RESEARCH ARTICLE

Delano Cole van der Linde

Senior Lecturer,
Stellenbosch University
ORCID: https://orcid.org/0000-0003-3347-3077

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DOES THE STATE HAVE TO PROVIDE SUBSTANTIATING EVIDENCE WHEN AN ACCUSED PLEADS GUILTY TO DRUG-RELATED CHARGES? A DISCUSSION OF *S V PAULSE* 2022 (2) SACR 451 (WCC)

SUMMARY

This analysis assesses the ruling in the case of *S v Paulse* 2022 (2) SACR 451 (WCC) and examines the possibility of an accused entering a guilty plea and subsequently being convicted for offenses under sec. 4(b) of the *Drugs and Drug Trafficking Act* 140 of 1992 (DDTA), even when the State presents no supporting evidence for such a conviction. According to the *Criminal Procedure Act* 51 of 1977 (referred to as "CPA"), a court has the authority to convict an accused who pleads guilty to a serious offense as defined in sec. 112(1)(b), following a thorough inquiry of the accused. This process is designed not only to safeguard the accused from unwarranted convictions but also to expedite proceedings. Nonetheless, legal precedents have indicated that determining whether a substance falls within the category of an "undesirable dependence producing" substance, as outlined in Part III of Schedule 2 of the DDTA, might be beyond the accused's knowledge.

To prevent unjust convictions, the State should provide the court with a certificate as outlined in sec. 212(4)(a) of the CPA, if the accused is unable to offer this information. This certificate is issued by a qualified expert subsequent to necessary tests that establish the chemical composition of the substance in question. The certificate acts as preliminary evidence of the relevant fact. When such a certificate is not presented, the courts ought to adopt a more careful approach, especially when an accused is unrepresented by legal counsel. This careful approach during questioning is intended to satisfy the court that the substance indeed falls under the prohibited category as per the DDTA. This approach underscores the importance of due process.

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There have been instances where some courts have been hesitant to demand the sec. 212(4)(a) certificate or to employ a more cautious approach, seemingly giving greater weight to crime control. However, to safeguard accused individuals from baseless convictions and to uphold their right to a fair trial as stipulated in sec. 35(3) of the Constitution of the Republic of South Africa, 1996, it is imperative to prioritize considerations of due process.

1. INTRODUCTION

In *S v Paulse* (hereafter, "*Paulse*"),[1] the Western Cape Division of the High Court had to consider whether an accused could plead guilty in terms of sec. 112(1)(*b*) of the *Criminal Procedure Act*[2] (hereafter, "*CPA*") to the use and/or possession of a substance under sec. 4(*b*) of the *Drugs and Drug Trafficking Act*[3] (hereafter, "*DDTA*"), and subsequently be convicted, without producing the certificate described under sec. 212(4)(*a*) of the *CPA*. This certificate confirms that a forensic analyst has examined the substance in question and confirmed its composition. Although case law indicates that such a certificate is unnecessary, a small body of case law emanating from the Western Cape High Court has developed, requiring the production of such a certificate in the event that an unrepresented accused pleads guilty to drug-related offences.

This note evaluates the judgment in *Paulse* against the backdrop of the relevant statutory provisions under the *CPA* and conflicting case law on the question of whether a sec. 212(4)*(a)* certificate is necessary following a guilty plea. Finally, it illustrates that the two schools of thought fit more or less within the due process and crime control models of criminal procedure.

2. BRIEF OVERVIEW OF THE RELEVANT STATUTORY PROVISIONS

2.1 Section 112(1)(*b*) of the *Criminal Procedure Act* 51 of 1977

Sec. 112(1)(*b*) of the *CPA* deals with the plea of guilty relating to serious offences. Sec. 112(1)(*b*) applies where an accused faces direct (or another form of) imprisonment and where there is no option of a fine, or where an accused faces a fine exceeding the prescribed amount.[4] This prescribed amount is currently R5 000.[5] An accused is also entitled to submit a written statement[6] regarding his or her guilty plea instead of being subjected to questioning under sec. 112(1)(*b*). A judicial officer may, therefore, convict the accused based on this written statement.

