THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 415/09

No precedential significance

In the matter between:

SHAUN HENDRICKS
Appellant

and

THE STATE
Respondent

Neutral citation: *Hendricks v The State*(415/09) [2010] ZASCA 55 (31 March 2010)

Coram: Lewis and Mlambo JJA and Saldulker AJA

Heard: 17 February 2010

Delivered: 31 March 2010

Summary: Lengthy delay in prosecution of appellant held not to have prejudiced him: convictions for dealing in drugs and conspiring to deal in drugs confirmed. Sentences reduced in part because of detrimental effect of proceedings extending over a period of 17 years from date when offences committed until hearing of appeal.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Motala J and Fortuin AJ sitting as court of appeal):

1 The appeal against the convictions on counts 3 and 4 is dismissed.

2 The appeal against the confiscation order is upheld and the confiscation order is set aside.

3 The appeal against the sentences imposed on counts 3 and 4 is upheld.

4 The sentences of the regional court are substituted as follows:

'(a) The accused is sentenced to four years' imprisonment on count 3.

(b) The accused is sentenced to eight years' imprisonment on count 4.

(c) The sentence on count 4 is to run concurrently with the sentence on count 3.'

JUDGMENT

SALDULKER AJA (LEWIS and MLAMBO JJA concurring)

[1] Approximately 17 years ago, during September 1993, the appellant, Mr Shaun Hendricks, was arrested on drug related charges.[1] Almost six years passed before his trial on these charges commenced in the Wynberg Regional Court, on 31 August 1999. The appellant and his co-accused, Mr Mogamat Amien Abrahams (accused 1 at the trial), pleaded not guilty to four counts of dealing in mandrax, as well as to the alternatives to these counts.

[2] On 19 January 2001, the appellant was acquitted on two of the

[1] In contravention of s 5(b) read with ss 1, 13(f), 17(e), 18, 25 and 64 and Parts I to III of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992.

four counts, being counts 1 and 2 and was convicted on count 3 of dealing in 100 000 mandrax tablets between 9 August and 9 September 1993 and on count 4 of dealing in 79 000 tablets between 9 September and 11 September 1993.

[3] A year later, on 2 January 2002, he was sentenced to 12 years' imprisonment on each count and the sentences were ordered to run concurrently. Additionally, in terms of s 18 of the Prevention of Organised Crime Act 121 of 1998 (POCA), the regional court made a confiscation order against him in an amount of R150 000. It took almost 18 months before the trial was finalised.

[4] The appellant appealed against his convictions and the related sentences to the Cape High Court. On 12 April 2007 his appeal against his conviction and sentence on count 3 was upheld. The order of the regional court on the conviction and sentence on count 3 was set aside and substituted, with the appellant being found guilty of contravening s 18(2)(a) of the Riotous Assemblies Act 17 of 1956 in conspiring to deal in 100 000 mandrax tablets on count 3, and was sentenced to eight years' imprisonment. His appeal against the conviction and sentence on count 4 and the confiscation order was dismissed.

[5] Aggrieved, the appellant applied for leave to appeal against those convictions and sentences to this court. The court below granted the appellant leave to appeal against the sentences imposed, but refused leave to appeal in relation to the convictions. This court granted the appellant leave to appeal against his convictions.

[6] This appeal is thus directed against the appellant's convictions on

counts 3 and 4, sentences imposed and the confiscation order granted in terms of s 18 of POCA. The appellant contends that a number of irregularities in the trial, and the delay both in the conclusion of the trial and in the appeal process, rendered the proceedings against him unfair to such an extent that the convictions and sentences must be set aside. The irregularities raised are:

(a) the unreasonable delay in the finalisation of his trial;
(b) the regional magistrate who conducted the trial was biased;
(c) the regional magistrate, in convicting him, had regard to inadmissible evidence, which was irregular, and without which a conviction would not have ensued; and
(d) the regional magistrate drew an inference of guilt from the appellant's failure to testify.

