IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 18/05/2007
Case no. A732/06 – SH1283/03

UNREPORTABLE

In the matter between:

KOTCHI ZHANG — 1st Applicant
AIQUN LI — 2nd Applicant

And

THE STATE

JUDGMENT

A. INTRODUCTION

1. This is an appeal against conviction on a charge of manufacturing of mandrax containing methaqualone in contravention of section 3 of the Drugs and Trafficking Act 140 of 1992 (hereinafter referred to as the Act).

2. The two appellants appeared in the Regional court Kemptonpark on a charge of manufacturing of mandrax in contravention of section 3 of the Act. I n the alternative the appellants were charged with an offence of dealing in dangerous or undesirable dependence producing substance to wit mathaqualone in contravention of section 5 (b) of the Act. In the further alternative the appellants were charged with possession of dangerous or

undesirable dependence producing substance to wit methaqualone, O-Toluidine, anthracitic acid, acetic anhydride and acetic acid in contravention of section 4(b) of the Act.

3. The appellants who were legally represented pleaded not guilty to the charges. They disclosed their basis of defence and denied that they had anything to do with dealing, manufacturing or possession as alleged in the charge sheet. They further made formal admissions in terms of which they admitted that a pill press machine that can be used for manufacturing of mandrax or drugs was found in the garage, and that the chemicals found on the premises could also be used in the manufacturing of drugs or mandrax. The forensic report was also admitted.

4. On the 22 July 2005 the trial court convicted the appellants on the alternative charge of dealing in mandrax in contravention of section 5 (b) of the Act. On the 3 August 2005, the trial court however, corrected the conviction on contravention of section 5(b) to conviction on contravention of section 3 of the Act. The trial court then sentenced the appellants to fifteen years direct imprisonment, the trial court having found the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 to be applicable.

5. The trial court in convicting the appellants, as it did, relied on the

evidence adduced on behalf of the state. I do not in this judgment intend dealing in details with the evidence of each witness. Such evidence has been set out in the trial court's judgment.

B. EVIDENCE BY THE STATE

6. In a nutshell the evidence against the appellants were to the following effect; After a long period of investigation on allegations of possible contraventions of the Act, the police on 22 December 2003 and after an application was made to the magistrate for the district of Kempton Park, obtained two warrants of search and seizure, to search premises no 25 6th Road, Plot 98 Cloverdene Benoni and plot 438 Killerny Road Pomona Kempton Park (hereinafter referred to as Brendel).

7. Subsequent to the issue of these warrants, the police on the evening of the 22 December 2003 proceeded to execute the warrants. In addition to the execution of search and seizure warrant at Brendell, the police also searched and seized certain items at no. 26-6th Road, plot 98 Cloverdene Benoni (hereinafter referred to as Cloverdene). The search and seizure at Cloverdene was without a warrant.

8. At Brendell the following items were seized:

- Chemicals;

- Photo of appellant 1 marked and admitted as exhibit E;

- A book in Chinese language translated as titled “Basis Organic Chemical Laboratory”;

- Photo of a bold headed man with a tattoo, marked and admitted as exhibit “F”.

9. At Cloverdene the following were found and seized;

- A book with notes thereon which was admitted and marked exhibit M;

- A book in a Chinese language and translated as titled “Practical Machine Manufacturing” found on the first floor and admitted as exhibit N;

- Affidavit purportedly by Olivier marked R.

10. Further at Cloverdene the following were found and seized:

- A pill press machine that can be used for manufacturing of mandrax found in a garage;

- Chemicals in containers of drums that could be used in the manufacturing of mandrax or drugs;

- A Corsa bakkie that was found in the garage;

- Ford Lazer bakkie that was found under a tree within the premises.

11. At both premises there was a very strong smell of chemicals. At one stage during the search and at Cloverdene, the police had to open the windows in one of the rooms upstairs due to the smell. The appellants were found at Cloverdene premises and were accordingly arrested by the police.

C. EVIDENCE BY DEFENCE

12. Both appellants stayed together at Cloverdene. They rented the premises in question since July 2003 and were paying R2 000.00 per month. They were aware of the smell. They did not know what was the cause of the smell. They tried to trace the smell outside the house, but not inside. Appellant 2 was aware of the chemicals inside the house. She did not know what they were been used for. Appellant 1 had no knowledge of the chemicals inside the house. They were not aware of the pill press machine in the garage. According to appellant 1, he had

never checked or have been in any of the other rooms in the house. They have been told by the owner of the garage not to access the garage and have never accessed the garage. They have never been at Brendel where the photo of appellant 1 was found and where some other documents relating to the appellant 2 were found. According to the appellant 2, the chemicals which she had observed in the house, she did not know what they were for.

13. In this appeal, the defence also contested the evidence relating to the search and seizure of certain articles at Cloverdene. Lastly, the defence challenged the trial court's competence to change a guilty verdict on contravention of section 5(b) of the Act, to guilty finding on contravention of section 3 of the Act.

