) were "dismissed", and he ruled as follows: "Both convictions stand". After hearing counsel in mitigation of sentence, the Magistrate, taking the two counts as one for the purposes of sentence, sentenced the appellant to 5 years' imprisonment.

The appellant appealed to the Natal Provincial Division. In response to the notice of appeal filed by the appellant, the Magistrate furnished written reasons for the convictions. He said, inter alia, that he had rejected the defence contention that the acts of the appellant were related to the acquisition of the drugs in question, and that he was satisfied that those acts were related to the supply of the drugs. He also remarked as follows:

"In the present case it is clear from the evidence that appellant had purchased the drugs from one person and then re-sold it to another.

Accordingly, the court is satisfied that appellant was correctly convicted."

The Natal Provincial Division held, in a judgment delivered by VAN HEERDEN J and concurred in by WILSON J, that the appellant's answers when questioned by the Magistrate made it clear that he had bought the drugs and thereafter resold them; that by reselling the drugs the appellant "was quite clearly dealing therein as that term is defined" in Act 41 of 1971; and that the Magistrate had been correct in finding the appellant guilty of dealing in dagga and mandrax. However, the Court mero motu "consolidated" the two counts. The order of the Court a quo was as follows:

"Save therefore as regards the consolidation of the two counts the appeal is dismissed

both as regards conviction and sentence."

The appellant applied for leave to bring a further appeal to this Court. In his judgment on the application VAN HEERDEN J said that there was a reasonable possibility that this Court might hold that the appellant's statements in response to the Magistrate's questioning were capable of being interpreted as meaning that the appellant was "merely acting as agent for those who wanted to purchase the dagga and the mandrax". On that basis the leave sought was granted.

I turn now to that part of the record which reflects the course of the proceedings before the Magistrate on 3 February 1984 after the appellant had pleaded guilty to the two main counts. It reads as follows:

"Accused is questioned by court in terms of Section 112 (1) (b) Act 51/1977. Procedure explained to accused.

X : Do you understand the two charges?  
A : Yes.  
X : Are you ready to proceed with your trial today?  
A : Yes.

Definition of "DEALING" as defined in Section 1 of Act 41 of 1971 explained to accused. Accused understands.

COUNT 1

A : Do you know dagga?  
A : Yes.  
X : Are people allowed to possess, use or deal in dagga?  
A : It is unlawful.  
X : Did you on 1.2.84 and at Chatsworth in this district deal in 30 grams of dagga?  
A : Yes.  
X : Tell the court what you did?  
A : Three men came to me. They asked me for dagga to use. They asked me for dagga and mandrax. I then went to someone and bought this dagga and six (6) mandrax tablets for R60,00 and then went back to these three men and gave them this dagga and the mandrax tablets and told them to pay me the R60,00. They then arrested me.

COUNT 2

X : Do you know Mandrax?  
A : Yes.  
X : Are people allowed to possess, use



or deal in Mandrax tablets?

A : No.

X : Do you know that mandrax contains METHAQUALONE, which is a prohibited dependence producing drug?

A : Yes.

X : Did you on 1/2/84 and at or near Chatsworth in this district deal in six (6) Mandrax tablets?

A : Yes.

X : Tell the court what you did?

A : It is the same as with the dagga. These three men asked me for dagga and mandrax. I went and bought this dagga and mandrax with my own money. It cost me R60,00. When I brought the dagga and Mandrax to these men they arrested me.

The court is satisfied that the accused is guilty of the charges to which he has pleaded guilty.

