Case No 241/88
/wlb

SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal between:

AHMED SALIEM ISHMAEL **Appellant**

and

THE STATE **Respondent**

CORAM: **VAN HEERDEN, MILNE et F H GROSSKOPF JJA**

Date of Hearing: 22 September 1989

Date of Judgment: 2 October 1989

J U D G M E N T

MILNE JA/.....

MILNE JA:

The appellant and three others were charged in the Magistrate's Court on two counts of contravening s 2(a), one count of contravening s 2(c) and three counts of contravening s 3(a) of Act No 41 of 1971, and on a further two counts of contravening s 22A 7(a) of Act No 101 of 1965.

The magistrate came to the conclusion that the guilt of the appellant and one of his co-accused had been established in respect of all these charges but, being of the view that there had been an improper splitting of charges, he reformulated the charges and convicted and sentenced the appellant as follows:

> On a new count one, of dealing in 70 1/2 "Mandrax" tablets in contravention of s 2(a) of the Act (in respect of which he was sentenced to 5 years'

imprisonment);

on a new count two, of dealing in 46 tablets and part of a tablet of "UCB" and 31 "K" tablets all containing secobarbital in contravention of s 3(a) of the Act (in respect of which he was sentenced to 3 years' imprisonment, the whole of which was suspended conditionally for 5 years);

on a new count three, of dealing in 4 "Wellconal" tablets containing dipipanone in contravention of s 2(c) of the Act (in respect of which he was sentenced to 5 years' imprisonment);

and on a new count four, of possession of 1 700 "Stopayne" tablets and 6 "Valium" tablets containing respectively meprobamate and diazepam in contravention of s 22A (7)(a) of Act No 101 of 1965 (in respect of which he was sentenced to a fine of R500 or in default of payment to 6 months imprisonment, the whole of which

was suspended for 5 years).

On appeal to the Transvaal Provincial Division, the conviction and sentence in respect of the amended count one were confirmed; the conviction in respect of count two in respect only of the 46 "UCB" tablets and part of a "UCB" tablet were confirmed, but the conviction in respect of the 31 "K" tablets was set aside and the sentence was altered to one of 2 years' imprisonment, the whole of which was suspended; the conviction and sentence in respect of the amended count three were set aside; the conviction and sentence in respect of 6 "Valium" tablets only were confirmed in respect of count 4, the conviction in respect of the "Stopayne" tablets being set aside and the sentence being altered to a fine of R250 or in default of payment to 3 months imprisonment, the whole of which was suspended for 5 years.

With leave of the Transvaal Provincial Division the appellant appeals against the convictions which were confirmed by that Division. For the sake of clarity, I summarise these as follows:

Amended count 1 - dealing in 70 "Mandrax" tablets in contravention of s 2(a) of the Act;

Amended count 2 - dealing in 46 "UCB" tablets and part of such a tablet (such tablets also being known as "Vesparax") in contravention of s 3(a) of the Act;

Amended count 4 - possession of 6 "Valium" tablets in contravention of s 22A (7)(a) of Act No 101 of 1965.

I shall, for convenience, refer to the UCB tablets as such even where the witnesses described them as Vesparax and I shall omit the inverted commas usually used when

describing a product by its proprietary name.

The appellant's co-accused at the trial were accused nos 2, 3 and 4 and I shall refer to them as such.

The offences with which the appellant was charged were alleged to have been committed on 23 December 1985. The appellant admitted that on the preceding day he had taken a box from accused no 3's car and put it in his, appellant's, bedroom. He also admitted that on the following day he had removed from this box 15 UCB tablets and 2 Mandrax tablets. (The appellant apparently erred in saying that he took 15 and not 14 tablets but no point was made of the discrepancy.) He did so for the purpose of the transaction I am about to describe. The appellant's version of the transaction was the following:

