THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 634/11
Reportable

In the matter between:

HEINRICH CARL KEYSER **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Keyser v State* (634/11) [2012] ZASCA 70 (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 – necessary to examine whole of the trial record to determine whether a failure of justice or unfairness in the conduct of the trial has resulted.**

Criminal procedure – Drugs and Drug Trafficking Act 140 of 1992 – dealing – courier importing 6.5 kg of cocaine – sentence.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Jajbhay and Mathopo JJ sitting as court of appeal):

The appeal against the conviction and sentence is dismissed.

JUDGMENT

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

[1] This is an appeal from the late Jajbhay J and Mathopo J sitting on appeal from a judgment of a regional magistrate. The appeal is with leave of the court a quo, with Lamont J sitting vice Jajbhay J.

[2] The appellant, a 35 year old married man, was arrested at Johannesburg International Airport on 10 December 2004. He had just boarded a flight to Cape Town having earlier that morning arrived in Johannesburg on a Varig flight from Sao Paolo, Brazil. He was charged with, and subsequently convicted of, dealing (in the sense of importing) in 6545 grams of cocaine in contravention of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992. He was sentenced to imprisonment for 20 years. This appeal is against conviction and sentence.

[3] The grounds of appeal against the conviction are two-fold. First, the appellant submits that the trial was voided in its entirety by the fact that the charge to which he

pleaded (and which was not afterwards amended) informed him that the State would rely on ss 20 and 21 of the Act. These sections contain reverse onus provisions that have been declared unconstitutional in various cases.

[4] In *Daniels v S* (125/11 [2012] ZASCA 71 (25 May 2012), the judgment in which is delivered today, I have explained that a criminal conviction can only be set aside on the ground of irregularity after consideration of the whole record in order to determine whether a failure of justice or an unfair trial has resulted from that irregularity. The mere inclusion in a charge sheet of references to statutory provisions that have been declared unconstitutional, whilst irregular, does not per se mean that there has been a failure of justice or an unfair trial.

[5] The shortcomings in the charge in the present appeal are a case in point. The appellant does not allege and the record disproves that reference to the unconstitutional reverse onuses influenced the conduct of the prosecution or his own response in any way. It is clear that the magistrate had no resort to the impugned provisions in arriving at his judgment. If the ‘taint’ flowing from the error is discounted, as the authorities require, the same conclusion of guilt must inevitably have followed. The appellant’s reliance on the irregularity is no more than technical as it did not deprive him of a fair trial.

[6] Second, the appellant’s counsel went on to submit, with marked skill, that the state had nevertheless failed to prove the case beyond a reasonable doubt. Despite his best endeavours I remain unpersuaded for the reasons that follow.

[7] The state case established without contradiction that a rucksack weighing 27kg was placed by the appellant on a flight from Sao Paolo to Johannesburg. When it arrived in Johannesburg it was found to hold 13 plastic bags containing clothes soaked in a cocaine solution, and a shampoo bottle holding what appeared to be a cocaine-loaded condom. When the clothing had been washed and the separated solution analysed it was found to contain 6,5kg of cocaine. The State also led evidence of incriminating statements said to have been uttered by the appellant to the investigating police officer after his arrest. All this called for an answer from the appellant. The defence he relied on under oath was that he was an innocent courier exploited by persons unknown to him.

[8] A general overview of the evidence will assist in an understanding of the respective strengths and weaknesses of the parties' contentions.

[9] The appellant lived in Cape Town. He had lost his employment at a night club, as a 'bodyguard' in the 'security field'. There is apparently little demand for such workers in South Africa. A friend, one Selsa, arranged job interviews for him in Argentina and Brazil, though he apparently speaks little Spanish and no Portuguese. Selsa provided half of the return airfare to South America, that is about R4000. Selsa was not called to confirm or explain his generosity or his general interest in the appellant's welfare.

[10] The appellant travelled to South America with one small overnight bag. He also returned with the same bag. He had intended, he testified, to spend about a week away. Instead, he stayed more than a month.

