CASE NO 642/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SIPHO NDZEKU APPELLANT

and

THE STATE RESPONDENT

CORAM: E M GROSSKOPF, VIVIER et MARAIS JJA HEARD: 7 November 1995 DELIVERED: 28 November 1995

J U D G M E N T

MARAIS JA/

MARAIS JA/

The two issues which require to be considered in this appeal are whether the court which convicted appellant had jurisdiction to try him and, if so, whether he was correctly convicted upon a count of being in unlawful possession of 3 mandrax tablets in contravention of sec 2 (b) of Act 41 of 1971 and upon a further count of dealing in a quantity of 3000 mandrax tablets in contravention of sec 2 (a) of that Act. The question of the trial court's jurisdiction

Presumably because appellant was to be charged with three counts of contravening sec 2 (a), alternatively sec 2 (b) of Act 41 of 1971, and two of those counts were alleged to have been committed in a jurisdictional area (Hillbrow, Johannesburg) other than the jurisdictional area in which the remaining count was alleged to

have been committed (Constantia, Cape), the Minister of Justice invoked the power conferred upon him by sec 111 (1) of the Criminal Procedure Act 51 of 1977 (henceforth "the Act") and directed that the former two main and alternative counts be tried in the area of jurisdiction of the Attorney General of the Cape of Good Hope Provincial Division of the Supreme Court of South Africa. Appellant was thereupon tried upon all three main and alternative counts in the Wynberg Magistrate's Court. That court plainly had jurisdiction to try the main and alternative count which related to offences allegedly committed in Constantia, Cape. Appellant was convicted upon the alternative count but succeeded in having that conviction set aside on appeal to the Cape Provincial Division so that no more need be said about that count.

The factual background to the jurisdictional issue needs

to be shortly given. Appellant was professionally represented at the trial by counsel (Mr Uijs) instructed by Mr Trisos of the attorneys' firm Molenaar & Trisos and later, when that firm was disbanded, by Messrs Jack Lewis & Associates. Prior to the commencement of the trial Mr Trisos had filed with the clerk of the Criminal Court on behalf of appellant a request for further particulars of the charges. It comprised 49 pages and included a question going to the jurisdiction of the Wynberg Magistrate's Court to try appellant upon the main and alternative counts relating to offences allegedly committed in Hillbrow, Johannesburg. The reply given was that jurisdiction existed "by virtue of section 111 of Act 51/1977 (copy of certificate is forwarded)". The certificate read:

"DIRECTION IN TERMS OF SECTION 111 (1) OF THE CRIMINAL PROCEDURE ACT, 1977 (ACT 51 OF 1977): THE STATE VERSUS VUYISELE NDZEKU

Whereas I, HENDRIK JACOBUS COETSEE, Minister of Justice, deem it in the interests of the administration of Justice that the offences of contravening section 2 (a) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971 (Act 41 of 1971)-dealing in mandrax, alternatively contravening section 2 (b) of the said Act - possession of mandrax (2 counts) allegedly committed by VUYISELE NDZEKU at or near Hillbrow, Johannesburg within the area of jurisdiction of the Attorney-General of the Witwatersand Local Division of the Supreme Court of South Africa, be tried within the area of jurisdiction of the Attorney-General of the Cape of Good Hope Provincial Division of the Supreme Court of South Africa, I hereby direct in terms of section 111 (1) of the Criminal Procedure Act, 1977 (Act 51 of 1977), that the criminal proceedings in respect of the above-mentioned offences be commenced in the area of jurisdiction of the Attorney-General of the Cape of Good Hope Provincial Division of the Supreme Court of South Africa.

Given under my hand at Pretoria on this 24th day of October 1990.

H J COETSEE, MP

MINISTER OF JUSTICE"

After a number of postponements of the hearing had occured and the charges were about to be put to the appellant on 25

November 1991, the prosecutor referred to the particulars relating to jurisdiction which he had given, said that he wished "to hand in a direction in terms of section 111 of the Criminal Procedure Act, 51 of 1977", and asked if he might read it out "for record purposes". The magistrate replied in the affirmative and the direction by the Minister of Justice was read aloud. Counsel for appellant was then asked by the magistrate whether he had seen the certificate and he replied: "I did. I have no objection to it being handed in". It was then handed to the magistrate and became exhibit "A". At this juncture the magistrate addressed appellant directly and asked him whether he had understood the direction and appellant confirmed that he had. Although appellant was later to give his evidence through the medium of an interpreter, it emerges from the record that he understands the English language.