[7] I intend to deal with these issues in the order in which they appear. In doing so I shall have regard to an agreed chronology of events (which I shall call the dossier) in so far as the delay is concerned and with the material parts of the record in relation to the remaining issues.

The delay

[8] The nub of the appellant's case is that the delay in the legal proceedings against him was unreasonable and resulted in an infringement of his right to a fair trial. That there has been a considerable delay in this matter is common cause. The investigation into the drug trafficking syndicate by the state spanned a number of years. It was lengthy and complex consisting, inter alia, of the interception and transcription of telephone calls, the procurement of witness statements, as well as conducting forensic tests.

[9] As pointed out above, it took almost six years after his arrest before the appellant's trial commenced. Subsequent to his arrest the appellant, through his legal representatives, made numerous requests

for further particulars to the charge sheet which were set out in comprehensive detail by the court below. This resulted in further delays.

[10] During 1994 the charges against the appellant were withdrawn. Two years passed before charges were reinstated in September 1996. In April 1997 the appellant launched an application in the Cape High Court for a permanent stay of prosecution on account of the delay. This application was removed from the roll on 27 February 1998 with Hlophe JP indicating that the State 'should get its house in order' within 90 days. A year later the State still did not have its house in order. Having withdrawn his application, the appellant requested further particulars in March 1998. After the State replied it amended the charge sheet. As pointed out, the trial commenced in August 1999, and was finalised in February 2002 when the appellant was sentenced.

[11] In *Sanderson v Attorney-General, Eastern Cape*[2] the Constitutional Court spelt out the approach to be taken in weighing up the effect of trial delay. The conduct of both the appellant and the State must be weighed up in determining whether the delay is reasonable. In determining this question, the court[3] considered the 'balancing test' formulated in *Barker v Wingo*[4] where the following considerations were examined: the length of the delay; the reasons the State relies on to justify the delay; the accused's assertion of his right to a speedy trial and the prejudice to the accused.

[12] Applying the test to the facts of this case, the following conclusions can be drawn. First, the lengthy delay in this matter is unacceptable.

[2] 1998 (1) SACR 227 (CC) para 30.
[3] *Sanderson* para 25.
[4] 407 US 514 (1972).

However, both the State and the appellant have in my view contributed to it. That said, an accused is entitled to request particulars from the State in preparation for his trial but as a beneficiary of the right contained in s 35(3)(a) of the Constitution it does not behove him to cause wilful delays.[5]

[13] The speedy conclusion of a criminal trial should not just be an ideal for the accused and the justice system but a reality that both protagonists should strive for. The dossier is a testimony to the battles fought by both the State and the appellant over a number of years. I agree with the court below that the delay is regrettable and unfortunate: indeed this appeal is before this court in respect of charges that were laid as far back as 1993. However, the delay did not affect the outcome of the trial.

[14] As to trial prejudice, just before the state closed its case, accused 1 was killed. In this regard the appellant contends that the death of his co-accused was prejudicial in the presentation of his case, as the role played by him was insignificant in comparison to that of accused 1 and that the latter's death deprived him of his favourable testimony. On this issue the court below quite correctly found that his death had not caused prejudice as there was no indication that he would have testified, or that his testimony would have been favourable to the appellant.

[15] The appellant has not been incarcerated during the past 17 years and the liberty and security of the appellant cannot be said to have been affected by the delay. As was stated in *Sanderson*:

'The Courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial–related variety is possibly hardest to establish, and here as in the case of other forms of

[5] *Sanderson* para 32.

prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalisation that the lapse of time heightens the various kinds of prejudice that s 25(3)(a) seeks to diminish'.[6]

Accordingly I conclude that the delay in itself did not lead to unfairness or trial prejudice. It does, however, have an impact on sentence as I shall discuss later.