[11] Neither job interview was productive. In Brazil the prospective employer was not even available but sent an agent (‘Joe’) on his behalf, for a purpose not clearly explained in the evidence. Be that as it may, Joe not only invited the appellant to spend time with him in Manaus but also of his own volition paid for his return air fare from Sao Paolo to that city and, apparently, his accommodation in a hotel. Manaus is, according to the appellant’s evidence about a ten hour flight from Sao Paolo. (The atlas shows it to be on the upper/central Amazon about 2000km distant.)

[12] Precisely how the appellant employed his time in Manaus was unexplored in the cross-examination (which, I am sorry to report, was, as a whole, extremely superficial). After a week or so the appellant decided to return home with a promise that the prospective employer would interview him in Cape Town early in the following year.

[13] Before he departed, Joe asked the appellant, ‘as a favour’, to carry a rucksack containing clothing to Johannesburg. The bag, unlocked and unaddressed, was to be left on the carousel in the customs hall at Johannesburg airport before the appellant exited customs. It would there be collected by or for someone called Diego. The appellant apparently found nothing strange in this arrangement and he asked no questions, notwithstanding his admitted awareness that South America was a source of the drug traffic and that unsuspecting persons were used to promote the transfer of illicit drugs from South America to South Africa.

[14] According to the appellant he opened the rucksack handed to him by Joe at his hotel in Manaus before leaving for the airport. He found, by pushing his hand right to

the bottom of the bag, that it was ‘jam-packed’ with clothing and contained nothing else. Neither bag nor contents gave off a noticeable smell. The appellant checked the bag in at Manaus airport and collected it on the conveyor belt on arrival at Sao Paolo airport the next morning. He immediately deposited it ‘for safe-keeping’ and only collected the bag again when he checked in that afternoon for the flight to Johannesburg. The rucksack weighed 27kg. From the time of handing the bag over to the airline representatives in Sao Paolo until his arrival in Johannesburg he did not see the bag. At no stage did he notice a change in the weight or shape of the bag or its contents. As requested, the appellant abandoned the bag on the carousel in the customs hall.

[15] Deliberately or inadvertently he also left, attached to it, a luggage tag bearing his name and flight number. Thus, Inspector Mars of the SA Police, engaged in a routine check and finding the unattended luggage, had no difficulty in tracing the appellant to his internal flight to Cape Town from which he was removed moments before its departure. What followed was the subject of some disagreement in court.

[16] According to Mars when he first found the bag and checked it he became aware of an oily smell perhaps caused by brake fluid. He was aware that such fluids are used by smugglers to deter sniffer dogs. On placing the bag under X-ray it was not possible to identify the contents because of its density. He unzipped the bag and could see a package wrapped in plastic in it. He cut a hole in the package, releasing a strong chemical odour such, as in his experience, emanates from a large amount of cocaine.

[17] Mars accompanied the appellant back to the police offices at the airport. On the bus he explained to the appellant that he had found a bag from Sao Paolo that possibly

contained cocaine and that the appellant had booked the bag in himself as the name tag showed. The appellant confirmed that and said that he had booked it in for another person named Beiro in Sao Paulo and it contained clothing. He explained that he had been told to bring the bag to Johannesburg and leave it in the customs hall where someone would collect it. Mars then arrested the appellant.

[18] Before Mars took a warning statement from him, the appellant repeated his version adding that there was clothing inside the bag for a friend. He said he had checked it himself.

[19] The evidence in chief of Mars continued:

'The photographer came to the office and I started opening the bag and while we took out the bag there was some other clothing inside that has already been worn. I asked him is the clothing his. At that stage he said no he does not know what was inside the bag. I then told him about DNA testing that we can prove that the clothing that is inside that he did wear it or there could be traces of him in that clothing. He then told me yes the clothing inside the bag except for the packages he did wear it and it is his clothing. The photographer then took pictures of all the exhibits inside the bag. I took out all these packages. There was clothing like denims and T-shirts all wrapped in plastic and then there was in between there was another plastic with oil inside with a very strong smell like brake fluid like I said I think that was to deter any if there were dogs that could pick up the scent of cocaine. I took photographs of all these packages with this sticky substance that I know it is a cocaine paste.'