He was sitting in accused no 3's car at about 5pm on 23

December 1985 together with accused nos 3 and 4. The car was parked outside the appellant's home where he lived with his mother. Accused no 2 approached them and enquired from accused no 3 the price of 5 000 UCB tablets. There were then some negotiations between accused nos 2 and 3. Accused no 2 indicated that he would have to discuss accused no 3's price with another person. In the meantime, he would like to buy 15 UCB tablets and 2 Mandrax tablets. According to the appellant, accused no 3 then instructed the appellant to fetch these tablets from the box which accused no 3 had given him to store the previous evening. The appellant said he then went to his room, opened the box and selected from its contents 15 UCB tablets and 2 Mandrax tablets. He had known how to identify the UCB tablets because accused no 3 had told him to get tablets with what he called "sort of a cut out V on the tablet". He also said that he knew how to identify Mandrax tablets as they were marked on one side with the

letters 'MX' and on the other side with the letters 'RL'. On his return to the car with the 2 Mandrax and 15 UCB tablets, he had handed them to accused no 2. He accepted that the 2 Mandrax tablets were those mentioned in count one, as originally framed and that the 13 UCB tablets and fragments of a fourteenth tablet were those mentioned in count 2, as originally framed. On receipt of those tablets accused no 2 paid R70. According to the appellant the R70 was for accused no 3, but accused no 3 instructed the appellant to take the money from accused no 2 and to look after it for accused no 3 until accused no 3 came back to collect it later. Accused no's 2 and 3 then left and the appellant and accused no 4 went into the appellant's house for a meal. During the course of the meal W/O Van Ryneveld and W/O Van der Westhuizen arrived. The appellant admitted that Van der Westhuizen had asked him whether he had any tablets. He considered that request to be the same as asking him whether

he had any drugs. He responded by handing Van der Westhuizen the plastic packet of tablets from the cupboard in his bedroom together with the box of tablets standing next to the cupboard.

Two police officers testified for the State. They were W/O Van Ryneveld, the investigating officer, and W/O Van der Westhuizen. They were both sergeants at the time when the offences in question are alleged to have been committed. They decided to set a trap for persons whom they suspected of possessing and dealing in drugs unlawfully. It was as a result of this trap that on 23 December 1985 accused no 2 approached the vehicle in which the appellant and accused nos 3 and 4 were seated as described above. Neither of the police officers could give direct evidence as to the transaction which then took place although Van Ryneveld could see accused no 2 enter the vehicle. He also said that

shortly thereafter accused no 2 returned to him and showed him a plastic bag with 16 white tablets in it. Van Ryneveld later arrested accused no 2 and took him to the place where Van der Westhuizen was waiting for them. Van der Westhuizen searched accused no 2 and found R80 in his possession. He also took possession of the plastic bag containing the 16 white tablets from Van Ryneveld. Van der Westhuizen said that 14 of these tablets were UCB tablets and 2 were Mandrax tablets. One of the 14 UCB tablets was broken into fragments for investigation, hence the reference to part of a tablet in the charge. Van der Westhuizen and Van Ryneveld then entered the appellant's house and Van der Westhuizen searched the appellant and found R70 in his possession. The notes making up this sum were marked notes which, together with other marked notes, had been handed by Van der Westhuizen to Van Ryneveld and by Van Ryneveld to accused no 2 for purposes of the trap. Van der Westhuizen said that he asked the

appellant to take him to his, the appellant's, bedroom. He asked the appellant whether he had drugs of any kind in the room and the appellant then removed a plastic bag containing tablets from a cupboard in the bedroom. Van der Westhuizen asked him whether he had "any more tablets" and the appellant then pointed out a cardboard box with tablets in it. Van der Westhuizen took possession of the bag, the box and the tablets contained in them. The appellant admitted that the tablets were his. Although the appellant and his mother had spoken only of a box having been brought from accused no 3's car to the appellant's home the previous night, it is clear that according to their version, the plastic bag and box which were found by the police in the appellant's bedroom on 23 December had been brought there the previous night by the appellant from accused no 3's car.

It is not in dispute that:

(a) Van Ryneveld opened a police docket and gave it the identifying number "John Vorster Plein MR 1623/12/85" and "Sonop" (SANAB?) SAP 13, 6/86;

(b) Certain tablets were placed by somebody in 12 different envelopes marked "A-L" respectively each of which was also marked "Sonop SAP 13, 6/86" and "John Vorster Plein MR 1623/12/85";

(c) Van der Westhuizen personally took such envelopes to Lt Ernest Mullach Kruger for analyses in Pretoria;

(d) Kruger analysed the tablets in the envelopes and that amongst the tablets contained in the various envelopes were

(i) 17 tablets containing methaqualone, a prohibited dependence-producing drug listed in Part I of the Schedule to Act No 41 of 1971;

(ii) 46 tablets containing secobarbital nitrate (this is a "salt" of secobarbital), a potentially

dangerous dependence-producing drug listed in Part III of the Schedule;

(iii) 6 tablets containing diazepam (diazepam is a benzodiazepine listed in the 5th Schedule to Act No 101 of 1965.)

