THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 320/07

In the matter between

NICHOLAS JAMES HAMMOND **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: MTHIYANE, LEWIS and JAFTA JJA
HEARD: 16 NOVEMBER 2007
DELIVERED: **29 NOVEMBER 2007**

SUMMARY: Appeal against conviction and sentence for drug-dealing in terms of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992: whether evidence of a police trap was admissible in terms of the Criminal Procedure Act 51 of 1977. Appeal against conviction dismissed; sentence reduced from 12 to five years' imprisonment, two of which suspended.

Neutral Citation: This judgment may be referred to as Hammond v State 164 [2007] SCA (RSA)

JUDGMENT

LEWIS JA

[1] In March 2004 the appellant was convicted in a district magistrate's court on a charge of dealing in Methcathinone (Cat) in contravention of s 5(b) of the Drugs and

Drug Trafficking Act 140 of 1992 (the Drugs Act) and sentenced to 12 years' imprisonment. Cat is categorised as an undesirable dependence-producing drug, listed in Schedule 2, Part 111, of the Drugs Act. The quantity of the Cat was established as 3.22kgs. The High Court, Johannesburg, in April 2006, dismissed an appeal against both conviction and sentence. This further appeal is with the leave of that court. It is regrettable that this court does not have the judgment of the high court on appeal, since, because of a technical error, it could not be transcribed.

[2] I turn first to the appeal against conviction. The appellant was apprehended on 17 October 2003 with another suspect, the second accused, by two police officers, Sergeant Tickner and Inspector de Jager, who had received information that men in a particular Mercedes Benz car, to be found at a BP Service Station opposite Gold Reef City in Johannesburg, were in possession of drugs: they were instructed to arrest them and duly did so.

[3] The appellant pleaded not guilty to the charge of drug dealing. The second accused gave a plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977, and at the end of the trial was acquitted. The essential submissions of the appellant before this court are that his trial was unfair as the State did not lead all the evidence available to it, and the appellant had been trapped into committing the offence by police, the evidence of the trap being inadmissible in terms of s 252A of the Criminal Procedure Act.

[4] The background is briefly the following. The police officers made statements after the arrest that they had been told by an anonymous informer that a man in possession of Cat was to be found at a BP Service Station opposite the Gold Reef City Casino in Johannesburg. They proceeded to the car where they found the second accused in the driver's seat. The appellant approached the car with cooldrinks in his hands. The police searched the car, finding a sports bag on the back seat which contained 7 plastic bags of a white powdery substance, later identified as Cat. The police handcuffed and arrested the appellant and the second accused.

[5] Before the trial commenced, both police officers provided the appellant and the court with supplementary statements. These differed from their original statements in two material respects, which the appellant argues are significant to the arguments that the evidence of entrapment by the police should not have been admitted, and that the conduct of the prosecution and the police was such that he did not have a fair trial.

[6] First, the police officers' statements, which were in virtually identical terms, save that Tickner's was in English and De Jager's in Afrikaans, referred to an anonymous informer who had instructed them to proceed to the BP Service Station and arrest the appellant and others, whereas in their supplementary statements they advised that the informer was not anonymous but in fact one Captain Kukard, who had died before the trial commenced.

[7] Secondly, both officers made no reference in their original statements to the presence of an Indian man in the car with the second accused and the appellant. They subsequently, in both their supplementary statements and in evidence, said that the Indian man, identified only as Yunus (his name is referred to throughout the record as 'Eunice', but I have assumed that 'Yunus' is the correct spelling, although 'Yunis' is used in the appellant's heads of argument) was in the front passenger seat of the car with the second accused. Yunus, they said, was removed from the scene by one of the officers, Tickner, on the instructions of Kukard. Both Tickner and De Jager also stated that Yunus (whom they did not identify further) was a police agent, and that Kukard had instructed them to release him when the other men were arrested. Their testimony was also to this effect.

[8] On the day the trial commenced the appellant requested further particulars to the charge. It asked:

'1 Berus die Staat se saak op lokval getuienis?