D. ISSUES RAISED

14. In my view, the following issues were raised in this appeal:

- Whether or not the trial court was entitled to correct its judgment regarding guilty finding of contravention of section 5(b) to guilty finding on contravention of section 3 of the Act. And if so;

- Whether or not contravention of section 3 of the Act is an offence under Part 11 Schedule 2 of Act 105 of 1997 read

with section 51 (2)(a)(i) thereof.

- Whether or not, the state proved beyond reasonable doubt an offence in contravention of the provisions of the Act, falling under Part 11 Schedule 2 of Act 105 of 1997 read with section 51 (2)(a)(i) thereof.

- Whether or not the search and seizure without warrant in particular regarding Cloverdene premises were lawful? And if so;

- Whether or not the evidence adduced by the state proved the case against the appellants beyond reasonable doubt, or;

- To put it differently whether or not the only inference that can be drawn from the facts of the case, proved that the appellants had knowledge of the pill press machine and that it can be used for manufacturing of mandrax or drugs and whether or not they knew of the presence of chemicals and that they knew that they could be used to manufacture of mandrax or drugs.

E. APPLICABLE PRINCIPLE TO THE ISSUES RAISED

15. Section 176 of the Criminal Procedure Act provides that when

by a mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgment. The general principle is that once a judicial officer has given his judgment, he is functus officio and it allows that he cannot alter or revoke an order that he might have made (See Firestone SA (PTY) Ltd v Gentiruco (PTY) 1997 (4) SA 298 (A). The mistake must either consist of judicial officer saying something different to what he intended (See R V Aaron 1936 EDL 214). Corrections of judgment had to be done immediately after such a judgment is recorded. In other cases for example, it was held hat an alteration of a judgment or sentence on the following day was held not to be within the meaning of section. (See R v Mitondo 1939 EDL 110 and R V Lombard 1941 (2) PHH138 (c).

16. In terms of section 13(b) of the Act any person who contravenes a provision of section 3 shall be guilty of an offence. Section 17 of the Act deals with penalty clause and in terms of subsection (d) thereof, any person who is convicted of an offence referred to in section 13 (b) shall be liable to imprisonment for a period not exceeding 15 years or to both the fine and such imprisonment. Contravention of section 3 is an offence referred to in section 13(b) of the Act. Section 3 of the Act provides that no person shall manufacture any scheduled substance or supply it to any other person, knowing or suspecting that any such schedule substance is to be used in or for the unlawful

manufacture of any drug. It terms of section 51 (2) (a) (i) of Act 105 of 1997 a regional court or High court shall in respect of a person who has been convicted of an offence referred to in Part 11 of Schedule 2, sentence the person, in the case of a first offender, to imprisonment for a period not less than 15 years.

17. For this, an offence referred to in section 13 (f) if it is proved that the value of the dependence producing substance is more than R50 000 or that the value of the dependence producing substance in question is more than R10 000 and that the offence was committed by a person or group of persons, syndicates or any enterprise acting in the execution or furtherance of a common purpose or conspiring or if such an offence is committed by a law enforcement officer, shall become an offence falling under Part II Schedule 2 Act 105 of 1997.

18. In terms of section 5 (b) of the Act no person shall deal in any dangerous dependence producing substance. Section 13 (f) provides that any person who contravenes a provision of section 5(b) shall be guilty of an offence. Section 17(e) provides that any person who is convicted of an offence under this Act, shall be liable in the case of an offence referred to in section 13 (f) to imprisonment for a period not exceeding 25years or to both such imprisonment and such fine as the court may deem fit to imposed.

19. Turning to the Bills of Rights, section 14 of the Constitution provides that everyone has the right to privacy which includes the right not to have their person, home, or property searched and their possessions seized. Section 21 of the Criminal Procedure Act prohibits any search unless such a search and seizure is by virtue of a search warrant issued for example by a magistrate or justice, if it appears to such a magistrate on oath that there are reasonable grounds for believing that any such article is in the possession or under control or upon any person or upon or at any premises with his area of jurisdiction. Section 36 of the Constitution deals with limitation clause. It provides for limitation of Bill of Rights only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human rights, equality and freedom. Section 22 of the Criminal Procedure Act provides for search and seizure without a warrant under certain circumstances. For example, if on reasonable grounds it is believed that a search warrant will be issued under paragraph (a) of section 21 (1) if such a warrant is applied for and that the delay in obtaining such warrant would defeat the object of the search.

19.1 In terms of section 20 of the Act, if in the prosecution of any person for an offence under this Act, it is proved that

any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved that the accused was found in possession of such a drug. In terms of section 21 (1)(a)(iii) of the Act, if in the prosecution of any person for offence referred to in section 13(b), it is proved that an accused was found in possession of undesirable dependence producing substance, other than dagga, it shall be presumed until the contrary is proved, that the accused dealt in such dagga or substance.

