

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

PRACTICE DIRECTIVE 61

<b>Case Title:</b> <i>The State v Belzel Tsaeb</i>	<b>Case No:</b> HC-MD-CRI-APP-CAL-2022/00068
	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Honourable Mr. Justice January <i>et</i> Honourable Ms. D Usiku J	<b>Heard on:</b> 30 June 2023
	<b>Delivered on:</b> 28 July 2023
<b>Neutral citation:</b> <i>S v Tsaeb</i> (HC-MD-CRI-APP-CAL-2022/00068) [2023] NAHCMD 448 (28 July 2023)	
<b>The order:</b> 1. The appeal is dismissed.	
<b>Reasons for the order</b>  JANUARY J ( D Usiku J concurring)	

[1] The appellant was charged with count 1: Contravening s 3(b) read with ss 1, 3(ii), 7, 8, 10, 14 and Part III of the Schedule of the Dependence Producing Substance and Rehabilitation Centres Act 41 of 1971 as amended, possession of potentially dangerous dependence-producing drugs, to wit: 4 doses of white powder wrapped in plastics, containing 53% of cocaine and 45 and a half units wrapped in plastic containing 20% of cocaine valued at N\$3150 and weighing combined 3.5 grams, and;

Count 2: Contravening s 2(b) read with ss 1, 2(i) and/or 2(iv), 7, 8, 10, 14 and Part I of the Dependence Producing Substance and Rehabilitation Centres Act 41 of 1971 as amended, possession of dependence-producing drug or a plant from which such drug can be manufactured, to wit: 10 mandrax tablets containing methaqualone, weighing 14.5 grams and valued at N\$1200.

[2] Appellant was unrepresented in the lower court and is represented in this court by Mr. Andreas, with Mr. Gaweseb representing the respondent.

[3] The appellant pleaded guilty to the charge and was questioned in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977, as amended. The learned magistrate was satisfied that the appellant admitted all the elements of the crimes. He was convicted accordingly. The appellant was sentenced to 24 months' imprisonment on count one and on count two, to 12 months' imprisonment of which six months was suspended for a period of three years on condition that the accused is not convicted of possession of dependence producing drugs, committed during the period of suspension. The sentences were ordered to run concurrently

[4] The appellant appealed against the sentences only. His grounds of appeal are as follows:

'The learned magistrate misdirected herself, alternatively erred in law or in fact:

1. When she failed to recognize that accused is a first offender and that he pleaded guilty;

2. When she failed to assist the unrepresented accused to elicit as much as (possible) information from him which could have assisted her in reaching a suitable sentence;
3. When she overemphasized the seriousness of the offense at the expense of the accused's personal circumstances;
4. When she ignored the fact that the accused is a youthful offender. A parent and a breadwinner:
5. When she failed to observe the principle of consistency/uniformity in sentencing in consideration of previous cases. Had she considered the principle of consistency in sentencing, she would not have sentenced the accused person to 24 months on the 1<sup>st</sup> count and the second count respectively.'

[5] The magistrate, in a well-reasoned judgment, applied the principles of sentencing cemented by the case of *S v Zinn*<sup>1</sup> and followed by various Namibian cases<sup>2</sup>. These are; the crime committed, the interest of society, the accused and his personal circumstances. Likewise, the objectives of punishment, i.e. prevention, deterrence, rehabilitation and retribution were considered. Moreover, that the sentence should fit the convict, the crime, be fair to society and should be blended with a measure of mercy, according to the circumstances.

[6] Further, the reasons reflect that the magistrate considered that the appellant was a first offender, youthful and that he pleaded guilty to the commission of the crimes. It is clear from the reasons that the magistrate balanced the personal circumstances of the appellant against the seriousness and prevalence of drug related crimes in her jurisdiction and in Namibia country wide. Although not stated in her reasons, the sentences reflect that the cumulative effect of the sentences were considered as the sentences were ordered to be served concurrently and in addition part of the sentence on count two were suspended on conditions.

[7] The appellant acknowledged that this court will be guided by the principle that punishment is pre-eminently a matter for the discretion of a trial court and that discretion should not be carelessly eroded. Such sentence should only be altered if the trial court did not

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<sup>1</sup> *S v Zinn* 1969 (2) SA 537 (A).

<sup>2</sup> Amongst others: *S v Tjiho* 1991 NR (HC) 361.

exercise its discretion judiciously.<sup>3</sup>

[8] It was further submitted that, considering that the appellant has shown to be a person of good character, a first offender and pleaded guilty, the magistrate should have imposed a more lenient sentence. Counsel referred to various cases<sup>4</sup> where fines with the alternative of imprisonment were imposed or the sentence was wholly suspended when he emphasized the principle of uniformity and to substantiate that the sentences are shocking and inappropriate.

[9] The cases are, however, different in that they relate to the dealing and/or possession of cannabis. The only similarity is that they are drug related. Counsel proposed sentences of N\$3000 or 12 months` imprisonment and N\$1000 or six months` imprisonment respectively for counts one and two. This appeal, in turn, relates to the possession of a dangerous dependence-producing drug, namely cocaine and dependence producing drugs, namely mandrax tablets containing methaqualone.

[10] The respondent initially raised a point in limine as he was under the impression that the notice of appeal was filed late. Counsel however, correctly so, abandoned it when he realized that the appeal was indeed filed on time.

[11] Counsel for the respondent submitted with reference to an article by Hogarth<sup>5</sup>, that although sentencing is a complicated and difficult task, the sentences in this appeal case are appropriate and balanced. He further submitted that the court a *quo* was authorized to give more weight on one or more aspects of the sentencing principles in the exercise of balancing principles.<sup>6</sup> Further, he referred this court to the principle of uniformity and individualization but submitted that circumstances unique to a particular case should also receive serious and particular attention. We agree.

<sup>3</sup> S v *Ndikwetepo and others* 1993 NR 319 (SC).

<sup>4</sup> S v *Daniels* (CR 31/2014) [2014] NAHCMD 170 (28 May 2014); *Mbundu v S* (HC-MD-CRI-APP-CAL-

2019/00056) [2019] NAHCMD 424 (22 October 2019); S v *Kambundji* (CR 62/2018) [2018] NAHCMD 243 (14 August 2018).

<sup>5</sup> J Hogarth 'Sentencing as a Human Process' (1972) at 233-280.

<sup>6</sup> S v *Van Wyk* 1993 NR 426 SC at 450G.

[12] It is trite that an appeal court is entitled to interfere with a sentence if:

- (i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentence proceedings;
- (iii) the trial court failed to take into account material facts or over-emphasized the importance of other facts;
- (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.<sup>7</sup>

[13] I do not find any misdirection by the learned magistrate. The sentence in the circumstances does not induce a sense of shock. The appeal against the sentence therefore stands to be dismissed

[14] In the result:

1. The appeal is dismissed.

<b>Judge(s) signature</b>	<b>Comments:</b>
January J:	
Usiku J	
<b>Counsel:</b>	
<b>Appellant</b>	<b>Respondent</b>
J Andreas Of Andreas- Hamunyela Legal Practitioners, Windhoek	T Gaweseb Of Office of the Prosecutor- General, Windhoek

<sup>7</sup> S v *Tjiho* 1991 NR 361 (HC) at 366.