2 Was die anonieme beriggewer op die toneel deel van die polisie optrede, indien nie, wat was die doel van sy teenwoordigheid op die toneel?'

The prosecutrix responded:

‘ 1 Ad par 1: Die Staat sal nie beweer dat daar van ’n lokval gebruik gemaak is nie. Indien die getuienis egter sodanige feit bewys, sal die Staat ook daarop steun.

b) Ad par 2: Dit is onbekend aan die Staat.’

[9] The prosecutrix, in her address to the court before evidence was led, confirmed that the State would not lead evidence on the use of a police trap, but that if the defence led such evidence the State would accept it. She added that the State had no evidence that a trap was used – the docket disclosed none and the police officers who had made statements would testify that they were not aware of one.

[10] It transpired during the course of the appellant’s evidence that there had indeed been a police trap. The appellant argues that the police and the State must have been aware of this, and thus did not come to court ‘with clean hands’. Before considering the soundness of this contention, and whether the evidence of the police trap was admissible in terms of s 252A of the Criminal Procedure Act, in that it did not go beyond affording an opportunity to commit an offence, or that if it did, the trial court nonetheless had a discretion to admit it, I shall deal briefly with the evidence led by the State and that of the appellant.

[11] I have already described the way in which the appellant and his co-accused were apprehended. Tickner described the arrest, and the discovery of the Cat, first. She was cross-examined on why she had failed to disclose the identity of the informant, and the presence of Yunus in the car, in her initial statement. Her explanation was that the identity of the informer, Kukard, and the presence of Yunus, were not revealed initially because both were involved in investigations into drug dealing that might be jeopardized if their identities and status were revealed. Kukard’s subsequent death enabled the police to reveal his identity and she had realized that it had been a mistake to fail to disclose Yunus’s presence on the scene. She had not known, when apprehending Yunus, that he was a police agent, but De Jager had been phoned by Kukard when at

the scene and told to release Yunus who was a police agent. Tickner had removed Yunus from the scene.

[12] De Jager confirmed the evidence of Tickner, and elaborated on the reasons for not disclosing Kukard's identity: not only would it jeopardize investigations into drug syndicates but it would also endanger his life. He testified that he had no knowledge of a police trap or the circumstances leading to his instruction to apprehend the appellant and the first accused.

[13] As counsel for the appellant argued, the evidence of the police officers was not entirely satisfactory, and their initial statements, which contained false statements and failed to disclose the presence of Yunus, are to be deprecated. However, the appellant himself admitted (despite his plea of not guilty) that he was involved in a transaction for the sale of Cat, and it is he who testified as to a police trap.

[14] His evidence is the basis of the conviction. Before dealing with the appellant's involvement in drug dealing, and the trap, it should be noted that the second accused's plea explanation was confirmed by the appellant. It transpired that the appellant had hired him simply as a driver on the day of their arrest, and that he had no knowledge of the presence of drugs in the car – hence his acquittal.

[15] The appellant testified that in 2003 he shared a house with a friend, Gareth. Gareth was friendly with a Cat dealer, Tommy Gregory. The appellant also became a friend of Gregory. Gareth became involved with a woman known as Roxy, who claimed to be a prostitute. Roxy advised them that she knew a brothel owner in Durban, known as Judy. Judy was interested in acquiring Cat. Judy in due course contacted Gareth, and at her instigation Gareth and the appellant met a man known as Joe. Joe wanted to buy Cat in large quantities. Nothing came of this encounter.

[16] Judy then arranged for Yunus to contact Gareth and the appellant. Gareth at that stage was having emotional problems and so Judy preferred to make arrangements

with the appellant. The appellant met Yunus three times near Gold Reef City, where Yunus was staying. On each occasion the appellant had been unable to procure Cat to sell to Yunus. On one occasion, Yunus had taken him to his hotel room, and shown the appellant a vast sum of money to assure him of his serious intention to buy large quantities of Cat. The appellant's failure to produce the drugs disappointed Yunus, and angered Judy who kept badgering him. On several occasions she was abusive and threatening and the appellant was afraid that he might be harmed by one of Judy's associates.