1 *S v Paulse* 2022 (2) SACR 451 (WCC).
2 *Criminal Procedure Act* 51/1977.
3 *Drugs and Drug Trafficking Act* 140/1992.
4 See also Theophilopoulos (ed.) 2020:299.
5 See GN R62 *Government Gazette* 2013:(36111).
6 *Criminal Procedure Act* 51/1977:sec. 112(2).

The wording under sec. 112(1)(*b*) is peremptory and imposes an obligation on a judicial officer to question an accused who falls under the purview of this section. This contrasts with the wording under sec. 112(1)(*a*),[7] which relates to less serious offences and employs the word "may". It, therefore, provides the judicial officer with a discretion to question the accused. The questioning is primarily aimed at determining "whether an accused's factual statements and answers in his or her plea of guilty adequately support the conviction on the charge".[8]

The Supreme Court of Appeal held that a court's role is not to determine the "plausibility" or "truthfulness" of the answers provided.[9] The questioning should also be aimed at establishing whether the accused understands the elements of the relevant offence and is, in fact, admitting that they committed the offence in question.[10] At this stage, a judicial officer should accept the answers provided by the accused as true.[11] However, a judicial officer must be alert to the answers provided by the accused and particularly whether a possible defence is disclosed.[12] Where doubt exists as to the guilt of the accused, sec. 113 of the *CPA* applies, and a court is obliged to enter a plea of not guilty on behalf of the accused, necessitating a prosecutor to proceed with a prosecution in the ordinary fashion.[13]

The purpose of sec. 112(1)(*b*) is twofold. First, it is cost- and time-saving, as it generally eliminates the need for a full trial and the production of further evidence where the accused admits to and understands all the elements of the crime.[14] The questioning must be done in a manner and language that is understandable to the accused.[15] This is particularly important in instances involving "unrepresented or illiterate accused".[16] Judicial officers should also

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7 Sec. 112(1)(*a*) of the *CPA* states that:
(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea—
(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and—
(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or
(ii) deal with the accused otherwise in accordance with law [.]

8 *S v Shiburi* 2018 (2) SACR 485 (SCA):par. 19.

9 *S v Shiburi*:par. 19.

10 Joubert *et al.* 2020:315; Theophilopoulos 2020:299.

11 *S v Shiburi*:par. 19.

12 *S v Shiburi*:par. 19.

13 See also *S v Ntlakoe* 1995 (1) SACR 629 (O):633.

14 *S v Shiburi*:par. 18. See also Van Rooyen 1976:207.

15 *S v Baron* 1978 (2) SA 510 (C):512.

16 *S v Fransman* 2018 (2) SACR 250 (WCC):11; *S v Baron*:512.

be circumspect as an accused waives his or her right to silence.[17] Secondly, it protects an accused from an "unjustified" guilty plea.[18] In this regard, unjustified convictions are a particular risk for the accused who is not literate or unrepresented, as pleading guilty may be rash or done without considering the full scope of consequences.[19] This is in furtherance of the accused's fair trial rights under sec. 35(3)[20] of the *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution*). The right to a fair trial is relatively comprehensive concerning specific rights but is by no means a *numerus clausus*. The right to a fair trial "extend[s] into the sphere of a broader residual right".[21] The fair trial rights of an accused will also be violated where a judicial officer questions an accused in an improper and aggressive manner.[22] The right to a fair trial, as a point of departure, should guide the framework of the questions that the judicial officer poses.[23]

The role of the prosecutor is limited where the accused pleads guilty and either sec. 112(1)(*a*) or (*b*) is invoked. The State should provide an overview or summary of the case against the accused.[24] In *S v Vorster* ("*Vorster*"),[25] the court held that, on the condition that the charge sheet discloses an offence, the State generally "has no further obligation on a plea of guilty".[26] This is in contrast to their ordinary duty, as the master of the proceedings (or *dominus litus*) in a full hearing present evidence and prove all the elements of the crime beyond a reasonable doubt.[27] There is instead a duty on the judicial officer to properly question the accused.[28] Du Toit, however, submits that it is also not the role of the court to place themselves in the role of the prosecution and establish "every piece of evidence which the state could have possibly presented".[29]