The conduct of the magistrate, bias and the admission and use of inadmissible evidence

[16] The evidence of a State witness, Mr Govender (who was himself indemnified against prosecution), as to what accused 1 had told him about the appellant was declared inadmissible. However, the trial court held that 'Govender, met sy diepgaande kennis van die sindikaat se bedrywighede, getuig dat beskuldigde 1 die man is wat vir 2 van Mandrax voorsien het. Dit verduidelik beskuldigde 2 se aktiewe betrokkenheid met die versending van Mandrax van Johannesburg na Kaapstad.'

[17] In my view it is unfortunate that the trial court referred to this 'inadmissible' evidence in its judgment. But there is nothing to indicate that this statement was evidence of bias, or that any finding was based upon it. The contention that the inadmissible evidence was the foundation of the finding is wholly unwarranted because it is not the only evidence on which the magistrate relied. It is clear from the evidence of Mr Haffejee, another State witness who was also granted indemnity, and to which I shall revert, that the appellant played a prominent role in the transporting of mandrax tablets from Johannesburg to Cape Town.

[18] Mr Govender testified also about the modus operandi used in the supply of the mandrax, the devious methods adopted by the drug cartel to hide the mandrax in vehicles, and the steps taken to avoid detection. Clearly it was only a very narrow aspect of Mr Govender's evidence that was declared inadmissible. The appellant had the right to challenge all the remaining evidence and adduce evidence in rebuttal but elected not to do so.

[6] Sanderson para 30.

Right to remain silent

[19] The appellant did not testify. In *S v Boesak*,[7] the Constitutional Court said the following:

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused.'

[20] In *Osman & another v Attorney-General, Transvaal*,[8] it was succinctly stated that in an adversarial legal system, once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut the case was at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused thus always runs the risk that, absent any rebuttal, the prosecution's case might be sufficient to prove the elements of the offence. The fact that an accused is put to such an election is not a breach of the right to silence. In *S v Thebus & another*,[9]Moseneke J summed up the position in regard to the right to silence:

'It is well established that it is impermissible for a court to draw any inference of guilt from the pre-trial silence of an accused person. Such an inference would undermine the rights to remain silent and to be presumed innocent. Thus, an obligation on an accused to break his or her silence or to disclose a defence before trial would be invasive of the constitutional right to silence. An inference of guilt from silence is no more plausible than innocence. The majority of the US Supreme Court in *Doyle v Ohio* reminds us that "every post arrest silence is insolubly ambiguous". To hold otherwise, the mandatory warning under s 35(1)(b) will become a trap instead of a means

[7] 2001 (1) SA 912 (CC) para 24.
[8] 1998 (4) SA 1224 (CC) para 22; see also *Boesak* para 24.
[9] 2003 (2) SACR 319 (CC) paras 58 and 59.

for finding out the truth in the interests of justice.

. . .

A distinction may properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent. In the dissenting judgment in *Doyle v Ohio* a comparable distinction is drawn between the "permissibility of drawing an inference on the credibility of the accused from silence and the impermissibility of drawing a direct inference of guilt". In the latter, the presumption of innocence is implicated. In the former, a court would have regard to the factual matrix within which the right to silence was exercised.'

[21] The trial court found that:

'Behalwe beskuldigde twee se betrokkenheid by handel soos reeds uiteengesit, dui ook die hoeveelheid tablette duidelik daarop dat beskuldige twee nie net deel van die sindikaat netwerk was nie, maar self ook 'n handelaar in eie reg. Indien dit enigsiens anders was soos byvoorbeeld dat hy 'n onskuldigde bystander of handlanger was, is daar geen rede waarom hy nie so kon getuig het nie. Sy besluit om te swyg, is 'n verdere bevestiging van die Hof se bevinding met betrekking tot sy betrokkenheid'.

[22] Both the trial court and the court below were entitled to take into account the appellant's failure to testify. The State established a prima facie case calling for an answer from him. His failure to testify justifiably had consequences, entitling the trial court to conclude that the evidence before it was sufficient, in the absence of an explanation to prove the appellant's guilt. The court below quite correctly held that the appellant's right to remain silent was not violated.