JUDGMENT : COUNT 2 : Guilty : Main count  
COUNT 2 : Guilty : Main count"

The vitally important parts of the appellant's replies to the Magistrate's questions are contained in the two passages by which the questioning in respect of each of the counts was concluded, and in which the appellant responded to the Magistrate's

request that he tell the Court what he had done. I shall refer to what the appellant said in those passages as the "appellant's explanation". One fact that is immediately apparent from the appellant's explanation, and which is clear beyond doubt, is that the appellant had acted as an intermediary between the person from whom he obtained the drugs (the supplier) and the three persons to whom he handed over the drugs (the recipients). Whether or not the appellant, acting as an intermediary between the supplier and the recipients, contravened section 2 (a) of Act 41 of 1971, falls to be considered in the light of the decision of this Court in S v Solomon 1986 (3) S A 705 (A). I quote from the judgment of the Court, delivered by SMALBERGER JA, at 712 J - 713 C:

"Gevolglik moet die vraag of 'n persoon 'n handeling verrig het in verband met die verkoop of lewering van verbode stof en derhalwe binne die woordomskrywing van handeldryf val, beantwoord word aan die hand daarvan of die betrokke persoon deel gehad

het, hetsy as dader of medepligtige, aan die verskaffing van die verbode stof, of suiwer en alleen aan die verkryging daarvan, want in laasgenoemde geval kom sy optrede nie op handeldryf neer nie. Waar n persoon se optrede beide verskaffings- en verkrygingselemente bevat, sal hy wel aan handeldryf skuldig wees.

Elke geval moet natuurlik volgens sy eie feite beoordeel word. In die geval waar n tussenganger of agent betrokke is, is dit gevolglik belangrik dat die feite van die bepaalde geval vasgestel word alvorens daar oorgegaan word tot die volgende stap, naamlik om te bepaal of daardie feite daarop dui dat die tussenganger of agent se handeling betrekking het op die verkryging of verskaffing van verbode stof. In sekere gevalle sal dit duidelik wees in welke kategorie die handeling van die tussenganger of agent val. In ander gevalle kan dit moeilike probleme oplewer."

If this approach is followed in the present case, it is manifest that the appellant's explanation falls far short of complying with the important requirement that all the facts pertaining to the transaction must be established before it can be determined whether the appellant's conduct constituted activities relating to the supply of the drugs, or to

the acquisition of them, or to both. Essentially, the appellant's explanation reveals no more than the following: he was asked by the recipients for dagga and mandrax "to use", which denotes, prima facie, consumption by the recipients themselves; he went off and bought the drugs from the supplier, paying for them with his own money; and he returned to the recipients, handed over the drugs to them, and asked for payment of the money he had expended. Wholly unexplored areas of uncertainty relating to the precise nature of the transaction, which cry out for further enquiry, include the following: What was the relationship, if any, between the supplier and the appellant? Was the supplier known as such to the appellant? Did the appellant go off to buy the drugs on his own initiative, or was he directed or requested by the recipients to do so? Did the recipients know the supplier as such? Did they request the appellant to go to the supplier for the purpose of obtaining the

drugs for them? Did the recipients undertake to refund to the appellant the money that he would spend in buying the drugs? And, did the appellant receive, or was he to receive, any remuneration for what he had done, either from the supplier or from the recipients?

The lacunae in the appellant's explanation can be demonstrated by postulating and contrasting two possible scenarios. Possibility (a): the appellant was acting as a runner for the supplier; the recipients did not know the supplier; the transaction would not have taken place but for the intervention of the appellant; and the appellant would have earned a commission from the supplier, had the transaction been carried through. Possibility (b): the supplier was known to the recipients, but not to the appellant; the recipients asked the appellant, purely as a favour, to obtain the drugs for them from the supplier; the recipients directed the appellant where to find the

supplier; it was arranged that the recipients would refund to the appellant the money that was required to buy the drugs; and the appellant would have derived no advantage from the transaction.

On possibility (a) the appellant would have contravened section 2 (a), but on possibility (b) plainly not. In the latter case he would have been no more than a mere conduit for the acquisition of the drugs by the recipients and he would not have been involved in any activity related to the supply of the drugs (see Solomon's case supra at 713 D-F). The decisive question is not whether the appellant was acting as the agent of the recipients, as may have been suggested in the judgment of the Court a quo on the application for leave to appeal, for in certain circumstances an agent for the buyer may be participating himself in activities which are related to the supply of drugs (c f S v Williams 1987 (3) S A

126 (E) at 130 G-I). But on the facts postulated in possibility (b) the appellant would not have been doing anything that the recipients could not have done themselves; as a mere conduit for the recipients his conduct was directed at the acquisition of the drugs and not at their supply.