[17] The phone calls ceased, however, and when Judy phoned again and apologized for her behaviour, the appellant accepted her apology and was 'quite happy'. On 17 October 2004 Judy phoned the appellant and said she knew of a source and that he could collect the drugs from Fourways, in Johannesburg. He had previously arranged for the second accused to drive him and they went to the address in Fourways given to him by Judy. There was nobody there. The appellant called Judy and she instructed him to go to Hyde Park instead. There he met two men and was given the bag in which the Cat was found.

[18] The appellant was then instructed to proceed to Gold Reef City, and then subsequently to the BP Service Station. There he met Yunus and his girlfriend and they tested the drugs. While Yunus's girlfriend was fetching something from their hotel room, the appellant went to buy cooldrinks. On his return he was arrested by Tickner and De Jager.

[19] The appellant testified that he was not himself a drug user, but wanted to make money out of the transaction. He would have received ten per cent of 'the deal' – some R60 000. In response to a question by the court he frankly said that he had become willingly involved in dealing with Judy and Yunus: had he been able to source the Cat from anywhere else, prior to the transaction in issue, he would have done so. He hoped to make easy money from drug-dealing transactions. He had learned after his arrest that both Roxy and Judy were police informers.

[20] The trial court convicted the appellant, finding that the conduct of the police, as described by the appellant, did not go beyond providing an opportunity to commit an offence, and that the evidence was admissible under s 252A of the Criminal Procedure Act. Section 252A(1) provides:

'Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible *if that conduct does not go beyond providing an opportunity to commit an offence*: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3)' (my emphasis).

[21] Subsection (2) lists various factors that a court should have regard to in deciding whether conduct does go beyond providing an opportunity to commit an offence.[1]

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[1] The subsection reads:

'(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:

(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;

(b) the nature of the offence under investigation, including-

(i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(ii) the prevalence of the offence in the area concerned; and

(iii) the seriousness of such offence;

(c) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;

(d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;

(e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;

(f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;

(g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;

(h) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;

(i) whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;

Subsection (3)(a) provides that where a court finds that the conduct in question has gone beyond providing an opportunity to commit an offence 'the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice'.

Subsection 3(b) requires a court, when considering the admissibility of the evidence, to weigh up the interest of the public against the 'personal interest of the accused'. The subsection lists numerous factors to be taken into account in the process of determining these respective interests.[2]

(j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;

(k) any threats, implied or expressed, by the official or his or her agent against the accused;

(l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;

(m) whether the official or his or her agent acted in good or bad faith; or

(n) any other factor which in the opinion of the court has a bearing on the question.

[2] The subsection reads:

(i) The nature and seriousness of the offence, including-

(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;

(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or

(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;

(ii) the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to-

(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;

(bb) the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution;

(iv) whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and

(v) any other factor which in the opinion of the court ought to be taken into account.

[22] Section 252A, introduced into the Criminal Procedure Act in 1996, does not create a special defence of entrapment: it creates an evidentiary rule, and the court is given a discretion as to whether to admit evidence of conduct that does go beyond providing an opportunity to commit an offence. The appellant argues that the conduct of the police did indeed go beyond providing an opportunity to commit the offence, and the State did not come to court 'with clean hands'.

[23] In respect of the latter contention the appellant relies on *S v Hayes*[3] where the court found that the conduct of the police officers involved in the trap, who had collaborated with one another in making their statements, was irreconcilable with a fair trial and amounted to defeating the ends of justice. One of the considerations to be taken into account in balancing the interests of an accused with the public interest under s 252A(3)(iii) is the infringement of any fundamental right, including, of course, the right to a fair trial under s 35(3) of the Constitution.