[23] None of the so-called 'irregularities' contended for by the appellant are of such a nature that they caused a failure of justice. They did not result in a violation of the appellant's right to a fair trial in terms of s 35(3) of the Constitution.

Count 3

[24] The court below set aside the conviction on count 3 and found the appellant guilty of conspiracy instead. It is common cause that the

tablets on this count were not analysed. (On the charge of conspiracy the number of tablets involved is immaterial.) The State contended that proof of the presence of methaqualone in the tablets in respect of count 4, together with the same pattern of conduct followed in respect of counts 3 and 4, lent itself to the reasonable inference that the appellant was dealing in mandrax. The contention was correctly rejected by the court below. In the absence of proof of what the substance actually was, dealing in 'mandrax tablets' (count 3) was not proved.

[25] However, both the circumstantial evidence and the appellant's conduct lead to the conclusion that he agreed with accused 1, Mr Haffejee and others, to the transporting and supplying of mandrax tablets from Johannesburg to Cape Town in a blue Cressida vehicle. Evidence as to his participation in the arrangements for the transportation of the drugs was unchallenged. His conduct and actions were 'in pursuance of a design common to him'[10]and the others: the transportation and supply of drugs.

[26] Moreover, Mr Haffejee's evidence with regard to the appellant's involvement with accused 1 in the counting and packing of 50 packets of mandrax tablets into two carton boxes in the garage of the appellant's house, and placing them in a blue Cressida destined for Cape Town, and his association thereafter, is uncontested. The court below thus quite correctly set aside the conviction of 'dealing' in mandrax tablets, and convicted the appellant of conspiracy.

Count 4

[27] Mr Haffejee testified that 80 bags of mandrax tablets were packed in the Cressida. The vehicle was driven to Cape Town where its

[10] *S v Cooper & others* 1976 (2) SA 875 (T) at 880C-D and *S v Moumbaris & others* 1974 (1) SA 681 (T) at 685H.

registration plates were replaced before the vehicle was driven to the appellant's home. There in the garage of the appellant's home and in his presence the police confiscated 79 bags of mandrax tablets.

[28] None of this evidence was disputed. Superintendent Swart placed the seized tablets in two plastic bags which he kept in his custody and control, until he delivered the tablets personally to the laboratory in Pretoria. Ms de Vos examined the contents of these bags and the tablets tested positive for methaqualone. The findings of Ms de Vos were confirmed by Mr Volsteedt, both experts in analysing mandrax tablets.

[29] The appellant challenged the finding of methaqualone in this court, contending that the standard against which the mandrax tablets were tested was not a generally accepted one, and the tablets tested were not a proper sample of what was in the other bags. This argument is to my mind disingenuous. There is no reason to doubt the accuracy of the findings of Ms de Vos and Mr Volsteedt. Furthermore, in the trial court counsel for the appellant did not place the standard against which the analytical tests were done on the seized tablets in dispute or suggest an alternative standard.

[30] The modus operandi adopted by De Vos in analysing 29 of the tablets taken from those seized, (which, as I have said, were not tampered with from the moment of their seizure to their confinement in the State's laboratory) was satisfactory in all respects. Her testing method left very little margin for error. Ultimately the State proved that the tablets confiscated by the police were the same tablets that tested positive for methaqualone. There is no cogent reason advanced to reject this evidence.

[31] I am satisfied that the appellant was correctly convicted of dealing in 79 000 tablets on count 4.

Confiscation order

[32] The trial court made a confiscation order in the amount of R150 000 against the appellant. Chapter 5 of POCA vests the criminal courts with a discretionary power to make a confiscation order against anybody convicted of any crime who benefitted from it or from 'sufficiently related criminal activity'.

