THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 161/2010
No Precedential Significance

In the matter between:

NOMVULA GAMEDE **First Appellant**

TANJANE JUSTICE MAKUNGA **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: *Gamede v The State* (161/10) [2010] ZASCA 122 (30 September 2010)

Coram: NUGENT, MHLANTLA JJA and EBRAHIM AJA

Heard: **10 September 2010**
Delivered: **30 September 2010**

Summary: Criminal Law – Drugs and Drug Trafficking Act 140 of 1992 ─ whether conviction justified by evidence ─ appropriate sentence.

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg)(Swain and Hollis JJ sitting as court of appeal.):

1 In each case the appeal against the conviction is dismissed.

2 In each case the appeal against the sentence is upheld.

2.1 The sentence of the first appellant is set aside and substituted with a sentence of 5 years imprisonment.

2.2 The sentence of the second appellant is set aside and substituted with a sentence of 15 years imprisonment.

JUDGMENT

EBRAHIM AJA (Nugent and Mhlantla JJA concurring)

[1] The appellants were convicted in the regional court at Durban of contravening the provisions of s 5(b) of the Drugs and Drug Trafficking Act 1992 (Act 140 of 1992) in that during June 2004, they dealt in 556 kilograms of methaquolone (commonly known as mandrax), an undesirable dependence producing substance, listed in part 3 of schedule 2 of the Act, the value thereof being approximately R50 million. They were each sentenced to a term of 20 years imprisonment.

[2] An appeal to the KwaZulu-Natal High Court, was dismissed but leave granted to appeal to this court against the convictions and sentences in each case.

[3] The issue in the appeals is whether the respondent proved beyond reasonable doubt, that mandrax was being manufactured at the premises concerned and, if so, was it proved that the appellants were dealing in the substance as envisaged by the Act.

[4] The factual background for the conviction is the following. On Thursday 22 June 2004, members of the South African Police Service from the Organized Crime Unit as well as the Crime Intelligence Unit found a powdered substance of the colour of sea sand in large quantities in various rooms in a house on Spitskop Farm near Newcastle in the province of KwaZulu-Natal. Some of the powder was already dry and some wet. Fans and heaters were also discovered in these rooms. In various outbuildings on the farm, buckets, pots, mixing bowls, measuring equipment such as a scale, bags of Anthranilic Acid and other chemicals, gas burners, gas masks, gloves and gum boots were found. In a nearby pigsty markings found on the ground were consistent with markings on the pots found and contamination on the soil indicated a cooking process had been conducted there.

[5] On Saturday 24 June 2004, the police arrived at Mange Farm a few kilometres away from Spitskop Farm, in the same district, where they found a Red Venture vehicle parked in the grounds. Inside the vehicle various equipment such as copper pipes sealing machine and boxes of pinchers as well as mandrax tablets were found. In a shed nearby, chemicals in 2 ½ litre drums were found, as also an industrial mixer, an industrial dryer, a gas bottle and a 3 phase power box. The following day at Osizweni, a place 22 kms away from the two farms, at the house of Alfred Mazibuko, the owner of Mange Farm, a mandrax press machine was found. Mazibuko told the police that he had been called out to the

farm on Friday and persons who owned the Red Venture vehicle had asked him to fix wheels to the mandrax press in the shed, so that it would be easier to move the machine. This was the reason he took the machine to his home at Osizweni.

[6] From this evidence the police concluded that a mandrax manufacturing operation was in progress on both farms. Samples of the powdered substance were removed for analysis by the police.

[7] The second appellant was arrested on Thursday 22 June 2004 at approximately 23.00 when he arrived at Spitskop Farm driving a Silver Colt bakkie. At the back of the bakkie, police found a load of groceries and a black plastic bag in which was placed a white bag containing a white powder substance. The identity of the white powder inside the bag was clear from an indication in writing on the bag that the contents were Anthranilic Acid. It is not disputed that Anthranilic Acid is used in the manufacture of mandrax. The second appellant explained his presence on the farm as a conveyer of food for the workers. He denied any knowledge of the acid. The first appellant was arrested two days later on 24 June. I shall deal with the circumstances leading to her arrest in due course.

[8] During the trial the respondent, in addition to the forensic evidence led the evidence of two former employees. One of them, Ivan Thusi, was a shepherd on Spitskop Farm. He identified the second appellant as one of a number of persons who stayed on the farm from time to time. Although he did not know why the second appellant was there, he said he was in the company of the others who were engaged in activities on the farm involving the spilling of water and the spreading of a brownish coloured substance, of the consistency of mud, on the floor. Duduzile

Petros Mchunu the other employee, regarded himself as the Induna of Spitskop Farm. He also identified the second appellant as one of the people who had come to work and stay on the farm. He said that these persons wore gum boots, gloves and a covering over their mouths whilst working. Although he had never seen the second appellant wearing such apparel, he had seen him on the farm grounds with the people wearing the boots, gloves and masks.

