



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

**CASE NO: 450/05
Not reportable**

In the matter between

ZANELE BRUNETTE MUHOLI

Appellant

and

THE STATE

Respondent

Coram: **MTHIYANE, HEHER, LEWIS, JJA**

Heard: 10 March 2006

Delivered: 29 March 2006

Summary: For a conviction of drug dealing in terms of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, where drugs have been sent to an accused, who has never acquired possession of the drug in question, it must be proved that the accused had knowledge that drugs have been sent to him or her. Where there is more than one reasonable inference to be drawn from circumstantial evidence as to the knowledge of the accused, the contravention of s 5(b) of the Act is not proved beyond a reasonable doubt.

Neutral citation: This case may be cited as *Muholi v State* [2006] SCA 44 (RSA).

JUDGMENT

LEWIS JA

[1] The appellant, Ms Z B Muholi, was charged in a magistrate's court with possession of, or dealing in, heroin in contravention of ss 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992. She was convicted on the charge of drug dealing and sentenced to 12 years' imprisonment. She appealed to the Johannesburg High Court against both conviction and sentence. The appeal was upheld only in so far as sentence was concerned. The High Court (per Schwartzman J, Masipa J concurring) confirmed the conviction but reduced the sentence to a period of imprisonment for eight years. The further appeal against the conviction lies before this court with its leave.

[2] The issue on appeal is whether the evidence led at the trial supports a conviction for drug dealing. 'Deal in' is defined in the Act as including 'performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug'.

[3] The conclusion of both the trial court and the court below was that circumstantial evidence led to only one inference, and that was that Muholi was part of a chain in a drug dealing transaction. Many of the facts are not in dispute. These are, in summary, as follows.

[4] Captain van der Merwe of the South African Police Service received a fax on 12 November 1988 informing him that a parcel of drugs was to be routed via London to a Ms Z Muholi, whose address was stated on the parcel to be PX Kaserne, Room 6, Admin Room'. PX Kaserne is the address of a parcel handling business which trades as 'Fast Forward'. No evidence was led as to who had sent the fax or where the parcel had come from: at the outset of the trial it was stated that the parcel had been sent from Pakistan via London, but witnesses who could testify to these allegations were not called by the State. There is no evidence therefore as to the importation of drugs by Muholi.

[5] On 16 November Van der Merwe was advised by Inspector Koen, a member of the police drug unit, stationed at Johannesburg International

Airport, that the parcel had arrived. Van der Merwe collected the parcel that day and took it to his office in Roodepoort. There he took photographs of the parcel, opened it, and found a baby bath and baby clothes. He also opened a letter addressed to Muholi that was in the parcel, and that purported to come from the Salvation Army. The letter congratulated Muholi on the birth of her baby and thanked her for past support.

[6] Van der Merwe noticed a slit in the side of the parcel: hidden in the side were packets of a substance that was subsequently proved to be heroin weighing 494.3 grams, with a market (street) value exceeding R200 000. He put all the items back in the parcel, sealed it and instructed two other officers, Inspectors Brand and Engelbrecht, to make what he termed a 'controlled delivery' to Muholi. On the morning of 18 November, Brand and Engelbrecht thus dressed in the uniforms of a parcel delivery company, Fedex, and drove in a Fedex van to Muholi's work address. Van der Merwe followed in an unmarked police vehicle.

[7] Muholi worked in the human resources department of Fast Forward, but assisted in the mornings in taking delivery of items sent to the business. Brand and Engelbrecht arrived at the office and asked for Muholi. She was not in the front office but another employee said she would call her. Muholi had been about to set off for a meeting with union members, and had gone to the toilet beforehand. She was told, when there, that there was a parcel delivery for her. She thus went to the front office where she saw the two police officers dressed in Fedex uniforms. She was asked to sign for the parcel, which she did.

[8] The testimony of Brand and Engelbrecht differed from that of Muholi as to her reaction when she came into the office. Engelbrecht testified that she said 'oh my parcel'. Brand's evidence was that she said 'oh my packet'. The difference between the words 'parcel' and 'packet' is in my view of no significance, given that both officers are Afrikaans speaking. Muholi testified that she had said nothing of the kind, but had simply signed for the parcel, as requested. Much was made by counsel for the State about the testimony of

Muholi in this regard. I shall return to it when evaluating the evidence for it is one of the facts (albeit contested) from which the trial court and the court below drew the inference that Muholi was guilty of drug dealing.

[9] The parcel was not ever handed to Muholi. As soon as she had signed for it Brand and Engelbrecht identified themselves as police officers. They took her outside to where Van der Merwe was waiting, and handed the parcel and the form that she had signed to him. Engelbrecht told Van der Merwe that Muholi had expected the parcel. It transpired that this was because she had shown no surprise, in his view, when receiving it, and had said “oh my parcel”. She had also not asked why she was being taken outside by two police officers. This too was regarded as a fact from which the inference of knowledge of the contents of the parcel, and thus guilt, could be drawn. Van der Merwe then arrested her, and according to him apprised her of her rights including the right to remain silent. She was told that her arrest was related to drug dealing. He asked her if she wanted to see anyone before being taken away, and she asked to see her employer, Mr Fernwood. She was taken to his office. Van der Merwe told Fernwood that Muholi was under arrest and that he was investigating a case of drug dealing.