[33] Section 18(1) provides as follows:

'Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any *benefit* which the defendant may have derived from-

(a) that offence;

(b) any other offence of which the defendant has been convicted at the same trial; and

(c) any criminal activity which the court finds to be sufficiently related to those offences, and, if the court finds that the defendant has so benefitted , the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate . . .'. (my emphasis)

Section 18(2) provides:

'The amount which a court may order the defendant to pay to the State under subsection (1)-

(a) shall not exceed the *value of the defendant's proceeds* of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Chapter; or

(b) if the court is satisfied that the amount which might be realised as contemplated in section 20(1) is less than the value referred to in paragraph(a), shall, not exceed an amount which in the opinion of the court might be so realised.' (My emphasis.)

[34] The requirements of a confiscation order under ss 18(1) and (2) are thus twofold. The first is the 'benefit' the defendant (accused)

derived from his crimes and the second is the ‘proceeds’ of his crimes. If the court finds that the defendant has benefitted, then it may make a confiscation order against him for any amount up to the value of the ‘proceeds’ he derived from his crimes.

[35] Both the trial court and the court below found that confiscation was in order. I turn to consider the affidavits filed by Mr G D Dawes, a Senior Special Investigator at the Directorate of Special Operations in support of an application for a confiscation order pursuant to s 18 of POCA, and the appellant’s reply thereto.

[36] Mr Dawes stated that there ‘can be no doubt that the defendant derived a benefit from his involvement in the commission of’ the offences contemplated in counts 3 and 4 and relied heavily on the trial court’s findings that the appellant was not only an integral member of the narcotics trafficking syndicate but also a drug dealer in his own right and must have benefitted therefrom. Furthermore, although the appellant was convicted of only two counts of dealing in mandrax, there was sufficient evidence to indicate that the syndicate was not restricted to these two transactions and that therefore the appellant’s benefit should not be limited to these transactions.

[37] To disprove that he had derived a benefit from the commission of these offences, the appellant set out in his answering affidavit his financial and employment history, together with supporting bank statements, tax returns and an affidavit from his companion and the mother of his children.

[38] The appellant denied that he had benefitted from the offences. He asserted that any asset or income accrued to him arose from lawful

undertakings derived from proceeds of sales of vehicles, businesses and family homes. He set out in detail the business ventures he was involved in, the various properties that he purchased and sold over a number of years, his earnings and that of his companion and the living expenses of his family with supporting documentation.

[39] He confirmed that his only realisable property was the Plattekloof property, Erf No 22315, Parow, purchased by the appellant in January 1998 for R532 500 with a mortgage bond registered against the property in favour of Nedcor Bank. This was the family home. He had no savings, no medical aid, no policies and no investments other than in the Plattekloof property. His companion confirmed that she contributed financially to the upkeep of the joint household and the bond repayments of the family home.

[40] The State filed no replying affidavit in rebuttal of these statements. The trial court ignored the appellant's affidavit, and only considered the unsubstantiated affidavit of Mr Dawes. It concluded that the appellant had derived a benefit from the commission of the offences and held that:

'Common sense dictates that no drug dealer would engage in drug trafficking merely for the fun of it the main objective is profit.'

. . . .

'That only in highly exceptional cases is proof of benefit possible.'

. . . .

'Drug dealers generally reap rich rewards from their activities and go to great lengths to conceal their assets.'

[41] These findings were unjustified. From the appellant's affidavit it is clear that he did not reap any 'rich rewards' nor was there any evidence that he had concealed any assets. The State, with the resources

available to it, conducted extensive and covert investigation into the drug syndicate over a number of years. Yet despite this, the State was unable to challenge the appellant's denial that he had not directly or indirectly benefitted from any drug deal.

[42] The trial court did not exercise its discretion judicially in granting a confiscation order. There was no basis for such an order as there was no proof that the appellant derived a benefit from the offences in question or from related criminal activity.

[43] It is noteworthy that the delay in concluding the trial made the confiscation order possible. POCA had not been passed in 1993 at the time of the appellant's arrest. However, POCA was made expressly retrospective, so that confiscation after 1998 in respect of crimes committed before then is possible. However, as no sufficient proof was tendered by the State to show that the appellant had derived any benefit from his criminal activity nothing turns on this aspect.