Theophilopoulos *et al.* note that the procedure under sec. 112(1)(*b*) is inquisitorial in nature.[30] The South African criminal process is predominantly,

17 *Constitution*:sec. 35(3)(*h*).
18 *S v Shiburi*:par. 18; *S v Naidoo* 1989 (2) SA 114 (A):121; *S v Fransman*.
19 *S v Fransman*:par. 11.
20 *S v Shiburi*:par. 18.
21 Van der Linde 2018:201, relying on *S v Zuma* 1995 (4) BCLR 401 (CC):par. 16. See also *S v Dzukuda; S v Tshilo* 2000 (2) SACR 443 (CC):455.
22 See *S v Williams* 2008 (1) SACR 65 (C):par. 5, 16-20. There the court held that the questioning by the magistrate took the form of a cross-examination of the accused. It was held that this constituted a violation of his presumption of innocence and right to remain silent (under sec. 35(3)(*h*)) and right against giving self-incriminating evidence (under sec. 35(3)(*j*)) as well as the right to hearing before an impartial and fair court (under sec. 34).
23 Theophilopoulos 2020:300.
24 Du Toit *et al.* 2022:317-318.
25 *S v Vorster* 2002 (1) SACR 379 (N).
26 *S v Vorster*:387.
27 Schwikkard & Van der Merwe 2016:603.
28 *S v Vorster*:387.
29 Du Toit 2021:524. The original text (in Afrikaans) reads "… elke stukkie getuienis wat die staat moontlik sou kon aanbied, vas te stel nie".
30 Theophilopoulos 2020:298. See also *S v Williams*:par. 20.

but not exclusively, accusatorial in nature.[31] There are notable exceptions such as an application for bail and the questioning under sec. 112. The questioning should furthermore not amount to judicial cross-examination[32] and the accused retains the right to refuse to answer any questions posed to them.[33]

2.2 Section 212(4)(*a*) of the *CPA*

According to *S v Naidoo* ("*Naidoo*"),[34] sec. 212(4)*(a)*

> provides that, whenever any fact established by an examination or process requiring skill in chemistry is or may become relevant to the issue in criminal proceedings, a certificate purporting to have been made by a person who in the certificate alleges that he is in the service of the State, and that he has established such fact by means of such an examination or process, shall upon its mere production at such proceedings be *prima facie* proof of such fact.[35]

It is pointed out in the provision itself that merely producing the relevant certificate constitutes *prima facie* proof of the fact in question. The Appellate Division held that, unless admissible contradictory evidence is submitted to the court, the assertions therein will harden into "conclusive proof".[36] The defence is, therefore, empowered to challenge the findings and conclusions contained in the report. Simply rejecting its accuracy is insufficient; the court will have to be provided with evidential material, in order to rebut the contents of the certificate.[37] The production of this certificate is also an exception to the requirement of *viva voce* evidence in criminal proceedings and where the witnesses are subject to cross-examination.[38]

2.3 The intersection between sections 112(1)(*b*) and 212(4)

There is a clear interplay between secs. 112(1)(*b*) and 212(4) of the *CPA*, especially in cases involving drunk driving as well as possession and use of drugs. An accused may elect to plead guilty and a judicial officer, by virtue of the offence being serious, will be compelled to question the accused under sec. 112(1)(*b*). Schmidt and Rademeyer note that courts should ensure that an accused is cognisant "of the meaning and consequences" of the admission and that the admission was made voluntarily.[39] If the judicial officer is satisfied that the accused is, in fact, guilty, they may convict them of the relevant offence without hearing other evidence. An exception has, however, emerged in case law. Certain courts have held that it would not be proper to convict

31 Theophilopoulos 2020:5-6; Joubert *et al.* 2020:22-24.
32 See *Le Grange v The State* 2009 (2) SA 434 (SCA):paras. 13-15.
33 Theophilopoulos 2020:300.
34 *S v Naidoo* 1985 (2) SA 32 (N).
35 *S v Naidoo:*39.
36 *S v Oosthuizen* [1982] 4 All SA 255 (A):258.
37 Kruger 2013:paras. 24-25.
38 Kruger 2013:paras. 24-25.
39 Schmidt & Rademeyer 2022:7-8.

an accused of offence, where an element of said offence falls beyond the accused's scope of knowledge. A sec. 212(4) certificate should be presented to the judicial officer in this event. This exception is particularly relevant where an accused is not represented.[40]

The following section discusses this very issue as it arose in the *Paulse* matter. Therefore, this contribution focuses on *Paulse* and on an evaluation of similar cases dealing with the same issue.