[24] The appellant contends that the conduct of Tickner and De Jager, in making false statements, and of the prosecution in failing to adduce the evidence of the police agents or informers who set up the trap, rendered the trial unfair. But in *Hayes* the court held that the true enquiry was whether the conduct of the police had been so fundamentally unfair that the accused's right to a fair trial had been frustrated. In my view, the dishonest conduct of Tickner and De Jager in the making of their initial statements is to be condemned. But it related only to the arrest of the appellant, the identity of the informant and the presence of Yunus at the scene of the arrest. They had nothing to do with the trap, and before the trial commenced they placed the facts known to them on record. The failure of the State to adduce the evidence of the police who were involved in the trap does not in itself render the trial unfair: there was nothing in the evidence or in argument to suggest, contrary to the appellant's submission, that the State suppressed vital or even relevant evidence. I do not consider that there is any merit in the appellant's contention that the trial was unfair.

[3]1998 (1) SACR 625 (O). See also *S v Nortjé* 1997 (1) SA 90 (C) at102B-C, decided before s 252A was introduced, but where the court considered that the police procedures were fundamentally unfair.

[25] That leaves the questions whether the police conduct went beyond providing an opportunity to source and sell the Cat, and whether the trial court had a discretion to admit that evidence if it did. The appellant submits that once it became clear to Judy and to Yunus that the appellant could not obtain Cat himself, and after Judy had threatened him, her conduct and that of Yunus fell foul of several of the provisions of s 252A(2): they had provided the drug to the appellant, they had induced him with a large reward (R60 000), and Judy's threats had made him fear for his safety. The trial court had not considered all of the 13 factors listed in s 252A(2)[4] nor determined whether they played any role in the commission of the offence by the appellant.

[26] The submission in this regard has no merit. The factors are listed simply as those to be considered in determining whether the entrapper has gone further than providing an opportunity. There is no requirement that each be considered. Moreover, in this matter the contention that any of these factors played a role is not consonant with the appellant's evidence. As indicated previously, he testified that he had willingly become involved with his friends in attempting to obtain and sell Cat. Had he been able to obtain it he would have done so before Judy and Yunus provided him with information about a source. Although testifying that he had become afraid after Judy had threatened him, once she had apologized he felt comfortable and willingly participated in the transaction. He was aware of the risks involved.

[27] As I have said, it is the appellant's evidence that led to his conviction, and I cannot see any reason why it should have been treated as inadmissible by the magistrate. The evidence showed that the police conduct did not go beyond providing an opportunity to commit an offence. Accordingly it is unnecessary to consider whether the trial court correctly exercised its discretion in admitting the evidence under s 252A(3).

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[4]Footnote 1 above.

[28] This court raised with counsel the question whether s 252A renders inadmissible evidence of a trap tendered by an accused rather than the State. But the matter was not fully argued before us and it is not necessary to decide the issue since I find that the evidence was in any event admissible. The appeal against conviction must therefore fail.

[29] That brings me to the appeal against the sentence. The trial court imposed a sentence of 12 years' imprisonment, and this was confirmed by the court below. It induces in me a sense of shock and this court must interfere. The appellant was seduced by police agents to participate in one transaction where they provided the drugs. While he was a willing party and entered into the transaction because of the financial reward it would bring, this does not warrant such a heavy sentence. There are, moreover, mitigating factors. Apart from the fact of entrapment, the appellant was frank with the court. He did not evade responsibility for the offence. Moreover, he has spent 20 months in prison awaiting trial, a factor that the trial court said it had taken into account.

[30] However, the offence committed by the appellant is a very serious one. The consequences for society of dealing in drugs are severe: vast quantities of dependence-producing drugs on the market almost invariably have a detrimental and irreversible impact on those who do become dependent. And the appellant admitted freely to having tried to deal, before he was trapped, in order to make money. His offence warrants direct imprisonment.

[31] The appeal against conviction is thus dismissed. The appeal against sentence is upheld. The sentence imposed by the trial court is replaced with the following:
'The accused is sentenced to five years' imprisonment two of which are wholly suspended for a period of five years on condition that the accused is not again convicted of any offence under the Drugs and Drug Trafficking Act 140 of 1992.'

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C H Lewis

Judge of Appeal

Concur:

Mthiyane JA

Jafta JA