Sentences

[44] On count 3, the court below altered the appellant's conviction to one of conspiracy and reduced his sentence of 12 years' imprisonment to 8 years' imprisonment. The sentence on count 4 of 12 years' imprisonment was confirmed.

[45] It is trite law that an appeal court will interfere with the sentence imposed only when a court exercises its discretion improperly or unreasonably.

'[A] mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.'[11]

[11] *S v Pillay* 1977 (4) SA 531(A) at 535E-G.

[46] The individualisation of sentencing is an important factor. The appellant was not the 'kingpin' in the drug syndicate. One of the syndicate leaders, accused 1, was killed during the trial and other syndicate leaders were indemnified against prosecution. The appellant is a first offender and he suffers from ill health. It is clear that the effect of having legal proceedings hanging over his head for 17 years like the sword of Damocles must have caused him immense mental strain.

[47] It is now nine years since his conviction and 17 years since his arrest. But this does not mean he must be set free. Drug trafficking and the use of drugs is a scourge in our society, calling for severe sentences.

[48] Although both the court below and the trial court took into account the appellant's personal circumstances, insufficient consideration has been given to the inordinate delay experienced by the appellant in the finalisation of his matter. It is necessary to say something about what happened after the trial. The appellant was convicted in 2001, sentenced in 2002, lodged his appeal in 2003, and had his appeal heard by the high court in April 2006. The judgment on appeal was delivered in April 2007 without notice to him by the court. In an affidavit filed by the appellant he stated that he only became aware that judgment had been delivered when his attorney was contacted 'recently' (the affidavit was deposed to in July 2008) by the state attorney enquiring as to when payment in terms of the confiscation order could be expected. It is regrettable that these circumstances led to further delays in this matter. The application for leave to appeal was heard in November 2008.

[49] Counsel for the State during 17 October 2005 filed heads of

argument which, although disputing that the delays were unreasonable, made several concessions with regard to the particular counts and apparently conceded that the State had not proved its case beyond a reasonable doubt. However, six months later the State appointed different counsel and withdrew all the concessions made.

[50] From the aforegoing, it is clear that the appellant (through no fault of his own), has experienced substantial delay in having his appeal against his convictions and sentences finalised and the State has pursued the matter against him in an inept and tardy fashion. The mental strain that the appellant has endured over the years awaiting the outcome of his appeal cannot be ignored. Ordinarily only facts that are placed before a trial court are taken into account for the purpose of sentencing.[12]However this rule is not invariable.[13]The circumstances that the appellant found himself in after sentence was imposed were extraordinary. It is possible therefore for this court to alter the sentences.[14] In my view, the exceptional circumstances following the appellant's convictions and sentences warrant a substantial reduction in the sentences on both counts. The appeal against the sentences imposed on both counts succeeds.

[51] The following order is made:

1 The appeal against the convictions on counts 3 and 4 is dismissed.

2 The appeal against the confiscation order is upheld and the confiscation order is set aside.

3 The appeal against the sentences imposed on count 3 and 4 is upheld.

4 The sentences imposed by the regional court are replaced with the following:

[12] *R v Verster* 1952 (2) SA 231 (A).

[13] *S v Jaftha* 2010 (1) SACR 136 (SCA) para 15.

[14] See in particular *S v Roberts* 2000 (2) SACR 522 (SCA) para 22 and *S v Balfour* 2009 (1) SACR 399 (SCA) para 17.

‘(a) The accused is sentenced to four years’ imprisonment on count 3.

(b) The accused is sentenced to eight years’ imprisonment on count 4.

(c) The sentence on count 4 is to run concurrently with the sentence on count 3.’

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H K Saldulker
Acting Judge of Appeal

APPEARANCES:

APPELLANTS: W King

Instructed by William Booth Attorneys, Cape Town;
Lovius Block Attorneys, Bloemfontein.

RESPONDENTS: C van der Viyver
Instructed by the Director of Public Prosecutions, Cape Town;

The Director of Public Prosecutions, Bloemfontein.