



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU– NATAL LOCAL DIVISION, DURBAN

High Court Ref No: **DR23/2024**

Magistrates Review Serial No: **1/2024**

Case No: **23/7627/2023**

In the matter between:

THE STATE

and

KILLIAN TAYLOR SHROSBREE

REVIEW JUDGMENT

Delivered on: 8 November 2024

Ntlokwana AJ:

Introduction

[1] This is a matter sent on special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 (the “CPA”). The accused was arrested on 10 December 2018 and thereafter on various occasions appeared in the Durban district magistrate’s court, was admitted into bail and had his own legal representation. On 17 October 2023 the accused pleaded guilty on both charges that he faced.

Proceedings before the magistrate’s court

[2] The two charges that the accused faced were the following:

(a) Count 1 related to the unlawful possession of a prohibited substance, where the accused was alleged to be guilty of the crime of contravening the provisions of s 29(K) of the Medicines and Related Substances Control Act 101 of 1965 (the Act) read with certain sections and schedules of the Act, in that on or about 10 December 2018 and at or near the Bluff Yacht Club, Maydon Wharf in the District of Durban, he unlawfully and intentionally possessed, or used, 4320 Atorvastatin tablets/Lipitor tablets, being a scheduled substance or medicine under schedule 6 of the Act, without having a prescription in terms of the Act;

(b) Count 2 related to the possession of an undesirable dependence producing substance where it was alleged that the accused was guilty of the offence of contravening s 4(b) read with certain sections of the Drugs and Drug Trafficking Act No. 140 of 1992 (the Drugs Act), in that on the same day and at the same place mentioned in count 1, he unlawfully and intentionally had in his possession, or used, an undesirable dependence-producing substance, being four plastic packets containing plant material/psilocin which apparently is a substance present in psychedelic mushrooms.

[3] On 5 September 2023, the accused's legal representative was furnished with witness statements by the prosecution and thereafter the matter was postponed to 17 October 2023 for a pre-trial conference to be held. However, on that day, the court was informed that the accused intended to plead guilty on both counts and that the matter would accordingly proceed with a plea of guilty. That is, indeed, what then happened: the accused pleaded guilty and his plea in terms of s 112(2) of the CPA was read into the record by his legal representative.

[5] On count 1, the accused stated that he was guilty of the charge, having committed the offence of unlawfully and intentionally possessing 4320 Lipitor tablets being a scheduled substance or medicine under schedule 6 of the Medicines and Related Substance Control Act 101 of 1965 without having a prescription in terms of the said act. The factual basis for this offence was that on 10 December 2018, and at or near Number 36 warehouse, at the Yacht

Club on the Bluff, the accused was found in possession of 4320 Adco-Atorvastin or Lipitor tablets, as he had a key to the warehouse, and had made use of the warehouse for storage of his personal goods.

[6] On count two, the accused pleaded guilty to the unlawful and intentional possession of four plastic packets containing psilocin, being a scheduled substance or medicine in terms of schedule 6 of the Drugs Act without having a prescription in terms of that Act, in that on the same day as mentioned in count one and at the same place he was found in possession of an undesirable dependence producing substance contained in four plastic packets containing psilocin. The facts mentioned, again, were that he had a key to the warehouse, and had made use of the warehouse for storage of his personal goods. In neither instance did he acknowledge the substances mentioned in counts 1 and 2 to be his own.

[7] In explaining how he got to be involved with the scheduled substances in count one and in count two, the accused stated in his plea that the holder of the warehouse, whatever that may mean, namely Dennis Swart (Swart), was a good friend of his. Swart, however, passed away on 8 December 2018, two days prior to the accused's arrest. While the warehouse belonged to Swart, the accused would, at times, work for Swart assisting him with odd jobs around the warehouse and with his boat. Sometime in September 2018, the accused was requested by Swart to assist him with storing medical pills such as Lipitor. Swart informed the accused that the pills were to be used for the treatment of heart conditions. As far as the accused knew, the medication was lawfully obtained by Swart on the prescription from a doctor.

[8] The plea went on to state that at around the same time, Swart started growing a plant known as 'magic mushrooms'. The accused was requested by Swart to help grow the plants by watering and fanning them. These plants were grown in tubs. The accused submitted in his plea that other than helping to grow the mushrooms, he had no further dealings with them. He, however, was informed by Swart that the mushrooms would be sold for R25.00 a gram.

[9] When Swart passed away, the accused was informed that the warehouse would be locked, and he then began moving his personal items from the warehouse to his boat. On 10 December 2018, the South African Police Services (SAPS) came to the warehouse whilst the accused was moving his personal items from the warehouse to his boat. The SAPS requested the accused to open up the storage unit, which he did, and the SAPS then found the Lipitor pills and the magic mushrooms inside the storage unit. Upon being questioned by the SAPS, the accused informed them that the tubs contained magic mushrooms and that Swart sold them for R25.00 per gram.

[10] The accused admitted that he had no defence in law and thus was pleading guilty and was remorseful for his actions in contributing to growing magic mushrooms. He regretted being in possession of the substances without a prescription.

[11] The court *a quo* accepted the plea, and the accused was then found guilty on both counts. He was thereafter sentenced on count 1 to a fine of R2 000 or two years' imprisonment and received an identical fine and suspended sentence on count 2.