19.2 'Dealing in' in relation to a drug does in terms of section 1 of the Act, include performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug. Drug in terms of section 1 means any dependence producing substance, any dangerous dependence producing substance or any undesirable dependence-producing substance. Undesirable dependence producing substance in terms of section 1 means any substance or any plant from which a substance can be manufactured, including in Part II of Schedule 2 of the Act. In terms of Schedule 2 Part II of the Act methaqualone is undesirable dependence-producing substance.

F. DISCUSSIONS, SUBMISSIONS AND FINDINGS

I now turn to deal with the issues raised in paragraph 14 of this judgment.

WHETHER OR NOT THE TRIAL COURT WAS ENTITLED TO CORRECT THE JUDGMENT

20. Judgment must be corrected immediately after it shall have been recorded. It must also be a mistake which consists of the judicial officer having said something which he did not mean to say. In the instant matter, the issue being whether or not she said something which meant or could be read to have meant that the trial court wanted to convict the appellants of contravention of section 3 of the Act and not of contravention of section 5 (b). On page 309 of the record the trial court expressed itself as follows:

> "Looking at the quantity no question, only reasonable inference, common sense dictates is, it is for dealing of mandrax. On the totality of the evidence this court is satisfied that the two accused were part of these syndicate. The question is now on which charge should the court convict them. There is no question as far as this court is concerned, if one look at the main charge, as well

> as the two alternative that the correct decision will be to find the accused not guilty - they had to have been in possession of all these substances, but to find the accused, seeing that it is count 1 and then two alternatives, that the correct decision is to find the accused GUILTY ON THE FIRST ALTERNATIVE
>
> That is that they were dealing in methaqualone and as the evidence suggested that, or proved beyond reasonable doubt in other words the common name that would be in mandrax. On the alternative to count 1, contravention of section 5(b) of Act 140 of 1992 the two accused being part of this syndicate that was investigated are found guilty."

On page 373 of the record, the trial court continued as follows:

> "The court just have to add something if it was not clear. The two accused's version that they were bona fide on this plot with the desire to make a living from vegetables is on the totality of the evidence rejected as false and thus not reasonably possibly and hence the accused is found guilty on the first alternative".

21. Regarding these quotations I can find no basis that the trial court

meant to find the appellants guilty of contravention of section 3, that is; manufacturing of mandrax or drugs. For example, she says they were dealing in methaqualone and that the common name would be "mandrax". Her assertion on page 374 seems to have wanted to invoke the provisions of section 176 referred to earlier in this judgment. At the end of page 374 on the 3 August 2005 the trial court stated as follows:

> "Alright, the court would like to rectify one aspect. I do not want to say it is an excuse but that I indicated that I convicted your clients on the alternative to court 1, that is the dealing. That is not correct because if you listened to the judgment too you would see that what I was talking about is that they were part of the manufacturing. Naturally manufacturing, from the manufacturing the dealing would have followed. I want to correct this before we go any further that I am convicting them on count 1, the main count, count 1".

Clearly, this is not in line with the quotations or it is confusing. Secondly, the trial court did not address itself to the requirement that such a correction should take place immediately after the judgment was recorded. The judgment of the trial court convicting the appellants of contravention of section 5(b) was recorded on the 22 July 2005. Correction thereof was sought to

take place on the 3 August 2005. In my view, this is not "immediately recorded' as required in terms of section 176 and therefore the trial court could not have corrected the judgment as it did. Whilst on this point, I must comment about the charge sheet. Contravention of section 3 was meant to be the main charge to contravention of section 5(b). In my view, this was wrong. The penalty clause as indicated in paragraph 18 of this judgment for contravention of section 5(b) is imprisonment not exceeding 25 years or to both such imprisonment and such fine as the court may deem fit to impose, whereas the penalty clause for contravention of section 3 is imprisonment not exceeding 15 years or both such imprisonment and fin as the court may deem fit to impose (See paragraph 16 above). Conviction on contravention of section 3 ought to be set aside and conviction on contravention of section 5(b) of the Act ought to be reinstated.

WHETHER OR NOT CONTRAVENTION OF SECTION 3 OF THE ACT IS AN OFFENCE UNDER PART 11 SCHEDULE 2 READ WITH SECTION 51(2)(a)(i) OF ACT 105 OF 1997

22. Whilst it may not be necessary to deal with this issue in the light of the order which I intend to make later in this judgment, I however, feel that I need to deal with this issue. On page 174 of the record referred to earlier in paragraph 20 of this judgment,

the trial court made no reference to the provisions of section 51(2)(a)(i) of Act 105 of 1997. Remember, this section provides for prescribed minimum sentence of 15 years on conviction of an offence referred to in Part 1I Schedule 2 of Act 105 of 1997. However, on pages 400 -401 of the record the trial court during sentencing stage expressed itself as follows:

> "The normal penalty for this kind of offence as embodied in section 17(d) of Act 140 of 1992 is a fine, that is in the discretion of the court, as well as imprisonment of a maximum of 15 years or both such imprisonment and such fine.
>
> But under the act of Act 105 of 1997, the Act on minimum sentence for serious offences the prescribed minimum sentence for a first offender, and you both are first offenders, is 15 years imprisonment. The court can defer from the prescribed sentence if material and compelling circumstances are found.
>
> After hearing the lengthy address of both the defence council, Advocate Sawayer, as well as Mr Smith this court is satisfied there are no material and compelling circumstances which can justify such a deferment. After considering all factors - and I must say even if it was not

> for the act on minimum sentences the court would still feel this is an appropriate sentence.
>
> The court have decided that the following is a sentence. I will ask you now to stand please. You are both sentenced in terms of section 51(2)(i) of Act 105 of 1997 to 15 YEARS IMPRISONMENT.

One can infer from this quotation that she meant to have convicted the appellants of an offence falling under Part 11 Schedule 2 of Act 105 of 1997, that is, contravention of section 3 of the Act read with the provisions of section 51(2)(a)(i) of Act 105 of 1997. In paragraphs 16 and 17 above, I referred to the relevant provisions of section 51 and the relevant offence falling under Part 11 Schedule thereof. Contravention of section 3 is not an offence referred to in section 13(f) but an offence referred to in section 13(b). Clearly therefor the minimum sentence under Act 105 of 1997 is not applicable for contravention of section 3. The trial court therefore could not have imposed 15 years imprisonment as if Act 105 of 1997 was applicable. To be more specific, the trial court could not have found contravention of section 3 to be a Part II schedule 2 offence under Act 105 of 1997.

WHETHER OR NOT THE SEARCH AND SEIZURE WITHOUT

WARRANT IN PARTICULAR, REGARDING CLOVERDENE PREMISES WERE LAWFUL?

23. The defence on page 39 of the heads of argument sought to attack the search and seizure without the warrant as follows:

> "112. Clearly section 22(a) could not be invoked in view of the common cause facts that the two appellants do not speak, neither understand English. Therefore no consent could have been obtained.
>
> 113. The state did not even attempt, despite cross-examination alerting them to the illegal search, to try and bring the facts within the ambit of section of section 22(b). It is submitted that the state would in any case have miserably failed if it attempted to do so in view of the further common cause fact that this operation extended for at least 15 months before the date of this search and arrest of the two appellants".

During oral submission, the point was persisted by counsel on behalf of the appellants. In paragraph 19 above, I referred to the relevant provisions of section 22. It must be believed on reasonable grounds that a search warrant will be issued if

applied for and that the delay in obtaining such a warrant will defeat the purpose of the search. I understood the defence to suggest that the evidence relating to the search or obtained during the search, was improperly obtained and it should therefore have been excluded as being inadmissible. In my view, challenge to the admissibility of evidence must be specifically raised.

For example, if such a challenge is specifically raised, a trial court could be under obligation to hold a trial within a trial to determine the admissibility of the challenged evidence. Any failure to hold a trial within a trial, where it should have been held, would render the trial unfair. Where there is a red light about challenge to the admissibility of evidence, a presiding officer should attempt to get clarity, especially where an accused person is undefended.

The appellants in the present case were legally represented by a counsel and in my view, ably so. Other than cross-examination as stated in paragraph 113 of the appellants' written heads of argument, the matter was never taken further. All what was sought during cross-examination was confirmation of the fact that such a search was without a warrant. It was never put to the witness that such a search was challenged as being unlawful in the absence of a warrant. Remember, after a long period of

police investigation, for possible contraventions of the provisions of the Act, the police on 22 December 2005 obtained search warrants.

However, there was no warrant to search 26-6th Cloverdene premises. The evidence by the police suggested that they knew on the very same evening of the information which led them to Cloverdene house. On page 76 of the record counsel for the appellants in the court *a quo* enquired as to when did the police know about Cloverdene premises, and Inspector Zeilstrachy's response thereto was as follows:

> "Edelagbare, terwyl ons by die adres by Kilarney straat was het misdaad intelegensie aan ons gesê die huis wat ons vroeer verkeerd geslaan het, dit was die huis reg langsaan, nommer 26.

24. His evidence further proceeded as follows:

Q. "So u- kom ons kry dit net ook weereens duidelik. Inspekteur u was by huis 24?

A. Ek kan nie onthou wat was die adres nie, maar die adres waar die beskuldigdes gearresteer was was reg langs die huis was ons eerste gedoen het.

Q. Daar is twee huise, die een anderkant die groentetuin of die een hier reg af?

A. Dit was anderkant die groentetuin wat on seers verkeerd geslaan het.

25. In questioning of Inspector Van Heerden called by the defence on page 255 of the record of the proceedings his evidence proceeded as follows:

Q. You knew about the premises here in Benoni as well?

A. Your Honour, I only found out the night with the arrest about the premises in Benoni.

Q. Again put it in perspective. You had the wrong premises here?

A. Your Honour, if I can bring the court in a short thing, in an overlook of the whole scenario that we sit with here. I had a premise in Springs that was surveyed, the original premises where everything started. So there I registered a project, the name is project Darling on that. That led us to the premises in Bredell, from there we went to two

other premises also in Kempton park from where the syndicate operate.