3. PAULSE

3.1 Facts and procedural background

The accused was convicted of contravening sec. 4(*b*) of the *DDTA*. She received a fine of R3 000 or a suspended sentence of 90 days.[41] Sec. 4(*b*) prohibits using and possessing a "dangerous dependence-producing substance or any undesirable dependence-producing substance". A list of "undesirable dependence-producing" substances is contained in Part III of Schedule 2 of the *DDTA* and includes amphetamine, methamphetamine, and methaqualone.

Since the accused faced imprisonment of up to 15 years,[42] a judicial officer was compelled to question the accused under sec. 112(1)(*b*) of the *CPA*, as sec. 4(*b*) is considered a serious offence.[43] It is clear from the court record that the court *a quo* informed the accused of the operation of sec. 112(1)(*b*) and that the accused elected to answer the questions posed by the court. The accused further indicated that she "freely and voluntarily" and free of influence or intimidation elected to plead guilty.[44] It must further be noted that the accused represented herself at the time she was questioned.[45]

The accused then recounted the two events that led up to the current proceedings. Although unclear from the limited information provided, the first

40 See Schmidt & Rademeyer 2022:7-8.

41 *S v Paulse*:par. 4.

42 Sec. 4(*b*) read with secs. 13(*d*) and sec. 17(*d*) of the *DDTA*. Sec. 64 of the *DDTA* further states that a court is empowered to impose "any penalty" under sec. 17 of the *DDTA*, but a magistrate's court may not exceed its penal jurisdiction. There are two types of magistrate courts in South Africa: district courts and regional courts. Under secs. 92(1)(*a*) and (*b*) of the *Magistrates' Courts Act* 32/1944, read with General Notice R63 of 30 January 2013, a district court may not impose a sentence of imprisonment exceeding three years or impose a fine exceeding R120 000. In contrast, regional courts may not impose a sentence of imprisonment exceeding 15 years or impose a fine exceeding R600 000.

43 See *S v Paulse*:par. 5.

44 *S v Paulse*:par.5.

45 *S v Paulse*:paras.1-2. The accused was initially represented but after her initial appearances and subsequent release on bail, she absconded. Due to this, the council withdrew from representing the accused.

event appeared to be a warrantless search.[46] The police found methaqualone and methamphetamine[47] (commonly referred to as "Mandrax" and "tik" in South Africa). The accused answered in the affirmative that she understood that these drugs "are undesirable dependence-producing substance[s]" that could attract criminal consequences. The accused further indicated that she intended to smoke the substances in question.[48]

Regarding the second event, the accused once more indicated that she voluntarily elected to plead guilty. During this search, the police again found methaqualone and methamphetamine in the possession of the accused.[49] She again indicated that she was aware that these are "undesirable dependence-producing substances" that may attract penal consequences and that she intended to smoke the substances.[50] Both the State and the court accepted the guilty plea on both charges. The court also held that there were no valid defences arising from the statements made by the accused and that her plea of guilty was correct. The court consequently found the accused guilty of both counts under the *DDTA*.[51]

On an automatic review to the high court,[52] that court questioned whether the proceedings in the magistrate's court "were in accordance with justice".[53] The magistrate was required to provide responses to two uncertainties. First, the basis for concluding that the accused possessed a listed drug under Part III of Schedule 2 of the *DDTA* (specifically methaqualone and methamphetamine) and whether that basis was founded merely on the sec. 112(1)(*b*) questioning.[54] Secondly, the reason why a sec. 212(4) certificate was not requested to affirm the validity of the accused's admission that she was in possession of the listed substances.[55] The court conceded that their findings were based solely on the admissions made during the sec. 112(1)(*b*) questioning and that they had "erroneously failed to request this evidence from the state".[56]