The prosecutor then placed on record that he had given a copy of the ministerial direction to appellants's attorney, Mr Trisos, "a while back, but (that) it was never ever served on the accused as required" by section 111 (2) (a) of the Act, and that he wished the magistrate "to apply" section 111 (4) of the Act. At this stage it is appropriate to recite all the terms of section 111:

"(1) Where the Minister deems it in the interests of the administration of justice that an offence committed within the area of jurisdiction of one attorney-general be tried within the area of jurisdiction of another attorney-general, he may in writing direct that criminal proceedings in respect of such offence be commenced within the area of jurisdiction of such other attorney-general.

(2) (a) The direction of the Minister shall state the name of the accused, the relevant offence, the place at which (if known) and the attorney-general in whose area of jurisdiction the offence was committed, and the attorney-general in whose area of jurisdiction the relevant criminal proceedings shall commence.

(b) A copy of the direction shall be served on the accused, and the original thereof shall, save as is provided in subsection (4), be handed in at the court in which the proceedings are to commence.

(3) The court in which the proceedings commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court.

(4) Where the Minister issues a direction under subsection (1) after an accused has already appeared in a court, the original of such direction shall be handed in at the relevant proceedings and attached to the record of the proceedings, and the court in question shall -

(5) cause the accused to be brought before it, and when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the attorney-general in whose area of jurisdiction the said criminal proceedings shall commence whereupon such time and date and court shall be deemed to be the time and date and court appointed for the trial of the accused or to which the proceedings pending against the accused are adjourned;

(6) forward a copy of the record of the proceedings to the court in which the accused is to appear, and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it.

(5) The direction of the Minister shall be final and not subject to appeal to any court."

The prosecutor thereupon asked the magistrate "to adjourn the

proceedings to today's date for 10 minutes' time for plea and trial", focussed the magistrate's attention upon the use of the word "shall" in section 111 (4), and asserted that a postponement was therefore necessary. After some further remarks were made by the prosecutor counsel for appellant was asked by the magistrate whether he understood the position. His reply was inaudible but was presumably in the affirmative for the magistrate proceeded to say: "And according to the certificate issued by the Minister in terms of section 111 this Court, being a Court, one that can do this case and your client is aware thereof and according to Mr Lea, Mr Marius Roos, the senior prosecutor, did inform him to proceed with the case today in this Court." To that counsel for appellant replied "yes" and added "I accepted that as the case". The magistrate asked the prosecutor whether it was really necessary for the court to adjourn and upon

being told that the prosecutor considered the provision to be peremptory and that it was unfortunately necessary to adjourn the proceedings "even if it is only for five minutes or ten minutes", he adjourned the court saying "Yes Mr Ndzeku, we will adjourn. We will proceed with the trial against you within the next ten minutes."

When the court resumed the charges were put to appellant and his pleas of not guilty were entered. No plea that the magistrate had no jurisdiction to try the offences allegedly committed in Hillbrow, Johannesburg was specifically raised or entered nor was any prior notice given by appellant or his legal representatives of any intention to plead a plea other than the plea of not guilty, as was required by section 106 (1) and (3) of the Act. However, in elaborating upon the pleas of not guilty and "the nature of (appellant's) defence", counsel for appellant said "the plea is based on jurisdiction"

in that there had not been compliance with the provisions of section 111 of the Act. Evidence on the merits then commenced to be led. There were a number of adjournments and the State ultimately closed its case on 4 March 1992. An application for the discharge of appellant was thereupon made. One of the grounds was an alleged absence of jurisdiction in respect of the counts to which the ministerial certificate related. The contention advanced to the magistrate was that a copy of the ministerial direction had not been served upon appellant as required by section 111 (2) (b) and that the omission to do so was fatal to the acquisition of jurisdiction. The contention was not upheld by the magistrate. It was repeated in the provincial division on appeal and again rejected. It has been advanced yet again before us. Further related submissions were also advanced. It was submitted that even if receipt of a copy of the direction by an agent authorised to receive

it on behalf of appellant would have sufficed, there is nothing to show that appellant's attorney was authorised by appellant to receive it on his behalf. It was also contended that even if the delivery of the direction to appellant's attorney could be regarded as service upon appellant, the prosecutor was not a person competent in law to serve the direction.

