LINDINE FLORENCE MLAMBO versus THE STATE **CA32/97**

1997/09/29

Strydom, J.P. et Karuaihe, A.J.

DRUGS & MEDICINE:

Sentence - quantity a factor to be taken

into consideration for sentence - However

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all other factors stilly where Namibia has noEmany cases

where big quantities are involved - useful to look at

sentences in comparable cases in South Africa.

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CASE NO. CA 32/97 IN

THE HIGH COURT OF NAMIBIA

In the matter between

LINDINE FLORENCE MLAMBO

versus

THE STATE

CORAM: STRYDOM, J.P. et KARUAIHE, A.J.

Heard on: 1997.09.29

Delivered on: 1997.09.29

JUDGMENT:

STRYDOM, J.P.: The Appellant in this matter pleaded guilty to contravening section 2 (a) of Act 41/1971 that she dealt in 36,102kg cannabis with the value of N$108 576-00. She was sentenced to 10 years imprisonment of which 2 years were suspended on condition that she was not again convicted of contravening section 2(a) or 2(b) of Act 41/1971. She now appeals against the sentence only on the basis:

1. **That the magistrate failed to take into account that she was a first offender, she has four children dependent on her support and that she was suffering from epileptic fits as a result of which she had lost her**

3.

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On behalf of the Appellant, the legal practitioner informed the Court-a-^wo that the Appellant was 27 years old, the mother of four children ranging from 9 to 2 years respectively, and that she was resident in Natal. The Court was also informed that she had no money to pay a fine.

The state led the evidence of Sgt. Eiman who testified that the police received information as a result of which a road block was set up outside Luderitz and the Appellant was caught. The cannabis was in garbage bags, smeared with floor polish and masking powder to hide its smell. Eiman said that many people use cannabis to commit other offences and that the drug crime rate in the South of Namibia was high. The Appellant was already convicted and sentenced on 9 May 1996 and because a notice of appeal was late she also applied for condonation. She explained that she had no family or friends in Namibia who could assist her to obtain the necessary funds to bring an appeal. As soon as she received funds she then launched her appeal.

Mr McNally who appeared for the Appellant submitted that the magistrate was overawed by the relatively large quantity of cannabis and in the process ignored or under emphasised the personal circumstances of the Appellant and the other mitigating factors. Ms Tjipueja, for the state, on the other hand pointed out that sentencing is pre-eminently the function of a trial court and that the court of appeal could only interfere in limited circumstances with the exercise of such discretion. Ms Tjipueja however also conceded that the sentence imposed by the magistrate was too harsh. Learned counsel for the State further pointed out the seriousness of the offence as also reflected in the punishment prescribed by the Act. Counsel furthermore submitted that the magistrate did not misdirect himself in any way.

In his reasons the magistrate mentioned the fact that magistrate's courts are not normally or usually called upon to deal with cases involving such a big quantity of cannabis and it seems to me that, as was submitted by Mr McNally, the magistrate found himself somewhat at sea when it came to determining an appropriate sentence. In my opinion the quantity of dagga, though very important, caused the magistrate to impose a sentence which did not take proper cognizance of the personal circumstances of the Appellant and the fact that she was a first offender and the mother of four young children.

It is so as was pointed out by Ms Tjipueja that the punishment prescribed by the legislator is a strong indication of the seriousness of the crime in the eyes of the State, however it was pointed out in the case of *State versus Sass, 1992 SACR 624,* **that a general application of this principle to cannabis would be wrong as the penalty clause also include punishment for more harmful drugs such as cocaine, mandrax ect.**

Because of the important role played by the quantity of the drug involved when it comes to sentencing, *{See State versus Nkombini, 1992,(2) SACR 465* **(TK) at page 468 G-H) it is useful to look at other comparable cases. Not thereby to establish a scale of sentences which graduates mathematically according to the quantity of dagga involved, as was warned against in the Nkombini's case (supra), but, especially where courts in Namibia do not often have cases where large quantities of cannabis are involved, to orientate oneself as to what would be an appropriate sentence in each particular circumstance. Because of the fact that the personal and other circumstances of an accused would differ from case to case as well as the circumstances under which the crime was committed, such orientation cannot be much more than a rough guideline.**