. . . The clothing that he said it is his clothing I put in other bags and that was also put in the safe. After he told me that he did wear the clothing and it is his I did not send if off for DNA testing. . .

On the 13th of the 12th month I took all these bags to forensic to be analyzed. After photos have

been taken I was busy in my office with the administration work on this docket. The suspect then voluntarily told me again that a person who lives with Cell was a person who sent him out to South America.

Say again? – Cell. He just gave me the name Cell.

Cell. – Yes Your Honour and this person send him out to South America and the bag he brought back was for him. He would have been paid 5 000 dollars for bringing in the bag and his instructions (intervenes).

PROSECUTOR: How much? – 5 000 dollars US dollars. The instructions was that not to take the bag out of the customs area because there is people in the vicinity he has got that will take the bag out of the customs area. I also gave him an opportunity to phone someone of which he then phoned the Cell person and he also phoned a guy by the name of Frederick. While talking to this person on the phone from the one side of the conversation I heard on my side is that this person knew what he was doing in South America and what he was arrested for.'

Later Mars added:

'Your Honour when I arrested him he said he was employed but he lost his job. He worked as a I think it is a bouncer or a guard at a club. At that stage he was not employed.

And as he was not employed at that particular stage did he tell you where is he getting money to travel like this? – Your Honour like I said he told me that Cell introduced him to go and get cocaine on the other side and he came back. So obviously a syndicate paid for his ticket as well.'

[20] Mars also testified about a conversation that he had with the appellant while unpacking the bag:

'Your Honour like I testified in the beginning he said the bag with the clothing everything does not belong to him but after I opened it and I started unpacking the stuff then he showed some of the clothing inside belongs to him that he did had it on and this is one of the T-shirts as well

as the other photos I testified about. This T-shirt in particular was right underneath all these packages. So the packages had to be the T-shirt had to be put in first before all the packages was placed on top.'

According to the witness the clothing that the appellant had identified as his own was not sent for forensic analysis 'because there was not any cocaine inside'.

[21] The appellant denied in his evidence that any of the clothing in the bag had been worn by or belonged to him or that he had admitted that to Mars. He claimed that when the policeman threatened to send the clothing for DNA testing the appellant said he was welcome to do so and that he would not find anything that belonged to him. That, he supposed, was why Mars had left the threat unfulfilled.

[22] Nor did the appellant, so he said, tell Mars that he was to be paid 5000 dollars. His version was as follows:

'So I said to him well if you work in South America I can earn anything from 5 000 dollars and up working there as a bodyguard so we had a bit of an argument about that as well and that is the only 5 000 dollars that I mentioned to him while I was there.

COURT: Were you able to speak Spanish a bit before you went over? – Ja I could do basic on sessions your worship because of my friends in Cape Town they are all Peruvians so I can communicate a little bit.'

[23] That the appellant physically brought the drugs into South Africa was not in question. The only disputed matter was his state of mind in so acting. To resolve this uncertainty the evidence for the State and the defence must be evaluated as a whole. The process of inferential reasoning has been the subject of wide debate as is

elucidated in, for example, *The South African Law of Evidence*, 2ed, by D T Zeffert and A P Paizes at 99 *et seq*. I propose to employ the principles discussed in *S v Reddy and Others* 1996 (2) SACR 1 (A) at 8c-9e. If, having done so, there remains a reasonable possibility that the appellant innocently conveyed the drug laden rucksack from South America to Johannesburg his appeal must succeed.