[12] The Senior Magistrate who has sent these proceedings through on special review cites two grounds of concern:

(a) The first is that a drug analysis report was not tendered by the State as an exhibit, and thus there was no conclusive proof that the Lipitor pills in count one and the magic mushrooms in count two were, indeed, prohibited or undesirable dependence producing substances; and

(b) The second is that the accused raised the defence that the substance in count 1 referred to as Lipitor, was lawfully obtained by Swart with a prescription obtained from a doctor.

[13] Further to the above, this court is requested, should it find that the proceedings were not in accordance with justice, to set aside the conviction

and remit the matter back to the Magistrates Court for the matter to start *de novo*.

Issues for Determination

[14] This court is required to determine whether the proceedings before the court *a quo* were in accordance with justice since:

- (a) The Lipitor pills, and the magic mushrooms were never taken to the SAPS laboratory for examination to determine whether they were, indeed, prohibited substances; and
- (b) The defence was raised that the Lipitor pills had been acquired under a valid prescription.

[15] The court will also consider whether the accused's legal representation was rendered illusory to the extent that his right to a fair trial was infringed.

Analysis

[16] After the accused's statement was read to the court by his legal representative, the magistrate required the accused to confirm the contents thereof as well as his signature. That was forthcoming. The magistrate then admitted the statement, despite its short comings.

[17] Section 112 (2) of the Criminal Procedure Act provides that:

'If an accused or his legal advisor hands a written statement by the accused, in which the accused sets out facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: provided that the court may, in its discretion put any question to the accused in order to clarify any matter raised in the statement.'

[18] Section 112(1)(b) referred to in section 112(2) provides that the magistrate shall question the accused with reference to the alleged facts of the case to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty. The emphasis is on the fact that the

court should be satisfied that the accused is guilty of the offence to which he or she has pleaded guilty.

[19] From the record of the proceedings, the magistrate did not request the state to present a certificate in terms of s 212(4) of the CPA to him in order to ascertain the correctness of the admissions that the accused made to determine whether he was in possession of the undesirable dependence producing substances, in accordance with his guilty plea. In *S v Naidoo*,¹ it was held that the court does not only have to ascertain whether the admitted facts, if accepted as being correct, would establish all the elements of the offence, but also must pass judgment on the reliability of the admissions.

[20] In this matter, the court accepted the plea of guilty on both counts without the state furnishing the accused with the necessary certificate relating to the scientific analysis of the substances referred to in count 1 and count 2. In this regard, in *State v Paulse*² It was held that:

‘When an accused pleads guilty to a charge where one of the elements of the crime can only be proven by scientific means, the court must request the prosecutor to hand up the analysis certificate’.

[21] Moreover, in his guilty plea the accused stated that the pills belonged to the deceased Swart, who had informed him that he had obtained them with a doctor’s prescription. These pills were found in the warehouse and not in the possession of the accused. The same applied to the magic mushrooms, which were also in the warehouse. While the accused had the keys to the warehouse, it was not his warehouse, and neither were those substances. In his plea explanation, the accused raised a defence to the allegations of possession of undesirable substance and the magistrate should not have accepted the plea of guilty.

¹ *S v Naidoo* 1985 (2) SA 32 9 (N) 37G-H.

² *State v Paulse* 2022 (2) SACR 451 (WCC) para [11].

[22] In *S v Adams*,³ the court held that where an accused is represented and admits to possession of a prohibited dependence producing substance being what it is alleged to be, the court will normally be entitled to convict. Section 112(2) requires the court to be satisfied that the accused is guilty of the offence to which he is pleading guilty. Whilst the accused in this matter had legal representation, the right of the accused to a fair hearing appears to have been compromised by the desire to finalise the matter. The question to be asked is whether the accused received proper representation in such circumstances. In *S Tandwa and others*,⁴ the Supreme Court of Appeal held that:

‘The Constitutional right to counsel must be real and not illusory and the accused has in principle, the right to a proper, effective or competent defence.’

[23] A legal representative owes a duty of loyalty to his client and should always act in the best interests of the client. He or she must be acquainted with the facts of the case and must have knowledge of the applicable legal principles. Failure to possess that knowledge will fall short of the required standards. In *S v Mafu*⁵, the court held that:

‘The idea of being represented by the legal advisor cannot simply mean to have somebody stand next to one to speak on one’s behalf. Effective legal representation entails that the legal advisor act in the client’s best interests, saying everything that needs to be said in the client’s favour and calling such evidence as justified by the circumstances in order to put the best case possible before the court.’

[24] These standards are required to protect the accused person’s rights entrenched in section 35(3)(f) of the Constitution. There is an inherent duty upon a court to protect the accused’s right to a fair trial, even if there is legal representation if such representation falls short of the required standard. The legal representative in this matter failed to protect the interests of the accused, leading to the accused pleading guilty when he should not have.

³ *S v Adams* 1989 (3) SA 733 (C).

⁴ *S Tandwa and others* 2008 (1) SACR 613 (SCA) at 620h-621b.

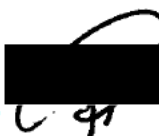
⁵ *S v Mafu* 2008 (2) SACR 653 (W) para [24].

[24] In my view, the proceedings in the Magistrate's Court were not in accordance with justice. As to whether there is sufficient evidence to again warrant putting the accused on trial, I leave that decision in the hands of the prosecuting authority.

Order

[25] In the result, I would propose that the following order should issue:

The accused's conviction and sentence on count 1 and count 2 are set aside.



NTLOKWANA AJ

I agree and it is so ordered:



MOSSOP J