[10] Muholi was then taken by the police officers to her flat in Jeppe. The parcel was opened in her presence. It was also photographed. Muholi’s flat was searched. She was then taken to Van der Merwe’s office where 10 plastic bags of heroin were extracted from the side of the box that contained the baby bath and clothes. Photographs were taken of this process too. By the time the appeal was heard by the court below all of the photographs and other exhibits had been lost. The court below accepted that the evidence led at the trial was sufficient to confirm the existence of what was contained in the parcel, and counsel for Muholi did not submit that we should disregard it. The evidence as to the contents of the parcel was in any event never contested by Muholi.

[11] The letter sent by the Salvation Army to Muholi, and found in the parcel, stated, as I have said, that it was sent to her as a gift on the arrival of her baby. It thanked her for her co-operation and support. Muholi told the

police officers that she had never had a baby and was never likely to have one; that she knew nothing of the sender and had never had anything to do with the Salvation Army. Engelbecht testified that when the parcel had been opened Muholi had looked surprised, shaking her head as though she had no knowledge of the contents.

[12] This is the essence of the evidence on which Muholi was convicted of drug dealing. The charge of being in possession of drugs was rightly dismissed since Muholi had never been in possession of the parcel containing the heroin. But both the trial court and the court below considered that the only reasonable inference to be drawn from the cumulative evidence was that Muholi was part of a chain dealing with drugs.

[13] On granting leave to appeal, this court asked that the heads of argument address the question whether there was admissible evidence to prove that Muholi had dealt in heroin, having regard to the definition of 'deal in' set out above. Counsel for Muholi argued that since she had never performed any act in connection with the importation or collection of heroin she could not be convicted of dealing in the substance. He conceded, however, that even if she had not herself actively arranged the importation of, or collected, the heroin she could be guilty of drug dealing if she knew that the heroin was being sent to her for collection or transmission. Whether she was dealing in drugs thus depends on her knowledge that she was going to receive heroin in the parcel. Counsel for the State argued that if she had knowledge the necessary intention to deal in drugs would be proved. In my view, had Muholi signed for the parcel knowing that it contained heroin she would have met the definition of dealing in drugs set out in the Act. The simple question, then, is whether the evidence led at the trial proved beyond reasonable doubt that Muholi knew that the parcel contained heroin or any other drug.

[14] The trial court and the court below relied on three factors in concluding that Muholi was guilty. Before turning to these it is as well to set out the test

for drawing inferences from circumstantial evidence set out in *R v Blom* 1939 AD 188 at 202-203:

'1 The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

2 The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

This two-stage test has been followed consistently and frequently since.

[15] What then is the evidence that the trial court and the court below relied on in order to draw the inference that Muholi knew that the parcel addressed to her contained heroin? First, Muholi expressed no surprise when she met the police officers, dressed as Fedex delivery men, in the office, and then said "oh my parcel". Muholi denied having said anything of the kind. She was disbelieved. But even if she had said it, this in itself is perfectly explicable: she had been summoned by a co-worker from the bathroom to sign for a parcel addressed to her. Her words are easily related then to the fact that she had been told there was a parcel for which she must sign. Her lie, if such it was, does not in itself lead to the inference that she knew what was in the parcel.

[16] Second, Muholi did not ask why she was not given the parcel for which she had signed; did not ask why she was being taken outside; and did not ask why she was being arrested. The inference argued for by the State is that she knew she had been caught for drug dealing. There are, in my view, other inferences to be drawn. She testified that she was taken by surprise and was in a state of shock. She thus did not realise what was happening. This is perfectly plausible. She was placed in an extraordinary situation – asked to sign for a parcel by Fedex employees who immediately identified themselves, after she had signed, as police officers and asked to accompany them outside without explanation. The inference that she was shocked and confused, and therefore did not question their instructions, is just as reasonable as the one that she knew what was in the parcel. Moreover, before being told that she was to be arrested for an offence relating to drugs she was warned of the right

to remain silent by Van der Merwe. No inference can be drawn from her silence in the circumstances.

[17] Third, the trial court found that it was highly improbable that a parcel containing heroin with a value in excess of R200 000 would be sent to a person who was not part of the drug dealing chain: it would not be sent to a stranger. The court below accepted that this was an improbability and found that the only reasonable inference to be drawn was that she was part of a chain dealing in heroin. There is another plausible inference to be drawn, however. Just as a baby bath and clothes had been put in the parcel as a decoy, so too could the name and work address of Muholi have been used as a decoy. Her name and address may well have been given to the sender of the parcel by the intended recipient to disguise his or her identity. A co-worker at Fast Forward, expecting the parcel, might have planned to take control of it as soon as Muholi had signed for it. This is just as probable as is the inference that Muholi was the intended recipient and knew that the parcel contained heroin.

[18] It may be that the accumulation of facts from which the inference of guilt was drawn makes it probable that Muholi was the intended recipient, and knew that the parcel contained heroin. But each of the facts relied upon in order to draw the inference of guilt leads to another reasonable inference. Viewing the circumstantial evidence cumulatively cannot lead to the conclusion that the probabilities add up to proof beyond reasonable doubt. Accordingly, there is not proof beyond reasonable doubt that she performed any act in connection with the collection of heroin. Muholi is thus not guilty of dealing in drugs as defined in the Act.

[19] The appeal is upheld. The order of the court below is replaced with the following:

‘The conviction is set aside.’

C H Lewis
Judge of Appeal

Concur:
Mthiyane JA
Heher JA