[24] It seems to me that there is no single instance in the evidence in respect of which it can be found, as a likelihood, that the appellant's evidence on a material aspect is true. On the contrary, his bona fides is undermined by the inherent improbabilities attaching to each individual step of the evidence and ultimately overwhelmed by the totality. The steps to which I refer are these:

(i) the reasons and justification for his visit to South America;

(ii) the payment of his travel costs for that trip;

(iii) the uncertainty of the arrangements for his job interviews;

(iv) the extension of his stay in South America from one week to nearly five weeks;

(v) the invitation to Manaus by a person with whom he was barely acquainted;

(vi) the payment for his air fare and accommodation;

(vii) the last-minute request to carry clothing to Johannesburg;

(viii) the nature of the instructions for carrying out the request;

(ix) the haphazard entrusting of an extremely valuable consignment to the ignorant appellant;

(x) the alleged naivete of the appellant which was inconsistent with his awareness of drug smuggling from South America;

(xi) the opportunity for planting the drugs in the bag and the unlikelihood of drug smugglers entrusting the cocaine to someone who might suspect something and

convey his suspicions to the authorities;

(xii) the failure of the appellant to realise that the contents of the bag had been replaced with something other than mere clothing;

(xiii) the weight of the bag, which was in itself at odds with its perceived contents.

[25] Although I consider a determination of the respective credibilities of Insp Mars and the appellant unnecessary for the discharge of the prosecution's onus, there are two additional aspects in which the former was favoured by the probabilities. These are:

(i) the reason that Mars did not carry out his threat to send the loose clothing in the bag for DNA testing; it is more likely that such action was rendered unnecessary by the appellant's admission that certain of the clothing was his (as Mars testified) than that Mars was dissuaded by the appellant's assertion that because the clothing was not his, nothing would result from such testing (as the appellant testified);

(ii) if the appellant were innocent he would surely have pressed upon Mars full information as to the persons who promoted his trip and those whom he met in South America; but he did neither.

[26] I should add that, in evaluating the probabilities, the context required an underlying assumption, not supported in evidence, that the persons behind the export of illegal drugs into South Africa might consider it worthwhile and feasible to set up carriage by an innocent courier into whose luggage drugs with a street value of at least R2 million had been introduced. That context notwithstanding, the gross weight of improbability was sufficient to leave no reasonable doubt that the appellant was a willing and informed participant in the scheme for importing the drugs into South Africa.

[27] In consequence the appeal against conviction cannot succeed and it is dismissed.

[28] The magistrate sentenced the appellant to imprisonment for 20 years. The High Court confirmed the sentence. The appellant's counsel directed his argument to the excessive weight of the sentence.

[29] The appellant was a first offender, temporarily separated from his wife and five-year old daughter. He was held in custody for almost eleven months before the conclusion of his trial. Having obtained a substantial number of credits toward a university degree, he is obviously both reasonably intelligent and, given the nature of his employment, worldly-wise. Since risk and reward are necessarily the two poles of a drug courier's existence it is fair to assume that he made a rational decision which favoured the latter. At his trial he showed neither contrition nor remorse testifying (in mitigation!), 'I do not see myself as a threat to society . . . I am not a criminal in any way'. His insight is clearly limited, which does not bode well for his prospects for rehabilitation.

[30] The sentence was undoubtedly a heavy one. In this regard much of what was said in the judgments of Lewis AJA and Olivier JA in *S v Jimenez* 2003 (1) SACR 507 (SCA) concerning the correct approach to sentencing drug-dealers can be applied *mutatis mutandis* to the facts of this case and need not be repeated. To my mind the most significant distinguishing feature is the quantity of the drugs carried in by the appellant. While the street value (well over R2 million according to the expert evidence)

is materially more than in *Jimenez* and the other authorities referred to by counsel, more important is the number of lives potentially affected by the abuse of the drug. The appellant must have reconciled himself to sowing the seeds of destruction, directly and indirectly, in the lives of a substantial number of people, including children. That consideration alone far outweighs his personal circumstances and justifies a very long incarceration.

[31] All matters considered, 20 years' imprisonment does not evoke any disquiet in me. It is, in fact, a condign punishment.

[32] The order is as follows:

The appeal against the conviction and sentence is dismissed.

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J A HEHER
JUDGE OF APPEAL

APPEARANCES

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