Q. And then there?

A. Your Honour, I never knew about this.

26. Counsel sought to criticise the police, firstly on the ground that it took them many months to investigate. I understood this to suggest that they should therefore have applied for the warrant or that they should long have known about the premises. Secondly, he suggested that the police should have left the scene to go and apply for the search warrant.

The evidence was that many police were at the scene around Cloverdene. They first went to the wrong place that is 28-6th Road. They were in a convoy. Police blue lights were on. They came later to the area after they had received a direction to go to 26-6th Road, Cloverdene. I do not think the police could have stopped the operation there and then without putting the purpose of the operation and in particular the search at risk.

The suggestion was that some members of the police could have been placed at the premises to guard until a warrant is obtained. This might be so, however I do not think that their failure in this regard should vitiate the search especially taking

into account the following:

- The police investigated the matter for a long period of time and when they were satisfied with the information at hand, they applied for the search warrants.

- The search warrants were granted.

- Such search warrants were to be executed during the night as a result of the activities which were being investigated by the police.

27. In my view, the police did not cut corners. For months, they did not hurry to search. They realized the importance of applying for search warrants. Of course, any search with or without a warrant would encroach on an individual rights to privacy as envisaged in section 14 of the Constitution. Right to privacy is clearly limited in terms of section 21 and 22 of the Criminal Procedure Act. Such a limitation in my view, should be seen in the light of the provisions of section 36 of the Constitution.

It would indeed defeat the proper administration of justice, should evidence be excluded in circumstances where the provisions of section 22 of Act 51 of 1977 could find an application. It would have been to expect too much from the

police, were the police to be forced to abandon the operation and come back later with the search warrant. I n my view, the police did not deliberately float the procedural aspect of seeking a search warrant to the extent that a sancture might be required. I therefore cannot find the search and seizure to have been unlawful in the circumstances of the case. On the same information they obtained the two warrants, they could have applied for the warrant to search Cloverden premises. Such a warrant in my view, would have been granted.

WHETHER OR NOT THE EVIDENCE ADDUCED BY THE STATE PROVED THE CASE AGAINST THE APPELLANTS BEYOND REASONABLE?

28. Regarding this issue, the question is whether the only inference that can be drawn from the facts of the case, one can say, that the appellants had knowledge of the pill press machine and that it can be used for manufacturing of mandrax or drugs and whether the appellants knew of the presence of chemicals and that they knew that the said chemicals could be used in the manufacturing of mandrax or drugs. Related hereto is whether the state proved beyond reasonable doubt an offence referred to in section 51 (2)(a)(i) of Act 105 of 1997 read with Part II Schedule 2 thereof.

29. The evidence against the appellants was more circumstantial in nature. The inference sought to be drawn from the proven facts is that the appellants dealt in mandrax or drugs. The followings are in my view proven facts in respect of which the inference is sought to be drawn against the appellants:

- A photo of the appellant 1 was found at Brendell premises. In addition, temporary residence permit for appellant 2 and an application form to join a spouse were also found at Brendell. Most importantly a book in Chinese titled "Basic Organic Chemical Laboratory" was found. The appellants denied ever been at Brendell premises. They denied any relationship with the people who were staying at Brendell. They could not explain, however, why documents relating to them were found in the premises.

- Drums containing chemicals were found in the premises where the appellants were staying at Cloverdene. Appellant 2 conceded to have seen these drugs. The appellant 1 alleged not to have been aware of the presence of the drugs. His denial should however, be seen in the light of the appellant 2' knowledge of the presence of these chemicals.

- There was a very strong smell on these chemicals. This was confirmed by the officer who had to open the windows on their arrival at Cloverdene in order to reduce the strong smell. Therefore, the suggestion by the appellants that they did not know where the smell was coming from and that they only looked outside for the smell cannot be reasonable possibly true. They could not have gone to look for the cause of the smell outside whilst the smell was so strong inside the house.

- The chemicals which were stored in the drums could be used to manufacture drugs. This was common cause as same had been admitted by the appellants.

- That a Chinese book translated as titled "Practical Medicine manufacturing" was found in the first floor at Cloverdene. The appellant1 suggested that he could not read nor write Chinese. Appellant 2, saw the book, but had no interest in it. The importance of this book should in my view, be seen in the light of what was found in the garage.

- A pill press machine capable of manufacturing mandrax or drugs was found in the garage.

- Final manufactured product represented by 12 tablets, tablet pieces, powder weighing 29 grams and a substance in the drying machine yielding methaqualone weighing 587,95 grams totaling 617,23 grams were found in the garage.

