THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 125/11
Reportable

In the matter between:

BRIAN DANIELS	**1ST APPELLANT**
JOHAN CLASSEN	**2ND APPELLANT**
FAREED MOHAMMED	**1st APPLICANT**
WINSTON ANTONY BLAAUW	**2ND APPLICANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Daniels v State* (125/11) [2012] ZASCA 71 (25 May 2012)

Coram: HEHER, SNYDERS, WALLIS JJA, McLAREN AND SOUTHWOOD AJJA

Heard: 9 May 2012

Delivered: 25 May 2012

Updated:

Summary: **Criminal Procedure – appeal charges referring to unconstitutional presumptions – charges not per se a nullity – necessary to examine whole of trial record to determine whether a failure of justice or unfairness in the conduct of the trial has resulted.**

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ORDER

On appeal from: Western Cape High Court (Cape Town) (Veldhuizen J sitting as court of first instance):

The applications for leave to appeal are refused.

JUDGMENT

HEHER JA (SNYDERS, WALLIS JJA, McLAREN AND SOUTHWOOD AJJA):

[1] These applications for leave to appeal come before us in consequence of an order made in terms of s 21(3)(c)(i) of the Supreme Court Act 59 of 1959.

[2] The two applicants, Mr Fareed Mohammed, and Mr Winston Anthony Blaauw, together with thirteen co-accused[1] were tried by Veldhuizen J and assessors in the Western Cape High Court for a variety of serious offences. The first applicant, Mr Mohammed, was convicted only in respect of count 48, a contravention of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 ('the Drugs Act') for dealing in an undesirable dependence-producing substance, to wit, 100 000 Mandrax tablets. He was sentenced to imprisonment for ten years. The second applicant, Mr Blaauw, was convicted on two counts of contravening s 5(b), counts 47 (65 000 Mandrax tablets) and 48, and sentenced to ten years' imprisonment on each, five years of the second sentence to run concurrently with the sentence on count 47.

[1] The first and second appellants, Messrs Daniels and Classen, having been granted leave, allowed their appeals to lapse.

[3] The trial judge refused the applicants leave to appeal against their convictions. When they applied for leave to this Court their applications were supported by affidavits by each of them in which the following allegations were made:

1. In the indictment against the accused they faced a charge framed as follows in respect of both counts 47 and 48:

'Oortreding van art 5(b) of 4(b) gelees met Artikels 1, 13, 17 tot 25 en 64 van die Wet op Dwelmmiddels en Dwelmsmokkelary 140 van 1992 (Handel in of besit van 'n ongewenste afhanklikheidsvormende stof)'.

It was to the charges so formulated that the applicants pleaded not guilty. During the course of the trial the charges were not amended.

2. On 1 February 2010 an application for discharge was made by all the accused at the end of the state case. The trial court refused the applications of the present applicants in relation to counts 48 and 47, and 48, respectively.

3. 'Just before the Court adjourned [the first applicant in these proceedings deposed] . . . the learned judge mentioned that the legal representative for Accused 3 should look at the case of *S v Tswai* 1988 (1) SA 851 (C). I enquired of my advocate what that case entailed and was told that it involved a presumption where drugs were found in a vehicle. I was further informed by him that he had done some further research and that there was also a case of *S v Thali* 2007 (2) SACR 23 (C) where an appeal bench of the then Cape of Good Hope Provincial Division had set aside a conviction in terms of the Drug Trafficking Act, because the charge was incompetent. I was advised that the reason for this was because the charge sheet contained the unconstitutional sections 21(a)(b)(c) and (d) of the Drug Trafficking Act and that the facts were almost identical in my case. I was further advised by counsel that in all likelihood, if the charge sheet was not amended by the State, the judge would follow that decision and would find that the charge sheet was incompetent.

At the time of the trial I was suffering from adverse cardiac related symptoms due mainly to the stress of the trial and was not keen on further aggravating this condition by testifying. After taking my health and the fact that the charge sheet was probably incompetent into consideration, I decided that if it was not amended I would instruct my counsel to close my case.

No application to amend the charge sheet was made by the State and I accordingly closed my case without leading evidence.'

4. Save for omitting reference to a cardiac problem the second applicant deposed in terms identical to the passages quoted.

[4] The reasons furnished by the applicants for not testifying in their own defence are to be found in the *ipse dixit* of each, raised long after the event. Their counsel, who might have been expected to corroborate their explanations, did not provide any supporting statement. Nevertheless the State has not taken issue with the veracity or accuracy of such evidence. I shall, for present purposes, accept it at face value.