The appellant's evidence that he possessed the drugs that were found in his possession only as an agent for accused no 3 and that in the transaction involving the 16 tablets with accused no 2 he was again acting only as the agent of accused no 3 was rejected as false by the magistrate (and by the Transvaal Provincial Division). The correctness of this finding was not challenged and there is no reason whatever to find fault with it.

The appellant's counsel confined himself to two main points: firstly, that it had not been proved that the

tablets contained in the envelopes which were analysed by Kruger were the tablets that were found in the possession of the appellant and accused no 2 and, secondly, that the State had failed to prove that the appellant had the necessary mens rea regarding the substances in respect of which the convictions were upheld in the Provincial Division; it being the appellant's contention that it was not proved that he knew that possession or dealing in any of the tablets was, or might be, unlawful.

Before dealing with the first point I should perhaps mention that it was originally submitted in the appellant's heads of argument that the affidavit of Lt Kruger was inadmissible for the purpose of proving the content of the tablets because it did not contain an allegation that Kruger had received the tablets "in the performance of his official duties" within the meaning of ss (8)(a)(ii) of s 212 of the Criminal Procedure Act. The appellant's counsel was,

however, obliged to concede that the affidavit need not contain such an allegation in order to afford prima facie proof of the content of the tablets in terms of ss (4)(a) of s 212 and that the State did not have to rely upon the provisions of ss (8) to establish Kruger's receipt of the tablets since Van der Westhuizen's evidence was that he personally delivered the envelopes containing the tablets to Kruger. (I should add that, had it been necessary for the State to rely upon the provisions of ss (8), I would have had no hesitation in holding that it was entitled to do so.) It was however submitted that the evidence of Van Ryneveld did not establish, beyond reasonable doubt, that the tablets contained in the envelopes were those found in the possession of the appellant and accused no 2. This argument found favour with the court a quo in respect of some of the charges. It was on this basis that the appeal to the

Provincial Division was partly successful. The argument is based upon the fact that Van Ryneveld, in describing what happened to the tablets after they had been removed from the possession of the appellant and accused no 2, used the passive voice. He said:

> "The different tablets were placed in different envelopes and marked from A -L"

The court a quo said of this evidence:

> "Van Ryneveld could thereby have meant to convey that he himself had thus packed and marked the envelopes, or that he had caused somebody else to do it and had watched such person do it. In either of those events the fact was duly proved by admissible evidence. On the other hand, Van Ryneveld could have been concealing the fact that he had parted with the tablets at Sonop, and that at some later stage some other person had brought him some envelopes marked from A to L and had told him that the envelopes contained the tablets which Van Ryneveld had parted with earlier. In that case his evidence of the contents of the envelopes would have been inadmissible as mere hearsay. This is a valid criticism. It was the prosecutor's duty to have led the evidence in such a way as to make it clear that it was admissible. He ought not to have left open the possibility that Van Ryneveld's evidence in this regard was mere hearsay."

It was accordingly held that (save in relation to the Mandrax tablets, the UCB tablets and the 6 Valium tablets) the State had failed to prove that the tablets analysed were the tablets of which the police had taken possession as aforesaid. Thus, in dealing with the 4 Wellconal tablets, it was held that:

> "Van Ryneveld's evidence in the passive voice of the tablets being placed in envelopes marked from A to L left open the possibility that some other unidentified person placed 4 Wellconal tablets in the envelope marked H and told Van Ryneveld he had done so (with no suggestion that Van Ryneveld supervised that operation) and that such other person might have confused the tablets obtained by Van Ryneveld from the appellant with some Wellconal tablets from some other source."