I shall assume without deciding that it was permissible for appellant to raise the question of jurisdiction in the manner in which he did notwithstanding the provisions of section 106 (1) and (3) of the Act. No attack is made by appellant upon the validity of the Minister's direction. Nor is there any suggestion that appellant was not informed of his direction timeously. The complaint is merely that a copy of the direction was not served upon him personally by anyone competent in law to do so. The manner in which an accused person

has to be informed of such a ministerial direction was submitted by counsel for appellant to be a critical and integral element in the creation of jurisdiction and a sine qua non of the valid conferment of jurisdiction. If jurisdiction was absent on account of a failure to inform appellant of the direction in the prescribed manner, it was rightly contended that so fatal a shortcoming could not be regarded as an "irregularity or defect" in the proceedings which was capable of being condoned in terms of section 309 (3) of the Act if no failure of justice resulted. However the contention that jurisdiction was lacking is valid only if the following propositions which are inherent in the contention are sound: firstly, that the manner in which appellant was apprised of the Minister's direction was not one for which section 111 (2) (b) makes provision; secondly, that the requirements of that provision as to the particular manner in which an accused is to be

informed are peremptory and permit of no deviation therefrom; and thirdly, that compliance with the provision is an essential constituent element of the jurisdiction conferring process. In my view, none of these propositions can be maintained successfully.

The empowering provisions of section 111 are subsections (1) and (2) (a). They vest the Minister with the power to direct that an offence committed within the area of jurisdiction of one attorney-general be tried within the area of jurisdiction of another attorney-general and provide for the manner in which the Minister is to do so. Once he has issued such a direction he has exercised the substantive power entrusted to him and he has no further role to play in terms of section 111. Sub-sections (2) (b) and (3) are consequential provisions involving other actors who have no jurisdiction conferring powers in their own right. The same can be said of sub-section (4) in

so far as it provides what is to be done after the Minister has issued a direction under sub-section (1) after an accused has already appeared in court. A direction by the Minister must have been intended by the legislature to have immediate effect whether or not the accused has been made aware of the giving of the direction. It could not have been intended that despite the giving of such a direction by the Minister, the attorney-general within whose area of jurisdiction the relevant offence had allegedly been committed should retain the power to charge the accused in a court in his area of jurisdiction merely because the accused had not yet been served with a copy of the direction. Were that not so, such an attorney-general could render such a ministerial direction nugatory by the simple expedient of charging the accused in a court in his area of jurisdiction before a copy of the direction has been served upon the accused. That is a

consequence so absurd that it could not have been intended by the legislature.

Those considerations suffice, I think, to show that the serving of a copy of the direction on the accused is not an essential prerequisite to the legal efficacy of the Minister's direction that the alleged offence be tried in another area of jurisdiction. To put the matter another way, it is not a necessary step in the exercise by the Minister of the substantive power given to him to direct that an accused be tried in another area of jurisdiction.