46 Various pieces of legislation enable warrantless searches. The *DDTA* is one such piece of legislation. Sec. 11(1)(*a*)(*i*) empowers police officials to enter premises if they have a reasonable suspicion that an offence under the *DDTA* has been committed or is about to be committed. Sec. 11(1)(*a*)(*ii*) further empowers the search for substances and sec. 11(1)(*b*) empowers the search of a person.
47 *S v Paulse*:par. 5.
48 *S v Paulse*:par. 5.
49 *S v Paulse*:par. 5.
50 *S v Paulse*:par. 5.
51 *S v Paulse*:par. 5.
52 *CPA*:sec. 302.
53 *S v Paulse*:par. 6.
54 *S v Paulse*:par. 6.
55 *S v Paulse*:par. 6.
56 *S v Paulse*:paras. 7-8.

3.2 Approach by the court

Henney J referred[57] to *S v Adams* ("*Adams*"),[58] which also involved the possession of drugs (specifically Mandrax).[59] There it was held that a court would be entitled to convict an accused based on their statements under the sec. 112(1)(*b*) questioning alone *if represented* by a legal representative.[60] The court in *Adams* held that this cannot endure if the accused is inexperienced and not represented by a legal practitioner. The court cannot then accept the accused's "admission of an unknown fact"[61] (the unknown fact being whether the substance found in possession of the accused is, in fact, a prohibited substance under the *DDTA*). A court must do more to be assured of a fact that falls beyond the personal knowledge of the accused. This can be achieved through "closer questioning" to "determine the strength of the knowledge on which he has made the admission"; by determining the surrounding supporting circumstances; or by analysing the relevant sec. 212(4) certificate.[62] This is not an absolutist approach, and each case must be judged on its own merits. The court is, however, not absolved from its judicial obligations because an unrepresented accused has elected to plead guilty.[63] According to *Naidoo*,[64] a court must not only ascertain the truthfulness of the facts admitted to by the accused, but also establish the reliability thereof.[65] Only reliable and truthful admissions can be used to establish the elements of the crime. The court, however, held that it does not propose an absolute rule for requiring further substantiation for matters that fall beyond the scope of the accused's personal knowledge.[66] In *S v Chetty* ("*Chetty*"),[67] the court held that "the State can and should" produce a sec. 212(4) certificate from an analyst.[68] This will prove that the substance in question "is what it is alleged to be".[69] Despite using such peremptory language, the court held that there are alternative methods to establish whether the substance in question contains the prohibited drug.[70] In this regard, Van den Heever and Rose-Innes JJ suggested that this may be done by ascertaining whether the drugs were obtained from a "reliable" dealer or whether the accused had consumed the drug themselves or by means of positive reports from consumers of the drug.[71] The then Cape Provincial Division set aside the conviction and sentence and remitted the matter to the

57 *S v Paulse*:par. 9.
58 *S v Adams* 1986 (3) SA 733 (C).
59 The accused was, however, charged with the forerunner to the *DDTA*, namely sec. 2(a) of the *Abuse of Dependence-Producing Substances and Rehabilitation Centres Act* 41/1971.
60 *S v Adams*:735.
61 *S v Adams*:735, 744.
62 *S v Adams*:735, 744.
63 *S v Adams*:735, 744.
64 *S v Naidoo*.
65 *S v Naidoo:*37.
66 *S v Naido*:37.
67 *S v Chetty* 1984 (1) SA 411 (C).
68 *S v Chetty:*413.
69 *S v Chetty:*413.
70 *S v Chetty:*413.
71 *S v Chetty:*413.

court *a quo*, in order to ascertain through "unequivocal factual admissions by the accused" that the substance in question is what the State purported it to be.[72] There is no mention of sec. 212(4) in this instance.