In my view there is nothing in the appellant's explanation which excludes possibility (b) from consideration as a possibility of what had actually happened. It is not far-fetched or fanciful. On the contrary, it seems to me to be a possibility that is implicit in the appellant's explanation and one that calls naturally for attention because of the lack of further details in the explanation. It follows that I do not agree with the Magistrate's finding, affirmed on appeal to the Court a quo, that it was clear that the appellant had purchased the drugs from one person and then resold them to

another. That is a possibility, of course, but it is not the only reasonable possibility emerging from the appellant's explanation. The Magistrate seems to have regarded the appellant's explanation as "evidence", as appears from the extract from his written reasons for the convictions quoted earlier, and he seems to have drawn an inference from the "evidence". In my opinion that was an unsound approach to adopt in applying the provisions of section 112 (1) (b) of Act 51 of 1977 (henceforth referred to as "the Act"), with which the Magistrate was concerned at that stage of the proceedings. The relevant part of the subsection reads as follows (I emphasize the important phrase):

"the presiding ..... magistrate shall ..... question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he has pleaded guilty, convict the accused on his plea of guilty of that offence and impose any competent sentence ....."



It may be assumed, purely for the sake of argument (I do not pause to consider the question), that the appellant's explanation shows prima facie, or even as a probability, that he had bought and then resold the drugs. But that is of no moment for the purposes of applying section 112 (1) (b). What is of decisive importance in this context is that the appellant's explanation was, for the reasons given above, entirely consistent with his innocence of the offences to which he had pleaded guilty. On that footing the Magistrate could not, objectively speaking, have been "satisfied" as required by the section.

With due respect to the Magistrate and to the Court a quo, the position appears to me to be so clear that there is no occasion to expatiate generally on the manner of application of section 112 (1) (b). I would merely observe that it is well settled that the section was designed to protect an accused from the

consequences of an unjustified plea of guilty, and that in conformity with the object of the Legislature our Courts have correctly applied the section with care and circumspection, and on the basis that where an accused's responses to the questioning suggest a possible defence or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence.

In my judgment, therefore, the appellant was wrongly convicted.

The matter does not end there, however. After he had been convicted, the appellant, on 27 March 1984, informed the Magistrate that he wished to plead not guilty. In effect, he wanted to change his original pleas. Thereafter, on 28 June 1984, his counsel pertinently raised the point that the appellant's explanation had not justified the

convictions and argued that his pleas should be altered in terms of section 113 of the Act. Counsel's argument was tantamount to an application to the Magistrate to apply the provisions of section 113 by recording pleas of not guilty and directing the prosecutor to proceed with the prosecution. In my view there can be no doubt that the Magistrate should have acceded to the application. I quote section 113 (emphasizing the parts of it which are important for present purposes):

"If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution ....."

Counsel's argument was based on the appellant's

explanation as it stood. His submission that the appellant's explanation showed that the appellant was not guilty on the main counts, because his conduct was related to the acquisition of drugs and not to their supply, was an overstatement, but it should certainly have alerted the Magistrate to the fact that the appellant's explanation was compatible with the proposition put forward by counsel. Having regard to what has been said earlier in this judgment, the Magistrate should have been "in doubt" as to the appellant's guilt, and he should consequently have applied section 113 and acted accordingly.

It must be stressed that on the facts of this case section 113 was invoked on the appellant's behalf solely on the ground that his convictions had not been justified by the explanation he had given in response to the Magistrate's questioning in terms of section 112 (1) (b). It was in that context that the Magistrate

was concerned, and was concerned only, with that part of section 113 which reads:

"..... is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty ....."