[5] The confidence expressed by counsel at the end of the argument on absolution proved unfounded. In his judgment at the end of the trial Veldhuizen J said:

'[22] Elk van die aanklagte onder die Wet meld dat die oortreding ten laste gelê gelees moet word met artikels 17 tot 25 van die Wet. In die lig van die beslissings van die Konstitusionele Hof (wat almal saamgevat is op bl 26*b* – *d* van S v Tshali 2007 (2) SASV 23 (KPA)) is hierdie verwysings verkeerd. Die staat het dan ook geredelik toegegee dat daar nie op die vermoedens in artikels 20 en 21 van die Wet gesteun word nie. Die verdediging wil dit hê dat die verwysing na hierdie artikels in die Akte van Beskuldiging tot gevolg het dat die aanklagte ongeldig is. Ek stem nie saam nie. Indien enige verwysing na artikels 20 en 21 geskrap word dan is die feitelike bewerings wat in die aanklagte uiteengesit word steeds voldoende om die ten laste gelegde oortreding daar te stel. Dit is nie onbelangrik om daarop te let dat artikels 20 en 21 van die Wet nie misdaadskeppende artikels is nie maar slegs dien as bewysregtelike hulpmiddels om 'n oortreding

van óf artikel 4 (b) óf artikel 5 (b) van die Wet te bewys. Die verdediging steun op die volgende passasie in *S v Tshali, supra,* te bl 27*f – g*. Dit lees: 'At the trial the appellant pleaded guilty to a charge based in part upon statutory provisions which had been declared to be unconstitutional and of no force and effect. Such a charge is incompetent and a conviction based upon such a charge cannot, even upon a plea of guilty, be sustained.' Die feite in *Tshali* verskil natuurlik van die feite wat voor ons dien maar indien Erasmus R bedoel het dat enige aanklag wat 'n verwysing na die ongeldig verklaarde artikels bevat die aanklag in sy geheel ongeldig maak (wat ek betwyfel) dan stem ek nie saam nie. Indien die aanklag gewysig word om die verwysing na artikels 20 en 21 te skrap, wat te eniger tyd voor uitspraak gedoen kan word, dan sal daar geen benadeling vir die beskuldigdes wees nie en, soos gemeld, wat oorbly is voldoende om die ten laste gelegde oortredings daar te stel.'

[6] Having referred to the definitions of 'deal' and 'sale' in the Drugs Act, the learned judge concluded:

'Indien die hoeveelhede mandrax tablette wat in elk van die aanklagte onder die Wet betrokke is, in ag geneem word noop gesonde verstand en dikteer logika dat dit, in die afwesigheid van enige getuienis van die beskuldigdes, vir die handel en in besonder vir verkoop besit is. Sien die passasie in *S v Mutize* 1978 (2) SA 911 (RA) at 913H.'

[7] Counsel for the applicants, sensibly, did not contest the learned judge's conclusion, which, as will appear, was plainly justified.

[8] According to the applicants, an application for a special entry was prepared by their counsel in relation to the invalidity of the charges in counts 47 and 48. They were however not present when and if it was submitted and argued. They say merely that the learned judge converted it into an application for leave to appeal (which he refused). It is however unnecessary to enter further upon this question, as there is nothing to suggest that the application for a special entry was refused or that the refusal was the subject of an

application for leave to appeal. Moreover it is common cause that the present application has covered all aspects of the application for a special entry.

[9] In argument before us the submission of the applicants' counsel was simple and limited in its scope:

1. The unamended charges in respect of counts 47 and 48 containing reference to the State's reliance on sections of the Drugs Act (the reverse onus provisions) that had been declared unconstitutional, per se amounted to a nullity. (The sections are summarised in *Moloi and Others v Minister for Justice and Constitutional Development and Others* [2010] ZACC 2 at paras 10 and 11. There the Constitutional Court expressly left open the effect on the validity of the proceedings of such an unamended charge while at the same time censuring the prosecution for continuing to rely upon charges containing reference to unconstitutional provisions.)

2. Inasmuch as the applicants relied on the defects in the charges in deciding to withhold their testimony from the trial court a failure of justice had resulted and their trial had been unfair.

[10] Counsel submitted that his first proposition was borne out by the judgment of Erasmus J in *Tshali*. In that case the appellant had been charged with one count of dealing in dagga in contravention of s 5(b) of the Act. The charge was defective in substantially the same respects as in the charges in the present appeal. Before a magistrate the appellant in *Tshali* pleaded guilty to the charge as framed. The Cape court, on appeal, said:

'[11] There is, however, a more fundamental flaw in the proceedings to which Mr *Pothier* also adverted. At the trial the appellant pleaded guilty to a charge based in part upon statutory provisions which had been declared to be unconstitutional and of no force and effect. Such a charge is incompetent and a conviction based upon such a charge cannot, even upon a plea of

guilty, be sustained.

[12] For the foregoing reasons, the conviction of dealing in dagga cannot stand.'