What then is the object which the legislature sought to achieve in enacting the requirement that a copy of the direction be served on the accused? The answer seems obvious. It was simply to ensure that the accused became aware that such a direction had been given by the Minister. If that is indeed the sole object of the

provision, it seems hardly likely, viewed purely as a question of interpretation, that personal service upon the accused by a particular functionary was to be regarded as the only permissible manner in which the accused could be apprised of the giving of the direction. The legislature could scarcely have been unaware that accused persons are frequently represented by legal practitioners and that once that is so, notification by the prosecutor of steps to be taken by him in the proceedings, or of documents of which he intends to make use, is made to the accused's legal representative and not to the accused personally. It is difficult to imagine any sensible reason why the legislature would have intended to insist upon a copy of the Minister's direction being served upon an accused personally by a particular functionary even although it has been delivered to the legal representative engaged by the accused to represent him in the very

proceedings to which the direction relates. It is worthy of note that the legislature has not explicitly provided for personal service of the direction upon the accused, nor has it specified any particular person or functionary who is to effect such service, or provided any statutory definition of the meaning which the word "serve" is to be given in this legislation. Service upon a duly authorised agent of the accused is not expressly precluded by the provision and there is no justification for implying any such prohibition. Given the facts which I have sketched, it cannot seriously be contended that Mr Trisos did not have appellant's authority to receive from the prosecutor any information or document relevant to the case in which he had been engaged to represent appellant. I conclude therefore that the manner in which appellant was apprised of the Minister's direction was one sanctioned by section 111 (2) (b). That finding disposes of the attack upon the

jurisdiction of the magistrate but even if that interpretation of the provision should be wrong and it does provide for personal service or service by a particular functionary or both, the question whether it is a peremptory requirement that notice of the Minister's direction be given only in that particular manner would remain. It is true that the word "shall" is frequently regarded as being indicative of the peremptory nature of a legislative provision but it is trite that it is not always so regarded. The considerations I have mentioned when dealing with the purpose of the provision are of course also relevant to the question of whether the provision is intended to be regarded as peremptory and, in my view, they militate against any such intention. In reaching this conclusion I have taken account of the approach to problems of this kind reflected in cases such as Maharaj and Others v Rampersad 1964 (4) SA 638 (A) and Nkisimane and Others v

Santam Insurance Co Ltd 1978 (2) SA 430 (A). In the former case

the following dictum of Lord Penzance in Howard v Bodington 2 PD

203 was once again approved by this Court:

> "……(I)n each case you must look to the subject matter;
> consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case on that aspect decide whether the matter is what is called imperative or only directory." (At page 643 F-G)

In the latter case the following caveat was sounded:

> "Preliminarily I should say that statutory requirements are often categorized as "peremptory" or "directory". They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non- or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of

> the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular (see the remarks of Van Den Heever J in Lion Match Co Ltd v Wessels 1946 OPD 376 at 380)." (At pages 433 H - 434 B),

However, even if the provision was intended to be peremptory, it would remain what it is - merely a prescribed method of informing the accused of the giving by the Minister of such a direction and not an integral element in the exercise of the substantive power to give such a direction. It would then follow that the provision of a copy of the direction to the accused in a manner other than the prescribed manner would have no bearing upon the substantive validity of the direction and would rank, at worst for the prosecution, as an "irregularity or defect" in the proceedings. Counsel for appellant conceded frankly in this Court that he found himself unable to contend that any failure of

justice had occurred as a consequence of such irregularity or defect if that was what the omission to give notice in the prescribed manner was. The concession was obviously correctly made. The plea to the magistrate's jurisdiction was therefore rightly not upheld. The merits or demerits of the convictions:

The case is a highly unusual one. The background to the alleged commission of the offences I shall sketch in broad brush strokes. In 1979 appellant was serving a prison sentence. He escaped but was re-arrested by detective warrant officer Lazarus. Appellant had access to a great deal of information about dealers in drugs both within and beyond the borders of South Africa. The police were anxious to have his co-operation and information. In the result, he remained at liberty on the understanding that he would work with the police by furnishing relevant information and assisting in the

apprehension of dealers in drugs. Appellant did so and the police achieved considerable success as a consequence. The personal relationship between appellant and Lazarus developed into a relatively close one over the ensuing years. They regarded one another as friends and came to know each other's immediate families. It was the State's case that appellant's relationship with the police became so close that appellant felt able to make with relative impunity certain unlawful proposals to them. More specifically, it was alleged that appellant had suggested that Lazarus participate with him in drug dealing activities upon which he intended to embark. Unhappy though Lazarus was at the implications of bringing appellant to book for his attempt to corrupt him and to deal in drugs with his covert assistance, Lazarus reported the approach to his superiors and a decision was made to allow appellant to believe that his overtures had been