The following cases considered by me mostly dealt with first offenders convicted of contravening section 2 (a) of the Act and the crime and personal circumstances were more or less comparable to the present case. Firstly I refer to the *State versus Thaele, 1979 (4) SA 1039,* **55 kg of cannabis were involved. The accused was sentenced to 5 years imprisonment and on appeal it was changed to 3 years imprisonment.** *In the State versus Sikwane, 1980 (4) SA 258,* **45kg of cannabis was involved. The accused was sentenced to 5 years imprisonment and on appeal it was changed to 7 years imprisonment. In** *State versus Batshise 1982 (I) SA 966,* **(A), 12kg of cannabis, the sentence was 2 years imprisonment which was suspended. In** *State versus Wilso Xaso, 1989 (3) SA 388,* **12,02kg of cannabis was involved and the accused was sentenced to 5 years imprisonment, but he had three previous convictions. In** *State versus Nkombini 1992 (2) SACR 465,* **a quantity of 169,2kg cannabis were involved and the accused was sentenced to 10 years imprisonment which was changed on appeal to 6**

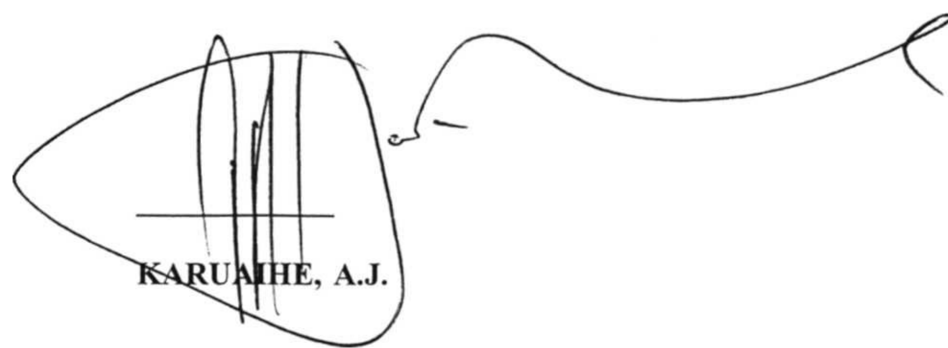
years imprisonment. In the case of *State versus Edmund Labina Motubidie,* **an unreported judgment of this Court, delivered on the 24th April 1987, the accused was sentenced to 8 years imprisonment where the quantity involved was 250kg of cannabis and this sentence was confirmed on appeal.**

In two cases where cocaine was involved, the sentences were as follows. In *State versus Hightower 1992 (1) SACR 420* **the cocaine involved was to the value of R500 000-00, 10 years imprisonment was imposed of which 3 years was suspended and in** *State versus Randall 1995 (1) SACR 559,* **2750 grams of cocaine was involved and the accused was sentenced to 15 years imprisonment of which 7 years were suspended.**

Bearing in mind the aforegoing, the personal circumstances of the accused and the fact that she is a first offender, the sentence of 10 years imprisonment of which 2 years are suspended, seems to me unreasonable and as set out previously it seems to me from the magistrate reasons that the quantity involved was over-emphasised to the detriment of the personal circumstances and other mitigating factors of the Appellant. I however agree with the magistrate, and also Ms Tjipueja, that this is not an instance where a sentence of a fine would have been appropriate as was submitted by Mr McNally. As was testified to by Sgt. Eiman, the bulk suppliers of cannabis are usually from South Africa. Also in this case the Appellant came from Natal to attempt to establish a market for cannabis here in Namibia. This is also evident from the quantity of cannabis brought by her namely 36,102kg. This Court would certainly fail in its duty if it does not send out a message to the importers of drugs that even a first offender can expect to be sent to prison for a long period.

1. The Appellant's appeal against her sentence of 10 years imprisonment of which two years was suspended, succeeds. The said sentence is set aside and substituted with the following sentence namely:

6 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition the accused is not again convicted of contravening section 2 (a) or 2 (b) of Act 41 of 1971 committed during the period of suspension.



KARUAIHE, A.J.

ON BEHALF OF THE APPELLANT **ADV. P MCNALLY**

INSTRUCTED BY **MESSRS LENTIN BOTMA AND VAN DER MERWE**