The learned judge proceeded to consider whether a conviction of possession was competent. He said:

'[14] In the present case the appellant was charged *simpliciter* with dealing; there is no reference to possession. The prosecution deliberately chose not to charge the appellant in the alternative with possession. That was an unfortunate choice because it is not now open to this Court to substitute a conviction of possession of dagga in contravention of s 4*(b)* of the Act.'

[11] That the court considered the appropriateness of a conviction for possession in para 14 of its judgment and rejected it, not because the charge as pleaded to was defective, but because of the failure to charge the appellant with the alternative of possession, is prima facie inconsistent with the statement in para 11 of the judgment that a conviction based upon a charge containing reference to unconstitutional provisions 'cannot, even upon a plea of guilty, be sustained'. It suggests that, in para 11, the court did not intend to convey that such a charge resulted in nullification of the proceedings which related to it.

[12] Whatever the court's intention in *Tshali*, the legal position is not in doubt. Section 322 (1) of the Criminal Procedure Act 51 of 1977 sets the limits of the powers of a court on appeal.

[13] Section 322 of the Criminal Procedure Act 51 of 1977 provides:

'(1) In the case of an appeal against a conviction of any question of law reserved, the court of appeal may-

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; . . .

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be

decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.'

[14] The test for a failure of justice is clearly established: see *S v Carter* 2007 (2) SA 415 (SCA) and the authorities there referred to. In short it requires the appellate court to exclude from consideration all aspects of the trial that were affected or influenced by the irregularity and to evaluate only the evidence that remains unsullied. If on considering that rump a conviction would inevitably have followed there has been no failure of justice; if it would not have the appellate court may set aside the proceedings (and usually will).

[15] Considering s 322(1) in the context of the Constitution Van der Westhuizen J said in *S v Jaipal* 2003 (4) SA 581 (CC) at 597B:

'The meaning of the concept of a failure of justice in s 322(1) must therefore now be understood to raise the question of whether the irregularity has led to an unfair trial.'

It is with this dictum in mind that the established test must be applied.

[16] There is therefore, within the scope of s 322(1), no room for approaching any irregularity or defect in the record or proceedings (including the charge or indictment) as per se nullifying a conviction in a criminal trial. The task of a court seized with an appeal is to reassess the evidence without the influence of the irregularity or defect in order to determine whether a conviction must inevitably have followed. In applying that test it may be that the irregularity or defect is so inseparable from the whole that a fair trial is necessarily excluded. Thus, if the court cannot conclude that, in the absence of the irregularity, the accused would have conducted his defence in the same fashion, it would be unlikely to conclude that there has been a fair trial. In that sense the effect of the irregularity or defect may be to nullify the conviction (ie the conviction would be 'fatally

irregular'). But that will usually only be determined on a conspectus of the full trial record and not, as seems to be suggested in *Tshali*, simply by identifying the irregularity and tipifying it as 'fundamental'.

[17] In the present instance the inclusion in the charge sheet of reference to the unconstitutional provisions did not exercise an adverse influence on the conduct of the trial. I say this for the following reasons:

1. The provisions relied on were procedural and not substantive. They were originally designed to assist the State to overcome the difficulty of proving matters thought to be more usually within the knowledge of an accused person, such as proximity to unlawful drugs, control of a vehicle in which drugs were being transported etc. But even the inclusion of such references in the charge sheet did not necessarily mean that the State became entitled to or would invoke them. In fact neither the court a quo nor the prosecution did so in this case. As the court noted in its judgment at the end of the case the State readily conceded that it placed no reliance on the presumptions in ss 20 and 21 of the Act. Counsel, who appeared for the applicants at the trial, accepted in his heads of argument that the charge sheet could have been amended without any prejudice to them, had such an amendment been sought at the close of the State case. He further informed us that it was made clear by the prosecution, during the argument at the stage of the application for a discharge, that no reliance would be placed on the presumptions.

2. Neither of the applicants has deposed that he was either informed of or understood the meaning or implications of the reference to the impugned sections in the indictment. Nor, save for what appears below, does either of them explain whether and how he was or might have been prejudiced by such references. It is clear that the substantive scope and content of the charges was not affected by their inclusion.

3. On their own say-so both applicants knew that the reference to sections 20 and 21 was unconstitutional and ineffective against them before deciding whether to testify. They also knew that the prosecution did not intend to rely on them. They were in no way dissuaded from testifying by reliance on those provisions or deterred by a perceived difficulty arising from the discharge of a reverse onus.