favourably received so as to see what further useful information might be forthcoming. Lazarus thereafter attempted to keep a diary of his meetings with the accused and attempted to record surreptitiously on tape the conversations which took place between them. The quality of the tape recordings was so poor that they were not placed before the court by the prosecutor but they were made available to appellant's legal representatives. Appellant continued to supply information to Lazarus and to co-operate with him in bringing other persons involved in drug dealing to book. According to Lazarus appellant offered to reward him if he acted as a courier for appellant and conveyed mandrax tablets for him. In due course after Lazarus had led appellant to believe that he was willing to fall in with the suggestion that he act as a courier for appellant, Lazarus was told by appellant that he had acquired some samples of a large consignment of mandrax tablets

which had been offered to him. Appellant was eager to have Lazarus arrange for them to be tested in order to determine whether they were genuine mandrax tablets of the requisite quality. To that end Lazarus went to an apartment in Hillbrow, Johannesburg where appellant handed him inter alia the three mandrax tablets which were the subject of count 2. The episode was monitored by other policemen who gave evidence which corroborated Lazarus's account in all material respects. Appellant was not arrested immediately thereafter as the police wished to allow things to develop further. The samples had been handed to Lazarus on 22 July 1988. On Friday 19 August 1988 Appellant allegedly telephoned Lazarus from Johannesburg to say that he had a large consignment of mandrax tablets (22 000) which he wished Lazarus to fetch immediately and take to Cape Town. Lazarus claims that he discussed the matter with his superiors and that it was agreed

that he should pretend to fall in with appellant's plan. Lazarus claims that he told appellant that he would only be able to fly to Johannesburg on Monday and that if appellant required him to come to Johannesburg sooner, he (appellant) would have to provide the necessary ticket. Appellant allegedly agreed to do so and did do so. Lazarus flew to Johannesburg on Saturday 20 August 1988 and, once again monitored by other police officers, he met with appellant in Hillbrow and took delivery. There were 21 000 tablets made up into 21 packs. Because one of the other police officers involved in the operation raised the possibility that the tablets might not be genuine and that appellant might be suspicious of Lazarus and intent upon testing whether or not Lazarus would carry out his mandate, it was decided to remove 3 of the tablets from 3 of the packs in order to have them tested at the forensic laboratories. At this juncture I should

explain that it was because the samples taken were not regarded by the Provincial Division as sufficiently representative of all 21 packs of tablets that the conviction upon count 3 of dealing in 21 000 mandrax tablets was altered to a conviction of dealing in 3 000 mandrax tablets. When Lazarus returned to Cape Town he was telephoned soon after his arrival by appellant and Lazarus attempted to persuade appellant to defer coming to Cape Town to collect the tablets until the tablets had been tested. By Monday 22 August 1988 appellant had become impatient and insisted upon coming to Cape Town to collect the tablets. Lazarus suggested that he meet appellant at the Kenilworth Centre on Monday evening. Appellant agreed. Lazarus reported to his superiors and arrangements were made for a number of senior officers to be in concealed positions at the Kenilworth Centre. When appellant arrived at the rendezvous he professed to be apprehensive

about the chosen venue, and claimed to have seen police vehicles in the vicinity. Lazarus attempted to reassure him but he remained apprehensive. Appellant then said that the handing over of the tablets should take place at the airport. Lazarus agreed but specified that it be in the parking area. Lazarus did so because entrance to and egress from the parking area could be controlled. They left for the airport independently and Lazarus advised the other police officers by radio of the change in plan. Lazarus said that despite the fact that appellant had told him that he would arrive at the Kenilworth Centre in a white Corolla motor vehicle, he arrived instead in a blue Honda motor vehicle. At the airport appellant parked his vehicle alongside Lazarus's vehicle and joined Lazarus in the latter vehicle. Lazarus pretended to be extremely nervous and asked for his money whereupon appellant asked to be given the tablets and he would go. Lazarus asked him to

