NOT REPORTABLE

CASE NO.: CC 10/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

DANIEL JOAO PAULO **First Accused**

JOSUE MANUEL ANTONIO **Second Accused**

CORAM: **PARKER J**

Heard on: **2010 February 1-5; 2010 April 19-28; 2010 May 31; 2010 August 2-5; 2010 September 23; 2011 January 19; 2011 February 23**

Delivered on: 2011 March 10

JUDGMENT (SENTENCING)

PARKER J: [1] In the present proceedings on sentencing Mr Sibeya represents the State, and Mr Namandje represents both accused persons. In my judgment delivered on 19 January 2011 last, I convicted each accused on one count of contravening s. 2(c), read with ss. 1, 2(1) and/or

2(ii), 8, 10, 14 and Part II of the Schedule of Act 41 of 1971 (as amended) ('the Act') - dealing in dangerous dependence producing drugs ('drugs'). I do not propose to rehearse the factual findings I made bearing on the conviction as set

out in the aforementioned judgment on conviction. It is worth noting that both counsel have submitted heads of argument; and I am grateful for their industry.

[2] I now proceed to determine an appropriate sentence. In doing so I must point out that the statute creating the offence that the accused have been convicted of has provided its own penal sanctions under s. 2(i) of the Act, namely, in the case of a first conviction a fine not exceeding N$30, 000.00 or to imprisonment not exceeding 15 years or to both such fine and such imprisonment. It is clear from the scheme of the statutory penal sanction that the Court has no power to impose any sentence beyond the maximum mark that is set by the Act. The converse is therefore that up to the maximum bar the Court has discretion to impose any appropriate sentence. This conclusion leads me to the next level of the enquiry.

[3] In imposing an appropriate sentence I should consider the well known trinomial factors, being the crime, the offender and the interests of society. I ought also to take into account a fourth element, i.e. a measure of mercy, but not misplaced pity *(S v Khumalo* 1973 (3) SA 527 (A); *Director of Public Prosecutions, Kwazulu-Natal v P* - cited with approval by this Court in *State v Losper* Case No. CC 11/2007 (Unreported); *State v Both* Case No. CC 29/2008 (Unreported)). Furthermore, the Court should strike a reasonable balance between the competing factors in order to do justice; and in doing so the Court may give greater weight to certain factors at the expense of other factors. (See S *v Van Wyk* 1993 NR 426 (SC)) Additionally, as Mr Sibeya reminded the Court, the aforementioned factors should be considered together with the main purposes of punishment, namely, deterrent, preventive, reformative and retributive. (S *v Tcoeib* 1991 NR 263)

[4] I now proceed to apply these factors to the facts and circumstances of the instant case in relation to each accused person. As to accused 1's personal circumstances; accused 1 is 44 years old, and before his arrest he worked for a pharmaceutical shop in Luanda earning a salary of U$500.00 per month. His educational level is Grade 12. Accused 1 is married and has four children who are still under his care. His wife is unemployed. He was arrested on 16 December 2007 and has now been in custody, awaiting trial, for more than three years. He has no previous conviction. He is diabetic; and his condition worsens sometimes in prison because of lack of one of his prescriptions called '*Dia bion*'. Accused 1 grew up in a war zone and only relatively started enjoying peace after 2002. And to accused 2's personal circumstances; accused 2 is 46 years old. He is a professional Mechanic as well as a Driver. His education level is Grade 8. He is married with six children and five of them are still under his care. His wife used to work before his arrest; however, she has since lost employment because of her constant absence at work as she has to visit accused 2 several times in custody awaiting trial in Namibia. His monthly salary used to be U$300.00 per month. He, too, is a first offender. He, too, has been in custody since 16 December 2007, awaiting trial, and he also grew up in the war zone.

[5] I pass to consider the crime. I have already set out previously the crime for which the accused persons were convicted. The crime involved is serious; that much both counsel agree. Indeed, that the Legislature in its wisdom has seen it fit to prescribe a sentence, albeit only the uppermost ceiling, is indicative of the seriousness with which the Parliament, as the legislative representative of the Namibia nation, views the crime. Mr Sibeya drew the Court's attention to the fact that the weight of the cocaine is 'a record' 31.1 kg, with a street value of N$15, 000, 000.00.

[6] Mr Sibeya submitted further that cocaine is presently prevalent in Namibia. Counsel's submission was confirmed in material respects by evidence by Chief Inspector De Klerk, the then head of the Drug Law

Enforcement Unit (DLEU) of the Namibia Police (NAMPOL). I accept De

Klerk's evidence. In this connection, I also accept De Klerk's testimony that since Namibia is a State Party to the SADC Protocol and the UN Convention on control of drugs like cocaine, the international community expects Namibia to play its role in enforcing those international instruments by, for instance, ensuring that Namibia does not allow itself to become a hub for the international trafficking of dangerous drugs like cocaine. On this, the evidence is incontrovertible in the judgment on conviction that the cocaine was not meant for the Namibia market; it was on its way to South Africa. But, of course, I hasten to add that, as I have said previously, as a member of the comity of nations Namibia must be seen to be playing its part in not being looked at as a transit point for such dangerous drugs as cocaine. That much also Mr Namandje appreciates. But it does not follow as a matter of course that only a severe punishment would satisfy the international community. That NAMPOL was vigilant in arresting the accused and charging them before the Court and seizing the cocaine are, in my opinion, on any pan of scale indicative of Namibia's preparedness to enforce the SADC and UN instruments.