4. They decided not to testify because of advice received from their counsel that judicial authority made it probable that they would be acquitted whether or not they gave evidence, because the State had failed to amend the defective charges against them. That advice was flawed but reliance on it was not caused by the irregularity, which they knew posed no threat to them, but because they decided to exploit the irregularity to their own advantage. Misplaced reliance on the legal advice of their counsel given in the bona fide (albeit mistaken) pursuit of his professional mandate is not a ground for claiming that justice has failed (*R v Mathonsi* 1958 (2) SA 450 (A) at 455H-456D; *S v Seheri* 1964 (1) SA 29 (A) at 35E-F). Where counsel relies (wrongly) on his view of precedential authority in his own court, as happened here in relation to the weight that counsel attached to *S v Tshali*, the scope for determining that the trial was as a result, unfair, must necessarily be limited: cf *S v Halgryn* 2002 (2) SACR 211 (SCA) at para 14. In this regard it seems to me that the language adopted by Erasmus J was sufficiently loose to engender in the applicant's counsel more optimism in its force than was justified. Nor should it be left out of account that the version put by counsel to the defence witnesses was hardly of such substance as to induce confidence in the defence case. In this regard it should be pointed out that neither applicant offered a statement explaining his plea of not guilty; nor did either say on oath in the present application that he would have testified had it not been for his counsel's advice or take this Court into his confidence as to the content of such evidence

as he was able to proffer.

[18] A short summary of the evidence adduced against the applicants at the trial is all that is required to establish the strength of the State's case, independent of the influence of the defective charges.

[19] The State evidence in respect of count 47 was in brief the following:

(1) On 26 May 2004 Mr Classen (the erstwhile second appellant) was driving a white Isuzu bakkie on the national road near Leeu-Gamka in the direction of Cape Town. When the vehicle was stopped and examined by a routine traffic patrol it was found to contain a false compartment in the chassis in which were discovered 65 plastic sacks containing more than 100 000 mandrax tablets (metaquolone) and powder.

(2) The police took possession of Classen's cellphone. Shortly thereafter a call was received on it from a person who claimed to be the owner of the bakkie and wanted to know what was happening. The recipient, assuming the guise of a disinterested bystander, informed him that the driver had been taken ill and removed by ambulance. The caller thereupon offered him R1000 to look after the vehicle, saying that he would come from the Cape to fetch it. He thereafter telephoned several times while en route to ensure that the vehicle was in order and to seek directions. Late at night a white Volkswagen golf driven by the second applicant (and carrying a passenger) arrived. Inspector Moolman, who held himself out as the owner of the filling station where the bakkie was standing, asked for payment of the R1000 but the second applicant first wanted to look at the bakkie. Moolman asked for R500 for the towing-in of the vehicle. After the second appellant had inspected the vehicle he paid Moolman R500 and received the keys. As he drove away in it the second applicant was stopped and arrested.

[20] The state presented the following case in respect of count 48:

(1) On 17 June 2004 Cape Couriers at Johannesburg International Airport received a consignment which on inspection by its representative appeared to contain drugs. The consignment was destined for its Cape Town branch. When the police were summoned they decided to let the delivery take its normal course but under surveillance.

(2) On the morning of 21 June 2004 the first applicant driving a Mazda bakkie collected the boxes containing the consignment from the Montague Gardens depot of Cape Couriers. The police followed him to a Caltex garage. There the first appellant met the second applicant and another person. The second applicant left with the Mazda bakkie. In Epping Forest the boxes were transferred to a white DAF bus and the second applicant drove off in the Mazda. The DAF bus was followed by the police to Elsies River. When the boxes were opened they held 152 384.6g of mandrax (metaquolone) tablets and powder.

[21] In regard to both charges, the inference that the applicants were knowingly involved in the commercial exploitation of the mandrax that they transported at the relevant times was the only reasonable inference in the circumstances.

[22] Having regard to what I have said earlier, I am unpersuaded that the irregularity which was constituted by the unconstitutional reference to the reverse onus presumptions in the charges caused the applicants to refrain from testifying in their own defence. The evidence of their guilt was overwhelming and they knew that the State did not intend to rely on the invalid presumptions. The inference is unavoidable that they decided to take a chance on escaping conviction by relying on the technical irregularity. No failure of justice or unfairness in the conduct of the trial resulted from the irregularity.

[23] The applicants' counsel conceded that the evidence adduced by the State built a prima facie case that called for an answer by his clients; when they remained silent, the onus on the State was discharged. There is therefore no future for the applicants in an

appeal against the merits of the conviction.

[24] The applications for leave to appeal are accordingly refused.

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J A HEHER
JUDGE OF APPEAL

APPEARANCES

1st and 2nd APPELLANTS:	E H de Villiers
	Legal Aid Board, Cape Town
	Legal Aid Board, Bloemfontein
RESPONDENT:	D A Greyling (Ms)
	The Director of Public Prosecutions, Cape Town
	The Director of Public Prosecutions, Bloemfontein