fetch one of his own bags so that he could transfer the tablets from his own bag to appellant's bag. He gave as his reason his unwillingness to part with the bag. In truth, so Lazarus claimed, he wished to give his colleagues more time to take up appropriate positions. Having handed over the tablets to appellant Lazarus allegedly offered to accompany him through the exit gates but appellant declined the offer and exhorted him to leave immediately. Lazarus drove away and in doing so lost sight of appellant. Having passed through the exit gate Lazarus stopped near one of the other senior police officers' vehicles and awaited the arrival at the gate of the appellant. When appellant arrived at the gate he was stopped and his vehicle was searched. To the consternation of the police and Lazarus no tablets could be found in appellant's vehicle. The police inferred that appellant must have handed the tablets over to an accomplice after having received them

from Lazarus. According to the police evidence, when appellant was asked what had become of the tablets, he claimed first to have given them to someone in a Grenada motor vehicle and that that vehicle had been driving behind him. It was claimed that appellant then amended his version to say that it was in fact a BMW motor vehicle and not a Grenada. Lazarus testified that appellant had asked him how he could have done such a thing to him. It was put to the police witnesses in cross-examination that appellant had been indignant and had insisted that he was participating in a covert operation in co-operation with Lazarus but the witnesses emphatically denied that he had said any such thing. As a fact, when appellant came to testify later in the trial, he did not claim to have said anything of the sort to the police.

A decision was made, so it was claimed, to give appellant an opportunity of recovering the tablets even although it was intended

to arrest him in due course. He failed to do so. These events formed the basis of count 3.

Appellant's case, and his evidence, was that he had never attempted to secure the services of Lazarus as a paid courier in any drug dealing activities and that everything which had happened had been regarded by him as an operation of the kind in which he had participated in the past in order to assist the police to bring drug dealers to justice. It came as a great shock to him when he was accused of having suborned Lazarus to participate in drug dealing activities allegedly conducted by appellant himself.

I do not consider it to be necessary to provide any further detail regarding the facts of the case. As was to be expected, much of what Lazarus had to say was common cause and was confirmed by appellant himself. The sole dispute between them was whether what

had occurred was represented by Lazarus, and believed by appellant, to be a normal and routine police operation directed against third parties or whether, as Lazarus claims, the transactions were intended to further appellant's own drug dealing activity. What had to be decided ultimately therefore was whether it was reasonably possible that appellant thought that he was merely a participant in a bona fide and lawful police operation designed to bring others engaged in the drug trade to book. If it was reasonably possible appellant should have been acquitted. If it was not, he was correctly convicted. Neither the magistrate nor the Provincial Division had any doubt that appellant's version could not reasonably be true. It is true that there are aspects of the evidence given by the police which seem strange but one cannot lose sight of the fact that one is dealing with a Geld of criminal investigation in which resort is often had to unorthodox and

seemingly improbable actions. Counsel for appellant sought in this court, as he had done in the Provincial Division, to persuade the court that these factors cast such a pall of doubt over the reliability of the evidence given by the police that the magistrate should have concluded that a reasonable doubt as to appellant's guilt existed. He referred in particular to the somewhat unconvincingly explained earlier withdrawal of the case against appellant and its reinstitution after nearly two years had elapsed, to the failure to arrest him at the airport in Cape Town when it became apparent that the mandrax tablets which Lazarus had brought from Johannesburg to Cape Town and handed to appellant were missing, and to the decision to allow appellant to attempt to recover the tablets. As against those considerations there is the sheer weight and cogency of the evidence against appellant. Counsel for appellant disavowed any intention of contending that

Lazarus had all along been intent upon inveigling appellant into a situation in which it would be possible to falsely but successfully prosecute him for dealing in drugs. He was driven to contend that Lazarus had initially been engaged in an operation in which appellant was playing his customary role of informer and participant but that when the drugs disappeared at the airport in Cape Town, Lazarus decided to penalise appellant for their disappearance by fabricating a case against him. In my view it is a proposition which cannot possibly be maintained. It is utterly inconsistent with a number of facts which are either common cause or incontrovertible.