It was not sought on the appellant's behalf to introduce any matter extraneous to the appellant's explanation in support of the application to the Magistrate to apply section 113. In effect, the Magistrate was invited to reconsider his earlier finding, in terms of section 112 (1) (b), that he was "satisfied" that the appellant was guilty of the charges to which he had pleaded guilty. Counsel's argument furnished a sufficient foundation for the Magistrate to be persuaded, as he ought to have been, that his earlier finding had been incorrect and that there was a doubt as to the appellant's guilt (c f S v Du Plessis 1978 (2) S A 496 (C) at 498 F).

I have emphasized the particular facts of

this case in order to make two things clear. The first is that in the circumstances of this case there can be no question of the appellant having been required to discharge any onus in regard to the application of section 113. The concept of onus is wholly inappropriate in the circumstances obtaining here. The Magistrate was simply required to bring his mind to bear upon, and to decide, whether the appellant's explanation as it stood was consistent with his innocence and, consequently, whether there was a doubt as to his guilt. In the argument before this Court counsel were ad idem, rightly in my view, that the question of onus did not arise. The second point, which flows from the first, is that this Court is not called upon in the present case to consider the controversy which has been raging for some time regarding the question of onus generally in relation to the application of section 113, as is reflected in a large number of reported decisions in the Provincial

Divisions. It is exemplified by the divergent views expressed in two of the most recent decisions on the matter, S v De Bruin 1987 (4) S A 933 (C) and S v Malili en h Ander 1988 (4) S A 620 (T). Diametrically opposed views are also to be found in various commentaries on the Act (see e g Du Toit, De Jager et al, Commentary on the Criminal Procedure Act, at 17-15 to 17-16, and the 1988 Cumulative Supplement to Hiemstra's Suid-Afrikaanse Strafproses at 14-17). None of the decisions dealt pertinently with a situation such as arose in the present case. In order to hold, as I do, that onus played no role in this situation, it is not necessary, nor would it be advisable, to consider the question of onus in relation to section 113 in a wider sense or in different contexts, and I refrain from doing so. For clarity, however, I should add this further observation. In some of the cases statements are to be found in regard to the onus in the context of section 113 that are so

widely phrased that they might be thought to cover the situation in the present case. An example can be found in De Bruin's case supra at 935 J - 936 A, 936 D and 937 I. But the factual situation in that case differed toto caelo from that in the present case. To the extent that the passages I have cited purport to embrace a situation such as the present, I respectfully disagree. For the rest I express no opinion on the correctness or otherwise of the views expounded in De Bruin's case supra.

In my judgment, therefore, the Court a quo should have allowed the appellant's appeal.

The only question remaining for consideration is the form of the order that should be substituted for the order of the Court a quo. Section 312 (1) of the Act provides as follows:

"Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of



subsection (1) (b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be."

In the present case the Magistrate did comply with the provisions of section 112 (1) (b), in the sense that he questioned the appellant as envisaged by the section, but he erred in convicting the appellant at the conclusion of his questioning, because he ought not to have been satisfied as to the appellant's guilt. Whether or not his error in that regard constituted a non-compliance with the provisions of section 112 (1) (b) for the purposes of section 312 (1), need not be considered, for the proceedings took a further course when application was made to the Magistrate on the appellant's behalf to apply section 113. In refusing that application, the Magistrate was again in

error. In a sense, his first error was superseded by his second. In view of the fact that section 113 was pertinently invoked and should have been applied, I consider that it would be appropriate to formulate the order to be issued with reference to compliance with the provisions of that section. I may add that in answer to a query by this Court counsel informed us that the Magistrate who presided at the appellant's trial is available to proceed with it.

The order of the Court is as follows:

- (1) The appeal is allowed.
- (2) The order of the Court a quo is set aside and there is substituted for it the following orders:
  - (a) The appellant's appeal is allowed and his convictions and sentence are

are set aside.

(b) The case is remitted to the Magistrate who convicted and sentenced the appellant.

(c) The Magistrate is directed to record pleas of not guilty to the two main counts and to require the prosecutor to proceed with the prosecution.

A.S. BOTHA JA

EKSTEEN JA

CONCUR

NICHOLAS AJA