- And most importantly, a pill press machine, chemicals and substances including methaqualone from which a drug could manufactured were found in the immediate vicinity of the appellants.

30. Remember, it was admitted by the appellants that the chemicals or substances found in the house were capable of manufacturing drugs. Drugs amongst others, means any undesirable dependence producing substance to wit, for example, methaqualone. Dealing in drugs in terms of the definition includes the manufacture of a drug. In my view, therefore on the basis of the chemicals which were found in the house, the appellants should be deemed to have possessed such substances as envisaged in section 21 of the Act. Secondly, the appellants should be deemed to have dealt in the drug, methaqualone, being undesirable dependence-producing substance as referred on in section 21 (1)(a)(iii) of the Act and also as referred to in the first alternative charge being contravention of section 5(b) of the Act. Same should equally

apply to what was found in the garage. The pill press machine found in the garage should be deemed to have been possessed by the appellants as it was also found in their immediate vicinity. This pill press machine being capable of manufacturing drugs should also activate the presumption of dealing particularly that it includes performance of an act to manufacture drugs through the pill machine. (See again the definition referred to earlier in paragraph 19.2 of this judgment).

31. The appellants' defence about the things which were found in the garage was that they were told by the owner of the premises not to access the garage, secondly, they did not know about the pill press machine and were not aware of the activities inside the garage. These denials should be seen in the light of the presumptions referred to earlier in paragraph 19.1 of this judgment.

These presumptions should in my view, be considered in the light of the totality of all proven facts and also the appellants' version. Firstly, on their own version, they were spending most of their times within the premises looking after the garden. They allegedly looked for the smell outside the main house. No evidence to suggest that even if they wanted to, they could not have gained access into the garage. Secondly, their denials regarding knowledge of Brendell premises, things found at

Brendell, coupled with what was discovered at Cloverdene inside the house, the Chinese book and the strong smell of chemicals, cumulatively considered, in my view, dispel the notion that they innocently stayed at Cloverdene, not aware of what was happening around them including the activities in the garage. The two books that were found at the two premises respectively, in my view, are in line with the activities in the garage and things that were found in the garage including the chemicals that were found in the main house.

32. The trial court said nothing about the presumptions referred to earlier in this judgment. Counsel for the appellants wanted to suggest that in the light thereof, no regard could be had to the presumptions. I cannot agree with this preposition. Surely, the presumptions should be matters for consideration in this appeal. The chemicals in the house and the pill press machine and other substances found in the garage, just to repeat were found within the immediate vicinity of the appellants as envisaged in section 20 of the Act.

The trial court found the version of the appellants to be false. For example, the suggestion by appellant 1 that he never saw the drums containing chemicals, the suggestion that the appellants looked for the smell outside and the appellants' denial that they knew what the chemicals were all about. The

appellants' apparent and clear distancing themselves from the chemicals, in my view, is indicative of the knowledge of what these chemicals were all about. These are chemicals capable of being used to manufacture drugs or mandrax. Added to this, is the pill press machine capable of being used for the manufacturing drugs together with 12 tablets of drugs, tablet pieces, powder substance and a substance in a drying machine yielding methaqualone.

To suggest otherwise that the state did not prove its case against the appellants would be to require too much from the state. Remember, it is not required of the state to close every avenue of escape open to an accused person. It would be sufficient for the state to produce evidence by means of which such high degree of probability is raised, that reasonable man concluding that no reasonable doubt does exist that the accused committed the crime charged. A benefit of doubt in favour of an accused is to rest upon reasonable and solid foundation created by positive evidence or reasonable inference. (See S v Phallo and others 1999 (2) SACR 558 (SCA). The court is not required to consider every fragment of evidence individually to determine its weight, but rather to consider cumulative impression, with all fragments considered collectively, in determining whether the accused's guilt established beyond reasonable doubt. (See S V Ntsele 1998 (2) SACR 178 (SCA).

33. Having found that the trial court could not have lawfully corrected her judgment, I am satisfied that the evidence tendered during trial established the guilty of the appellants beyond reasonable doubt on contravention of section 5(b) of the Act. I now turn to deal with the issue whether the evidence showed that the appellants dealt in mandrax or drugs in contravention of section 5(b) of the Act, read with section 51(2)(a)(i) of Act 105 of 1997.

The defence led the evidence of Inspector Van Heerden. He is a member of the organized crime unit. He was one of the members who for a long period of time participated in the investigation of the activities at Bredell premises and the premises in Benoni. Clearly, on his evidence the value of the drugs found, were more than R10 000 or R50 000. His evidence in my view, had brought contravention of section 5(b) within the ambit of an offence under section 51 of Act 105 of 1997. Of course the charge sheet did not specifically refer to the provisions of section 51 (2)(a)(i) of Act 105 of 1997.

However, it became apparent during submission by counsel on behalf of the appellants during trial that he was specifically aware of the fact that the minimum sentence was applicable.