The court in *Chetty*, however, pointed to the potential danger of indiscriminately accepting an accused's testimony in drug-related cases. Manufactured products such as Mandrax pills (unlike a naturally occurring dagga plant) have no distinguishing features (such as a particular smell or appearance) and can be counterfeited. An accused is a lay person, and testimony that a particular substance "was a disprin or bactrim or mandrax or milk of magnesia must be suspect".[73]

In *Paulse,* the court referred[74] to Du Toit *et al.* who suggest "a more cautious approach" by an undefended accused involving both secs. 112 and 115 of the *CPA*.[75] The authors, citing Snyman, favour this approach and allude to the inherent dangers of an accusatorial system where "procedural" or "formal" truth is discounted in favour of "material truth".[76]

Ultimately, the court in *Paulse* found that, where the weight of the authority depends on scientific means, a "court *must* request the prosecutor to hand up the analysis certificate" (emphasis added).[77] Only after the sec. 212(4) certificate has been produced can a court be properly satisfied with the admissions made during the sec. 112(1)(*b*) questioning. This would be applicable in cases of undefended accused involving dangerous dependence-producing substances or undesirable dependence-producing substances proscribed under the *DDTA*[78] and the offence of driving a motor vehicle with an excessive amount of alcohol in one's system under sec. 65(2) of the *Road Traffic Act*.[79] The court *a quo* convicted Ms Paulse without the underlying scientific analysis contained in the sec. 212(4) certificate to confirm the accuracy of the admissions made during the sec. 112(1)(*b*) questioning.[80] Despite the court employing similar peremptory language (like the court in *Chetty*), Henney J still held that there are exceptions where a court may nevertheless convict the accused without producing a sec. 212(4) certificate. These instances include where the accused admits that they are addicted to the substance; that they obtained the drug from a particular dealer, and it had caused the desired effect on the accused; that some of the substance had already been consumed while in possession of the accused at the time of the arrest.[81] These are the grounds put forward in *Chetty*.[82] These grounds do not constitute *numerous clauses* of instances, whereby a judicial officer

72 *S v Chetty:*413.
73 *S v Chetty:*412.
74 See *S v Paulse*:par. 10.
75 See Du Toit *et al.* 2022:17-21-17-22.
76 Du Toit *et al.*:17-22; Snyman 1975:100, 108.
77 *S v Paulse*:par. 11.
78 *S v Paulse*:par. 11.
79 *Road Traffic Act* 93/1996; *S v Paulse*:fn 6. See also Hoctor 2009:B11-75; Du Toit 2021:516-524.
80 *S v Paulse*:par. 11.
81 *S v Paulse*:par. 12.
82 *S v Chetty:*413.

may confirm the veracity of the accused's testimony under sec. 112(1)(*b*) as it pertains to the allegation that the substance in question was one proscribed under the *DDTA*. Judicial officers "are under a duty to request" the sec. 212(4) certificate. This is the most reliable way to ascertain whether the substance is, in fact, what it purports to be.[83]

Consequently, Henney J found that the court *a quo* did not base its finding on any of the grounds mentioned above to conclusively find that the accused was in possession of the vexed substance(s) under the *DDTA*.[84] Accordingly, Ms Paulse's convictions and sentence were set aside.[85] Due to the number of cases that have been subject to automatic review and a failure to apply the guidelines in *Adams*, the court also directed the Chief Registrar to forward a copy of the judgment to the Chief magistrate of Cape Town to bring uniformity within the administrative regions of the Western Cape.[86] Due to the operation of *stare decisis*, the lower courts are bound by the finding in *Adams*, *Chetty*, and *Paulse*.

4. DISCUSSION AND CONCLUDING REMARKS

The decision draws attention to the very real danger of convicting innocent persons, particularly those not represented by a legal practitioner. It is not always that a person who pleads guilty is legally guilty due to noncompliance with the definitional elements of the crime. This may be true, despite the fact that they are factually guilty. It is, therefore, necessary to do a proper questioning under sec. 112(1)(*b*) to unearth this possibility and consequently follow the procedure under sec. 113 of the *CPA* and enter a plea of not guilty.

Innocent persons (be it legally or factually) may plead guilty for myriad reasons. This danger was clearly highlighted in *S v Mavundla*,[87] where Didcott J held that if an accused is

> [a]nxious to avoid the damaging consequences of a protracted trial, he may do himself an injustice without realising it by admitting after insufficient consideration something which, unbeknown to him, the prosecution could not have proved, perhaps because a thorough investigation would have shown it to be untrue. Extra caution is therefore needed when an undefended accused offers to admit a fact unlikely in B the nature of things to be within his own knowledge.[88]

