LL Case No 80/1990

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MAKS MASIKE Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN, E M GROSSKOPF JJA et VAN COLLER AJA

HEARD: 2 MARCH 1992

DELIVERED: 13 MARCH 1992

JUDGMENT

VAN HEERDEN JA:

On 7 December 1984 a police trap, one Benn, entered the home of Mrs Patricia George in the district of Port Elizabeth. In the dining room he and a companion encountered Mrs George and the appellant. Benn referred to a previous arrangement with Mrs George, said that he had come for "the merchandise" and, upon being asked by her what quantity he required, replied that he wanted 250 Mandrax tablets. Mrs George left the room and on her return produced tablets from her bosom. Benn then paid her the sum of R1 500. She handed this amount to the appellant who proceeded to count the money.

Shortly afterwards, and pursuant to a pre-arranged plan, warrant officer Strydom burst into the dining-room. Mrs George tried to hide the tablets but was thwarted by Strydom. She then threw the tablets on the floor and commenced crushing them underfoot. At this stage the appellant left the room with the notes that had been handed to him by Mrs George.

The scattered tablets and fragments were collected and later analysed. There were then 184 tablets and 15.69 grams of fragments and powder, all of which contained methaqualone.

As a result of the above occurrence Mrs George, the appellant and a co-accused were arraigned in a magistrate's court on a main charge of dealing in the said quantity of Mandrax in contravention of s 2(a) of the Abuse of Dependence Producing and Rehabilitation Centres Act, No 41 of 1971 ("the Act"). In essence Mrs George and the appellant denied that there had been Mandrax in the house on the day in question and that any deal had been concluded with Benn. Their versions were rejected by the magistrate, and each was found guilty on the main charge and sentenced to eight years imprisonment of which two years were conditionally suspended for a period of five years. Following on unsuccessful appeals to the Eastern Cape Division (against their convictions and sentences) they were

granted leave to appeal to this court against sentence only.

Mrs George died before the hearing of the appeal in this court. Hence only the sentence imposed upon the appellant need be considered.

The appellant did not give - or tender - evidence in mitigation of sentence. Apparently his personal circumstances were brought to the attention of the magistrate by his legal representative but these were not recorded. However, nothing appears to turn on this omission.

The respondent led the evidence of captain Ferreira on the prevalence of the offence in the Port Elizabeth area. He testified that from June 1984 to June 1985 there had been 64 arrests involving some 14 600 Mandrax tablets, and that during the period June 1985 to June 1986 the arrests had increased to 86 involving 4 661 tablets. It does not, however, appear from Ferreira's evidence how many of the arrests led to

actual convictions. But since the magistrate did not rely on the above statistics when sentencing the appellants, no more need be said thereanent.

At the time of the trial the appellant was a 53 year old self-employed man who for some time had had a relationship with Mrs George. He did have previous convictions but none under the Act. It does appear, however, that on 17 December 1984 he was convicted of dealing in dagga. The magistrate did not refer to this conviction, presumably because at the time of sentencing in the present matter the conviction was the subject matter of a petition for leave to appeal.

When considering appropriate sentences the magistrate pointed out that the offence in question was a very serious one. He went on to say that the personal circumstances of Mrs George and the appellant could not take precedence over the interests of the community; that the number of the tablets was an indication of the scope of their activities; that this

in turn was a "guideline" to the attitude of Mrs George and the appellant which he had "to take into account", and that:

> "... the evidence indicates a well-oiled organization for the distribution on a wholesale basis of tablets and possibly even at retail level."

I have some difficulty in following the import of the quoted passage. There was no evidence that either Mrs George or the appellant was in possession of more tablets than those sold to Benn. Likewise there was no evidence that they were directly involved in a "well-oiled organization". They may well have acted exclusively for their own account and to a relatively limited extent. Be that as it may, it certainly does not appear that the appellant played an active role in the procuring of the tablets in question. His uncontested evidence was that he visited Mrs George on a number of occasions during 1986, and that he arrived in Port Elizabeth on 5 December 1984,

i e two days before the commission of the offence. By then Benn had already - on 29 November - contacted Mrs George and had asked her to sell Mandrax tablets to him. She said that she had none available and it was arranged that she would phone Benn after she had procured a supply. The envisaged phone call was made on 6 December.

The evidence does not show when Mrs George obtained possession of the tablets, and she may well have done so prior to 5 December. The magistrate accordingly materially misdirected himself in making the quoted passage applicable to the appellant, and also in stating that "the Court must assume that he [the appellant] is involved in it in that he took an active part in the negotiation - in the whole transaction". There was no room for such an assumption. It suffices to mention that the appellant was not in Port Elizabeth when the initial "negotiation" took place on 29 November, and that the

only direct evidence of his involvement related to the handing-over and counting of the money.

On the assumption that the magistrate materially misdirected himself, it was rightly common cause that this court should afresh consider a proper sentence in the light of the provisions of s 2(i) of the Act as amended by s 1(a) of Act 78 of 1990: Prokureur-Generaal, Noord-Kaap v Hart 1990 (1) SA 49 (A). The amended s 2(i) now provides that an offender found guilty of dealing in a prohibited dependence-producing drug, such as Mandrax, shall be liable to imprisonment for a period not exceeding 25 years or to both such imprisonment and a fine. Hence the appellant may now be sentenced to less than the mandatory five years imprisonment which was applicable at the time of sentencing by the magistrate.

No doubt the appellant did commit a serious offence - witness the maximum sentence of 25 years imprisonment (and notionally also a fine) which may be

imposed on even a first offender. The appellant also has a bad record reflecting criminal propensity. I need mention only two of his previous convictions. In 1975 he was convicted on two charges of theft and sentenced to imprisonment for corrective training. And in 1980 he was found guilty of an offence somewhat analogous to dealing in a prohibited drug, viz dealing in intoxicating liquor without a licence.

On the other hand, the number of tablets involved, although by no means insignifcant, does not afford an indication of a large scale distribution of Mandrax. But what is more important, is that the appellant played a minor part in the sale of the tablets to Benn. I repeat that he was not involved in the initial arrangement between Benn and Mrs George, and it does not appear that he took part in procuring the tablets. Although he no doubt knew that Mrs George was going to supply the tablets to Benn, and agreed to assist her, he did no more than count the money after

it had been handed to him by Mrs George.

In the light of the above considerations I seriously doubt whether from the point of view of deterrence, retribution or reformation a relatively long term of imprisonment will better serve sentencing objectives than a medium term. In this regard it must also be borne in mind that the appellant's involvement in the commission of the offence may well have been fortuitous in that he just happened to visit Mrs George at the critical time. I am accordingly of the view that a proper sentence is four years imprisonment of which two years is conditionally suspended.

The appeal succeeds and the following is substituted for the sentence imposed on the appellant by the magistrate:

> "Four years imprisonment of which two years is suspended for five years on condition that the accused does not during the latter period

contravene any of the provisions of s 2(a) or 2(c) of Act No 41 of 1971."

H J O VAN HEERDEN JA

E M GROSSKOPFF JA

CONCUR

VAN COLLER AJA