Firstly, there is the fact that for a considerable time prior to the incident at the airport Lazarus had been tape recording conversations between himself and the appellant with a view to using them against appellant in due course. The fact that, in the result, the

tapes were of too poor a quality to be usable at appellant's trial does not derogate from the significance of the fact that the tapes were recorded. They were disclosed to appellant's legal representatives and that is compelling evidence of their authenticity. Had the discussion between Lazarus and appellant been no more than the usual discussions which had been taking place between them over the years, the question arises why Lazarus should have bothered to surreptitiously record them. No satisfactory answer occurs to me.

Secondly, it is also implicit in the thesis advanced by counsel for appellant that there could have been no prior intimation by Lazarus to other senior police officers of any approaches made by appellant to Lazarus regarding participation for reward by Lazarus in appellant's drug dealing activity. But senior policeman testified that Lazarus had indeed informed them of such approaches and that a

decision had been taken to allow Lazarus to inculcate the belief in the appellant that Lazarus had become his partner in crime. While it is theoretically possible that those policemen may have invented that evidence, it cannot be considered a reasonable possibility in the light of Lazarus's contemporaneous recording of the conversations which he had with appellant at the time.

Thirdly, it is also inherent in the thesis propounded by counsel for appellant that without having had any opportunity of ascertaining whether or not senior officers would approve or disapprove of, or co-operate or refuse to co-operate in, a conspiracy to prosecute an innocent man, Lazarus decided upon that course. The behaviour of Lazarus at the airport when it was discovered that the drugs were missing shows clearly that he was already intent upon prosecuting appellant so that it cannot be argued that he had time to

ponder the question overnight and an opportunity to sound out other senior officers in order to ascertain whether or not they would cooperate in a conspiracy to secure the successful prosecution of appellant.

Fourthly, the undisputed presence at the airport of a veritable posse of high ranking police officers is also impossible to reconcile with this having been simply yet another police operation in which appellant was assisting Lazarus, So of course is the undisputed fact that appellant was stopped and his vehicle searched before it was realised that the tablets had disappeared. For what conceivable purpose would the police participating in the operation have wished to stop appellant and search his vehicle if he was participating with them in an operation designed to bring a third party to book? Then there is appellant's failure when he was stopped and searched to say what

he obviously would have said if, as he claimed, he thought himself to be a participant in a police operation. It will be recalled that in cross-examination of the police witnesses it had been put to them that appellant had indeed protested that such was the case. However, when he came to give evidence, appellant admitted that he had said nothing of the kind. In the circumstances, there is no reason to doubt the evidence of the police witnesses that appellant gave conflicting explanations as to what had happened to the tablets and that at no time did he claim to have been a participant in an operation planned by Lazarus to bring another to book.

To all this must be added appellant's poor showing in the witness box. Counsel for appellant was obliged to concede that he was a very poor witness. In the light of all this such disquieting features as there are in some of the evidence given by the State

witnesses pale into insignificance. Finally, there is the question of motive. One asks oneself why, if it was not for the reason given by him, Lazarus should have elected to kill the goose that laid the golden eggs. As I have said, in this court counsel for appellant suggested that Lazarus's annoyance at the disappearance of the tablets at the airport accounted for his decision to do so. That, as I have shown, does not bear analysis. In the courts below it was suggested that an operation of the kind in which appellant claimed he was participating had been vetoed by higher authority on a previous occasion and that Lazarus might have wished to conceal the fact that he was indulging in such an operation. Again the suggestion does not bear scrutiny. If such an operation had been intended to take place and had in fact taken place it would have been impossible to prosecute the third party concerned without it coming to light that the forbidden operation had taken place.

Lazarus could therefore not have been so apprehensive about that that he would have felt driven to resort to so desperate and wicked a stratagem as to fabricate a case against appellant. No other plausible motive for Lazarus having chosen to effectively terminate the career of his informant and partner in the successful detection of drug dealers suggests itself to me and I am satisfied that, other than the one given by Lazarus, none are reasonably conceivable. In my view appellant was correctly convicted on both counts and the appeal must fail. It is dismissed.

R M MARAIS

E M GROSSKOPF)
) CONCUR
VIVIER JJA )