Moreover, Du Toit *et al.*, Snyman, and Van der Merwe also warned against the risk of sec. 112(1)(*b*) becoming too formalistic at the expense of material truth.[89] Such a formalistic approach was noted in *S v Booysen* ("*Booysen*"),[90] where the court rejected the necessity for laboratory testing for the sake of

83 *S v Paulse*:par. 13.
84 *S v Paulse*:par. 12.
85 *S v Paulse*:paras. 14-15.
86 *S v Paulse*:par. 14.
87 *S v Mavundla* 1976 4 SA 731 (N).
88 *S v Mavundla*:733. See also *S v Tentelil* [2003] 1 All SA 327 (C):331.
89 See Van der Merwe 1980:102.
90 *S v Booysen* 1985 (2) SA 95 (C).

expediency. In the interest of the accused and not to delay the case further, Burger J held that testing would be unnecessary.[91] The court found that the decision in *Chetty* went too far, holding that the mere admission that the pills in question were Mandrax and no further evidence needed to be submitted to the court.[92] Despite the formalistic tenure of this judgment, the facts in this particular case would have fallen within the *Chetty* exceptions because the drugs were obtained from a trusted dealer.[93] Therefore, it appears that the court did not properly evaluate the scope of the judgment in *Chetty*. In *S v Arendse* ("*Arendse*"),[94] it became apparent on appeal that the sec. 112(1) (*b*) questioning done in the court *a quo* did not satisfactorily establish the necessary elements for liability for dealing in Mandrax. During questioning in the court *a quo,* the various accused had given unconvincing answers, with one accused answering that he did not really know the drug and two accused responding that it was the first time they had smoked it.[95] Rose-Innes J found that these answers could hardly amount "to a satisfactory admission".[96] The accused were indifferent to *what* substance they were selling and were only concerned that they were being paid R10 a tablet – whatever the substance may be.[97] Although the admissions of the accused were unequivocal regarding the sale of the purported Mandrax, they lacked the knowledge to admit to the fact that the pills were indeed Mandrax tablets. This was a clear-cut case of facts falling beyond the accused's scope of knowledge.[98] The admissions of the accused were insufficient to establish his or her guilt beyond a reasonable doubt.[99]

The court in *Arendse* went much further than *Chetty*, in that Rose-Innes J suggested that a serious charge such as dealing in drugs should, as a matter of course, be accompanied by a certificate confirming that the substance in question is what the State alleges it to be.[100] Therefore, over and above the fact that the questioning was generally defective, it did not establish whether the vexed pills were Mandrax.[101] An additional layer that complicated the case was that the vexed pills were nowhere to be found and could not be analysed. The court, therefore, faced the conundrum: in normal circumstances under sec. 312(1) of the *CPA*, where there has been non-compliance with sec. 112(1)(*b*), the case will be remitted to the court *a quo* to properly comply with

91 *S v Booysen*:96.
92 *S v Booysen*:96.
93 *S v Booysen*:96.
94 *S v Arendse* 1985 (2) SA 103 (K).
95 *S v Arendse*:106.
96 *S v Arendse*:106.
97 *S v Arendse*:107.
98 *S v Arendse*:107.
99 Also see *S v Ndzishe* [2023] ZAWCHC 167 (20 July 2023):par. 16, where the court held that the "sparse" admissions did not provide a satisfactory basis to establish beyond reasonable doubt that the substances in question were the unlawful substances in question. This was especially true, considering that no certificate was offered to substantiate the chemical composition of the substances.
100 *S v Arendse*:107.
101 *S v Arendse*:107.

the duties under sec. 112(1)(*b*) or to follow the procedure under sec. 113. This would, however, have been futile, as it was already established that the accused bore no knowledge of whether the pills in question were, in fact, Mandrax. Further, as the pills were missing, no scientific analysis could be performed to confirm their chemical composition.[102] The court subsequently found the accused not guilty of the charges relating to the Mandrax tablets.[103]

The remarks in *Arendse* are noteworthy because, already in 1985, a court realised the importance of scientific analysis. The court also realised the risk of convicting ignorant accused who may merely be selling pills for economic gain. Such an accused may simply be testifying that the pills are Mandrax because the police have informed them that it was. In this particular case, the only appropriate outcome was overturning the verdict of the court *a quo* because the State would not have been able to discharge their evidentiary burden without the pills.