In relation to the Mandrax tablets, the UCB tablets and the Valium tablets, it was held, however, that the appellant's own admissions in evidence eliminated "... any danger of a mistake having been made at the stage when Van Ryneveld had the tablets put into envelopes". Stegmann J referred to the

fact that the appellant admitted that he had fetched 2 Mandrax tablets and 14 UCB tablets from the box in his bedroom and to the fact that the envelope marked F (which was amongst the envelopes handed by Van Ryneveld to Van der Westhuizen, and by the latter to Kruger) contained 2 Mandrax tablets and 13 UCB tablets and part of such a tablet. The Mandrax tablets were marked in exactly the same fashion to the markings described by the appellant as being on the 2 tablets of Mandrax that he had fetched. The effect of the State evidence was that the plastic bag and box contained 68 1/2 Mandrax tablets, the exact quantity contained in the envelope marked J. The court a quo referred also to the envelope marked G which contained 33 UCB tablets; to the admissions of the appellant to the effect that he had UCB tablets in his possession which he identified as tablets marked with a V-shaped cut; and to the fact that the appellant admitted that he knew that he was in possession of

6 Valium tablets, there being 6 such tablets contained in the envelope marked K.

I agree that the guilt of the appellant was clearly established with regard to the Mandrax, UCB and Valium tablets but I am, with respect, unable to agree that there is, in the particular circumstances of this case, any reasonable possibility of Van Ryneveld's evidence as to the packing of the tablets in envelopes and the marking thereof being hearsay. He was the investigating officer, he opened the docket and there is nothing in the record to indicate that anyone other than he and Van der Westhuizen at any stage handled the tablets. Furthermore, there is, in my judgment, no significance in the fact that Van Ryneveld used the passive voice in the passage set out above, since it is quite apparent that Van Ryneveld, from time to time, used the passive voice even when describing actions which he himself

had performed. The appellant may, therefore, count himself fortunate that his appeal succeeded to the extent which it did in the Provincial Division. I would not have upheld the appeal on this point on any of the counts.

I deal now with the question of mens rea. The true enquiry in this regard,

> "... is whether or not the appellant knew that possession or dealing in the tablets in question was, or might possibly be, unlawful, irrespective of whether he knew what law was being contravened and what the precise provisions of the law might be."

S v Hlomza 1987(1) SA 25 (A) at 32F. The court a quo in the present case came to the conclusion that

> "... it was proved beyond reasonable doubt that the appellant knew that dealing in or possession of any of the tablets in the plastic bag and box in his room, including tablets of a kind he had never seen before and of those constituents was ignorant, was or might well be unlawful ... The appellant recognised some of the tablets and knew very well that possession of or dealing in those might be unlawful. In the absence of any positive grounds for a reasonable belief that he could

> lawfully possess or deal in any other tablets in the plastic bag and the box of kinds which he had never seen before and of whose nature he was ignorant, he was not free to assume that possession or dealing would be lawful. On the contrary, his state of mind can only have been one that recognized the possession of or dealing in them might be unlawful."

I have no doubt that this conclusion was correct. The appellant admitted in his evidence that he was found with the drugs and that he knew that they were drugs; he admitted that he knew that the transaction in respect of the 2 Mandrax tablets and the 14 UCB tablets was an illegal transaction; one of the explanations as to why accused no 3 had asked him to keep the box in his, the appellant's, bedroom, was that accused no 3 could not keep it at his own house as the latter's father had once caught him with Mandrax tablets and implicit in this is the appellant's knowledge that it was wrong to possess Mandrax tablets; the appellant also admitted that he knew what Mandrax tablets looked like and that before delivering UCB tablets to accused no 2 he

realised that a number of the tablets in the box were UCB tablets; furthermore, he knew that he had a large number of such tablets because he says he was present when a price was being worked out for a possible purchase of 5 000 of such tablets by accused no 2. It must be borne in mind, furthermore, that the appellant said that he "knew" Mandrax tablets and that at the time when the offences were alleged to have been committed Mandrax was actually included by that name in Part I of the Schedule to Act No 41 of 1971. Van der Westhuizen's evidence was that the appellant told him that the drugs in his, the appellant's, bedroom were his property. The evidence as a whole clearly established in my judgment that the appellant possessed all the drugs in respect of which the convictions were upheld for the purpose of sale. The definition of "deal in" in s 1 of Act 41 of 1971 of course includes any act in connection with the sale of any of the substances referred to in the Schedule to the Act, and

"sell" in relation to such substances includes possessing for sale and "sale" has a corresponding meaning. The evidence establishes that the appellant actually dealt in 2 Mandrax tablets and 14 UCB tablets. The State is assisted by the provisions of s 10(1)(a) of that Act with regard to the Mandrax tablets and in the case of the remaining UCB tablets that the appellant did not actually deal in, his possession for the purpose of sale falls within the definition of dealing as already indicated.

The appeal is accordingly dismissed.

A J MILNE
Judge of Appeal

VAN HEERDEN JA]
F H GROSSKOPF JA] CONCUR