On page 385 line 5 whilst dealing with mitigation of sentence, counsel for the appellants stated as follows:

> "Maar my submissie is verder Edelagbare dat beskuldigdes staan voor u en u hou die sleutel tot hulle toekoms in u hande, u kan vir hulle baie jare in die gevangenis sit. Sindikaatbedrywighende, ek dink die minimum vonnis is 15 jaar. 15 jaar Edelagbare, waar hulle eintlik geen voordeel - en daar is geen getuienis dat hulle enige voordeel daaruit geniet het nie. Nie dat die wetgewer enige voordeel as in vereiste stel vir die oplegging van 15 jaar gevangenisstrag nie, maar now sit hulle ook al bykans twee jaar verhoorafwagtend en as ons .. .(tussenbei) "

G. SENTENCE

34. Whilst the trial court meant to be dealing with contravention of section 3 during sentencing, it found that there were no compelling and substantial circumstances to justify a lesser sentence than 15 years direct imprisonment. She was however wrong in finding that contravention of section 3 of the Act is an offence under section 51 (2)(a)(i) read with Part I1 of Schedule 2 of Act 105 of 1997.

Having found that the earlier conviction on contravention of

section 5(b) of the Act should stand, and having found that contravention section 5(b) is an offence under Part II Schedule 2 of Act 105 of 1997, I find that factors taken into account by the trial court when dealing with the presence or absence of compelling and substantial circumstances should still stand. Having considered all of these factors that is, the nature and seriousness of the offence, the interest of the society, personal circumstances of the appellants and the circumstances under which the offences were committed, I can find no existence of compelling and substantial circumstances.

35. Lastly, I must comment about the magistrate's behaviour during trial. Remember a presiding officer through out the proceedings is required to be an empire who must ensure that proceedings are conducted according to the rules of court. But, most importantly, to be impartial, calm and treat each person with decency and respect.

Proceedings in court should not be used as platform to express one's personal convictions and ideas or believes. Those who appear before us should not only feel that they have been treated respectfully, but, should also see that justice is being done. It is these negative remarks and attitude which are sometimes made in court by presiding officers, which create a bad image of the judiciary as a whole.

36. I must say I have read with pains and surprise the record of the proceedings in the court aqua. I read and tried to understand many remarks made by the trial court through out the proceedings. I should be concerned and doubt if this was just an isolated incident in which the presiding officer lost her cool. It is for this reason, that I intend referring this matter to the Magistrate Commission for their consideration and possible remedial measures. I hereunder refer to some of many negative remarks made by the presiding officer in the court *a quo*:

During the evidence of Inspector Pieters for the state, the presiding officer referring to Exhibit “O””a traffic document" having enquired what the nationality of the person referred to in the document was, and after the interpreter had answered "Chinese' the trial court remarked as follows:

> "Chinese! Just hang on. This is what is so crazy about this world. I am looking at this Exhibit "O" which is suppose to be a traffic registered number but, there is no indication of any ID number. Now what is the purpose, except of spending tax payers' money printing no sensical documents?"

On page 148 of the record whilst Inspector Pieters was being

cross-examined and having indicated to the presiding officer that a certain person referred to in the proceeding as Zony Yuping could not be found, on page 149 thereof the presiding officer remarked as follows:

> "As julle nou hierdie mense soek - julle soek nou hierdie mense … Jy weet jammer dat ek nou nie baie vertroue het nie maar het julle al gaan kyk of hierdie man ooit in die land is en of hy uit is?'

Inspector Pieters tried to respond to this remark and stated:

"Edelagbare, ons het beriggewers wat … (tussenbei)" and the presiding officer proceeded as follows:

> "Nee, maar wag 'n bietjie meneer. Ek weet dat die wereld is een hoop van hopeloosheid en ek bedoel teen hierdie tyd weet ons, ons kan nou nie vreeslik vertroue he in die binnelandse sake nie, want ons almal lees die koerant en ons alaml sien die programme wat gemaak word rondom korrupsie in die department, maar seer sekerlik is daar tog 'n record van mense die land uitgaan of inkom? Julle het dit nie gedoen nie?

This statement in my view is unfortunate. It is this kind of

statement which creates a bad perception about the judiciary. For example, one might be tempted to say the statement was political and it was used at a wrong forum and at the wrong time. The witness, inspector Pieters, should also have found himself in a very difficult situation where he had to attempt to answer question. in a somewhat hostile atmosphere from the court. For example, on page 150 of the record part 3 as inspector Pieters was trying to respond to the presiding officer's questions, the presiding officer remarked as follows:

> "Maar meneer my liewe maqtiq /nspekteur Pieters. ek het rede om qeen vertroue en qeen respek te he nie. Hoe kan u nou su/ke boq vir my kom staan en verte/? Oit juis wanner jy nie 'n adres het nie, dit is juis waneer jy nie weet waar 'n man is nie wat jy 'n J50 /aat magtig sodat dit gesirku/eer kan word sodat iemand wat vir 'n ommblik nie hope/oos is nie da/k by 'n grenspos hierdie paspoort kyk en da/k hopelik weet ons, ons is veronderste/ om in die 21 ste eeu te /ewe. dit /yk asof ons noq 'n k/omp voortrekkers is, dat hulle kan sien of hierdie man daar is. So asseblief moet nie vir my snert kom praat nie. Ekskuus tog, iammer vir daardie uitbarstinq maar weet u, ek wonder partykeer hoekom b/y ek nog hier. U moet su/ke goed doen, iissie. Jammer Mnr. Sawayer, ek moet op 'n persoonlike punt daardie toespraak inkry".

37. Remember, many of the people who appear before us as witnesses, really, did not choose to appear. They appear because, they are competent and compellable witnesses. Like victims of crime, they testify in court because they want to see justice being done.

They should therefore be encouraged to give evidence without fear that they would be ridiculed. Our police officials and most of them are under tremendous pressure in ensuring that law and order is maintained in our country. When they so appear before us, they need to be acknowledged and most importantly respected. It serves no purpose to burst when dealing with them no matter how sloppy their work could be.

38. Many other negative comments were made by the presiding officer during the evidence of inspector Pieters, amongst others, (See pages 152 line 10, 168 line 15, 170 line 15, 171 line 15 and 172 line 51). Inspector van Heerden who was called as a defence witness also was confronted with same attitude from the bench in the court *a quo*. When asked as to when did the police started keeping the suspected premises under surveillance he gave the answer by saying "if he was not mistaken". The presiding officer immediately remarked and stated as follows on page 253, line 5 of the record:

> "Do not say things like, if I am not mistaken. That is a no-no in this court. I am the only one who is allowed to make mistake and I am not allowed to. So please do not do that.

The presiding officer on page 254 when inspector van Heerden did not bring along certain records in court, remarked as follows:

"Why not? What is wrong with Organized Crime? Do you not understand when you come to court you must have everything? On page 256 lines 5 and 10 the presiding officer proceeded as follows:

> "You at Organized Crime must pull up your socks". Whilst inspector van Heerden was trying to explain himself, the presiding officer interrupted him and remarked again as follows:
>
> "Ja, but I tell you what, the police must pull up their socks. I have a good mind in writing a report about what is done and what is not done. It is in the interest of everybody, also the people who are being accused, that we get all detail. Because you know I think we all know that sometimes the small little detail will make the improbable

all of a sudden probable. And you say when you do your investigations must do that."

39. In my view, these kinds of remarks can compromise one's proper evaluation of evidence at the end of the case. For example, at the end of the case, the presiding officer was expected to deal with the credibility and reliability of the evidence of witnesses. Having made negative comments on these witnesses even on some irrelevant issues, could cloud one's reasoning at the end of the case.

40. Certain untasteful remarks were made by the trial court during the evidence of the appellant 1. On page 216 Part 2 of the record, when appellant was asked by his counsel if he had seen or knew what chemicals were in the house, the trial court in line 15 thereof remarked:

"Ja. for God's sake. do not tell me he does not know what chemicals are, then I would really ask from which planet is he? Because everybody has got to know what chemicals are. Ms Linn? On page 217 line 5 the presiding officer proceeded as follows:

"Alright, because he must just understand. I am not asking him if he knew this chemicals, but I mean for

> crying out loud. it is impossible. You can tell him Ms Linn, there is no-way. A little child that aGe will know what chemicals are, please".

On page 228 Part 2 of the record, the presiding doubting that the appellant 1 was paying rental in the sum of R2000 expressed herself as follows in line 20 thereof:

"What? Sir, with the greatest respect, you people were living like pigs in that house. You paid R2000 for a room and then for a stamp, postage stamp, and you say that was for the vegetables".

Choice of words in any court proceedings is very important. Wrong choice of words can create a wrong impression about judicial officers and in particular the image of the judiciary as a whole. To akeen human beings with pigs for example, can be seen as an insult. Remember, the accused too must be treated with respect and dignity. They are innocent until proven otherwise. Negative remarks directed at them may create the impression that the presiding officer is bias and not impartial.

CONCLUSION

41. In conclusion I would dismiss the appeal by making the following order:

41.1 Conviction of the appellants on contravention of section 3 is hereby set aside.

41.2 Conviction of the appellants on contravention of section 5(b) of the Act is hereby reinstated and confirmed on appeal.

41.3 Sentence of 15 years direct imprisonment is confirmed for contravention of section 5(b) of the Act.

41.1 The registrar of this court is directed to send a copy of this judgment to the Chairperson of the Magistrate Commission and to the magistrate who presided over the case in the court *a quo*.

M F LEGODI
JUDGE OF THE HIGH COURT

I, agree

F J JOOSTE
ACTING JUDGE OF THE HIGHCOURT