However, it is clear that there has been no uptake of Rose-Innes J's suggestion that the testing be done as a matter of course. Such an approach will be the fairest to the accused, but the reality of backlogged forensic laboratories looms over South Africa.[104]

The process followed by the judicial officer left much to be desired. As mentioned earlier, the questioning under sec. 112(1)(*b*) is aimed at preventing unjustified convictions, especially by accused persons who are not literate or who are unrepresented. The questioning must further be done within the broad framework of the right to a fair trial under sec. 35(3) of the *Constitution*. The judicial officer, under this inquisitorial procedure, should take a more proactive and conscientious role, in order to protect the accused from trial unfairness and an unjustified conviction. This questioning should confirm the legal and factual guilt of the accused. The questioning must establish "the attributes or indicators [that] establish the identity of the substance at issue".[105] There cannot be an assumption by the judicial officer that the accused was aware of the chemical composition of the said substance.[106] Knowledge cannot be assumed merely due to prior use without proper questioning.[107] Since Ms Paulse was an undefended layperson accused of a crime carrying a possible

102 *S v Arendse*:107-108.

103 *S v Arendse*:108. See, however, *S v Gresse* 1985 (4) SA 401 (T):406-407, where the then Transvaal Provincial Division disagrees with this outcome (as well as the decision in *S v Chetty*) and rather agrees with the approaches in *S v Naidoo* and *S v Booysen*.

104 Matya "Parliament slams National Forensic Laboratory for failing to provide accurate data on DNA backlog", https://www.sabcnews.com/sabcnews/parliament-slams-national-forensic-laboratory-for-failing-to-provide-accurate-data-on-dna-backlog/#:~:text=Home%20South%20Africa-,Parliament%20slams%20 (accessed on 3 March 2023); Martin "MEC Reagen Allen on DNA backlog reduction", bit.ly/3q8HX0S (accessed on 3 March 2023); Van der Linde 2022:2.

105 *S v Ndzishe*:par. 12.

106 *S v Ndzishe*:par. 12.

107 *S v Paulse*:par. 12; *S v Ndzishe*:paras. 12-13.

prison sentence, more care should have been taken in establishing the guilt of the accused. This should have been done not only through the sec. 112(1)(*b*) questioning, but also by requiring a sec. 212(4) certificate.

Balancing a formalistic view (therefore, a stronger focus on crime control) with the interests of a potentially innocent (and unrepresented) accused (and a stronger emphasis on due process) may be difficult at times. Strong proponents of crime control "emphasize processing efficiency and conviction of the guilty, and would be willing to accept some factual error rate".[108] Packer describes this "efficiency" as "the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses have become known".[109] Efficiency also favours "[r]outine and stereotyped procedures" in dealing with large caseloads. This, in turn, evokes the image of a "conveyor belt … which moves an endless stream of cases" with the ultimate purpose of bringing finality to a matter.[110]

This approach is in contrast to the "Blackstone ratio" that would favour the exoneration of some of the guilty rather than risk convicting a single innocent person.[111] The judgment in *Arendse* (and, to a slightly lesser degree, in *Paulse*) can be viewed as the anthesis to *Booysen*. A stronger focus on due process de-emphasises the importance of efficiency (and therefore guilty pleas), which is prevalent when there is a stronger focus on crime control. Due process is equally concerned with the rights of the accused, especially marginalised groups that may not have access to legal representation.[112] This, in turn, de-emphasises the "formal fact" finding,[113] against which Du Toit *et al.*, Snyman, and Van der Merwe warned. The decision in *Paulse* is, therefore, welcomed, as it emphasises the plight of often unsophisticated, unrepresented persons who have also been relegated to the outskirts of society, due to their drug dependency. This also advances trial fairness in the broad sense.

108 Norris & Redlich 2014:1010.
109 Packer 1964:10.
110 Packer 1964:11. See also Roach 1999:676-677.
111 See Blackstone "Blackstone's Commentaries on the Laws of England", https://avalon.law.yale.edu/18th_century/blackstone_bk4ch27.asp (accessed on 3 March 2023).
112 Roach 1999:681.
113 Roach 1999:681.

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