[9] The first appellant was arrested during the evening of Saturday 24 June 2004. The police were keeping Mange Farm under surveillance when they saw lights of a motor vehicle leaving the farm. They followed the vehicle, a maroon Isuzu bakkie, and attempted to get it to stop but the driver, the first appellant, increased speed. The police vehicle gave chase putting on its siren and blue light. Despite that the first appellant continued driving at high speed. Eventually approximately 2 ½ kilometres from the farm, the police managed to stop the vehicle. The vehicle was searched and at the back of the bakkie, buckets and plastic bags were found containing a powdered substance. The first appellant explained that she was asked to discard the buckets and plastic bags, with contents, by people on the farm. She told the police that the powder was cattle feed and that people from the farm were going to follow her to indicate a place at Arbor Park where the goods were to be discarded.

[10] On the evidence set out, both appellants were convicted of dealing in mandrax, despite the denial by the second appellant that the bag of anthranilic acid was on his vehicle and despite the exculpatory statement made by the first appellant to the arresting police officers.

[11] The veracity of the forensic analysis of the substance found on the farms was challenged on behalf of the appellant but it is not necessary to deal with that. According to the undisputed evidence the equipment and materials that I have referred to are of the kind that is used in the manufacture of mandrax. It is clear from the nature of the material and equipment alone that both farms were being used for the manufacture of mandrax on a substantial scale.

[12] The question arising from this, is whether the conviction of the appellants is sound in law. The definition of the statutory offence of dealing in drugs is very wide and encompasses almost any activity performed in connection with the drug. In s 1 of the Drugs and Drug Trafficking Act 1992, dealing is defined, in relation to a drug, to include 'performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.'

[13] There can be no doubt at all, against the background of the factual finding of the court a quo, that a mandrax manufacturing operation was taking place at the farms. It is also clear from the evidence that the first appellant was in the process of assisting to remove incriminating evidence of the operation at the time that she was arrested. It was submitted on her behalf that it had not been established that she had knowledge that the material and equipment that she was removing was connected to the manufacture of mandrax but that submission must be rejected. The manufacturing operation was of such a scale that she could not but have known that mandrax was being manufactured. She was clearly participating with the persons connected with the Red Venture in removing incriminating evidence and must at least have been told why

that was required. Moreover, her explanation for not stopping when she encountered the police is far-fetched, and is consistent with knowledge on her part that she was involved in an illegal operation. Taken together the inference is inescapable that she was aware of the nature of the materials that she was conveying. Her conduct falls within the wide definition of the statutory offence of dealing and she was properly convicted.

[14] The second appellant was caught 'red-handed' with material that announced itself to be Anthranilic acid. There was no suggestion in the evidence that the contents of the bag might have been some thing other than Anthranilic acid, nor was it suggested that the second appellant might not have known what it was. The evidenced also establishes that Anthranilic acid is a substance used in the manufature of mandrax. That he led the police on a 'wild goose' chase thereafter to seek the main perpetrator does not detract from his culpability. He was also seen on the farm on at least four occasions in the company of persons working there, some of whom wore masks, boots and gloves. He, despite the overwhelming evidence against him, elected not to testify. The inference is inescapable that the second appellant was knowingly bringing the acid to the farm so that the drugs could be manufactured. His actions too fall squarely within the definition of statutory dealing, having performed an act in connection with the manufacture of mandrax. I would accordingly confirm his conviction.

[15] In so far as the sentence is concerned, I would uphold the appeal on the basis that the sentence in the case of the first appellant is unjustifiably excessive, given the fact that the evidence establishes no greater role in the operation than to have assisted in attempting to dispose of the evidence. Accordingly in line with this court's approach in *S v Scott-*

Crossley 2008 (1) SACR 223 SCA at 239 para 29, I am of the view that an appropriate sentence in respect of the first appellant would be one of five years imprisonment. The second appellant was directly involved with the manufacturing process and as a first offender, the Criminal Law Amendment Act 105 of 1997, as amended, makes provision for a minimum sentence of 15 years imprisonment to be imposed on him. Whilst the sentencing court had regard to the mitigating character of the second appellant's clean record, having reached the age of 40 years without blemish, it nonetheless considered that there were aggravating circumstances that justified a sentence in excess of the minimum. The evidence did not establish that the second appellant played more than a subsidiary role in the operation. I do not think there was any justification for imposing more than the minimum sentence. Accordingly, I would uphold second appellant's appeal against sentence, by setting aside the sentence of 20 years imprisonment and in its place substituting a sentence of 15 years imprisonment.

[16] 1 In each case the appeal against the conviction is dismissed.

2 In each case the appeal against the sentence is upheld.

2.1 The sentence of the first appellant is set aside and substituted with a sentence of 5 years imprisonment.

2.2 The sentence of the second appellant is set aside and substituted with a sentence of 15 years imprisonment.

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S Ebrahim

Acting Judge of Appeal

APPEARANCES

FIRST APPELLANT:	B Bam SC Instructed by Ehlers Attorneys, Irene c/o Adrie Hechter Attorneys, Bloemfontein
SECOND APPELLANT:	J Engelbrecht SC Instructed by Ehlers Attorneys, Irene c/o Adrie Hechter Attorneys, Bloemfontein
RESPONDENT:	(Ms) TS Jacobs Instructed by The Director of Public Prosecutions, Pietermaritzburg The Director of Public Prosecutions, Bloemfontein