



CASE NO.: CR 24/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

SIMON MBOTI

(HIGH COURT REVIEW CASE NO.: 23/2009 OSHAKATI)

(MAGISTRATE'S SERIAL NO.: 428/2009)

CORAM: PARKER, J et SHIVUTE, J

Delivered on: 2011 September 22

REVIEW JUDGMENT

SHIVUTE, J: [1] The accused person appeared in Eenhana Magistrate's Court. He was convicted on a charge of possession of cannabis

contravening section 2 (b) of Act 41 of 1977. The cannabis was weighing 0,002g valued at N\$6.00.

[2] The accused was sentenced to a fine of N\$2000.00 or 18 months imprisonment.

[3] I directed the following query to the magistrate:

1. *"The accused was convicted of contravening section 2 (b) of Act 41 of 1971 (possession of cannabis), weighing 0,002 valued at N\$6.00. He was sentenced to N\$2000.00 or 18 (eighteen) months imprisonment.*
2. *How did the court satisfy itself that the accused was in a position to pay a fine.*
3. *Considering the value of the cannabis being N\$6.00 and given the fact that the accused is a first offender does the sentence not induce a sense of shock?"*

[4] The learned magistrate responded as follows:

"I gave an option of a fine because the state or condition in which the accused was indicated that he was able to pay a fine. I take cognisance that the value of the cannabis is very low, yet the sentence appears to be harsh. I agree with the honourable that I was harsh on the accused person this was so because of the prevalence of the offence within the district.

I therefore submit that the sentence of N\$2000.00 or 18 months imprisonment be set aside and substituted with the appropriate one."

[5] Although the learned magistrate stated that he gave an option of a fine because of the condition or state in which the accused was indicated that he

was able to pay a fine, there is nothing on record to that effect. The accused never indicated that he was able to pay a fine. The accused in mitigation of sentence asked for a suspended sentence as he was allegedly suffering from Asthma. The magistrate never established whether the accused was employed or how he earns his living. He was also never asked whether he was able to pay a fine. Therefore the court never satisfied itself that the accused was able to pay a fine.

[6] As for the sentence I found it to be shockingly inappropriate and it cannot be allowed to stand.

[7] In the result, the following order is made:

- (1) The conviction is confirmed.
- (2) The sentence of N\$2000.00 fine or 18 months imprisonment is set aside and substituted by the sentence of 6 months imprisonment suspended *in toto* for 5 years on condition that the accused is not convicted of possession of prohibited dependence-producing drugs contravening section 2 (b) or dealing in dependence-producing substance, contravening section 1 (a) of Act 41 of 1971 committed during the period of suspension.

- (3) It is ordered that the sentence is back dated to the date when the accused was sentenced by the magistrate.

SHIVUTE, J

I agree

PARKER, J