[7] In this regard, I find that although the accused have been convicted of 'dealing in' the cocaine, in terms of s. 1 of the Act the crime of 'dealing in' consists of different and separate kinds of acts connected with cocaine: (1) collection, (2) importation, (3) supply, (4) transshipment, (5) administration, (6) exportation, (7) cultivation, (8) sale, (9) manufacture, (10) transmission and (11) prescription. In my opinion, all these acts cannot be put in the same basket

for the purpose of sentencing. For instance, 'importation', 'cultivation', 'sale' or 'manufacture' of a dangerous drug like cocaine is more serious than its 'exportation' or 'transmission' and so, therefore, any of the latter acts should attract a lesser sentence than any of the former acts. That, in my view, is fair. In this regard, it must be remembered that the accused were convicted of 'dealing in' the cocaine on account of 'exportation' or 'transmission' of the cocaine.

[8] As respects the interests of society the pith and marrow of Mr Sibeya's submission is that the prevalence of such crimes as the present can be gathered from the many cocaine cases which come to our courts, including the district magistrates' courts and the regional magistrates' courts. I agree that since the crime is a serious one, the society must be protected from its devastating effects.

[9] To crown it all, Mr Sibeya invited the Court to view in a serious light the fact that 'the accused did not show genuine signs of remorse'. What is the reason for counsel so saying? As I can gather from his submission, it is because 'the accused persisted in their innocence from the time that they were arrested by the Police'. Counsel found support in *S v Wilhelm Swartz and Others,* being an unreported review judgment of this Court. But we must also remember that this is not a religious court where for the court to show mercy it would expect the condemned person (i.e. the convicted person) to confess to his crime; say, 'I am sorry'; and then ask for the mercy of the court. Our secular Law says an accused person may plead not guilty, if he or she so wishes, because, indeed, our secular Law provides that every accused person is presumed innocent until proven guilty, that is, until the State adduces sufficient evidence capable of proving the guilt of the accused person beyond reasonable doubt. I, for one, do not therefore put any currency on whether or not the accused persisted in his

or her innocence, only to be proven guilty in due course at his or her trial. Thus, on this point, I accept Mr Namandje's submission that the Court should not draw any adverse inference from the fact that the accused persons pursued their constitutional right and pleaded not guilty and persisted in that plea.

[10] Be that as it may, I accept Mr Sibeya's submission that the crime involved is so serious that society expects the Court to play its part in punishing the accused severely so as to deter others from taking up such criminal conduct. But we are also reminded that wrongdoers must not be visited with punishments to the point of breaking them *(See S v Sparks*

and Another 1972 (3) SA 396 (A)). It is also my view that it offends this

Court's sense of fairness and justice to use one convicted person as a sacrificial lamb on the altar of protection of society in the criminal justice system; hence, the need for the Court to exercise its discretion in the imposition of an appropriate sentence by looking at the facts and circumstances of the case at hand through, for instance, 'being mindful also of the personal circumstances of the accused *(S v Sibonyoni* 2001 NR 22).'

[11] This conclusion leads me to Mr Sibeya's submission in which - as I see it - he seeks to draw a comparison between this case and the case of S *v Sibonyoni* supra where the amount of cocaine that the accused dealt in weighed 1.797 kg and he was, on conviction, sentenced by this Court - in an appeal - to ten years' imprisonment of which two years' imprisonment was suspended. Many a time this Court is confronted with such comparisons, without due regard to the incongruous facts and circumstances at play. Granted, while imposing an appropriate sentence in a matter a court ought to take into account sentences imposed in similar matters; but to follow this judicial precept mechanically and

with religious ferver without due regard to the particular circumstances and facts of a particular case will throw the whole aspect of sentencing into laughable straightjackets of precedents, robbing the Court of one of its most important and efficacious tools found in judicial decision-making, namely, the exercise of judicial discretion. What is more, in the instant case, the Act itself enjoins the Court, and expects the Court, to exercise discretion within the graduation of the statutorily allowable amount of punishment when imposing an appropriate sentence. This reasoning and conclusion deal with Mr Namandje's submission that this Court should keep in mind the particular facts and circumstances of the present case, particularly the personal circumstances of the accused persons. In this regard Mr Namandje submitted that the accused person's cumulative personal circumstances invite leniency from this Court.

[12] Apart from the personal circumstances mentioned previously, Mr Namandje sought to draw this Court's attention to others, particularly the fact that the accused persons are first offenders, coupled with the fact that each accused has been in custody awaiting trial for three years and some three months.

[13] On the issue of first offenders, I accept Mr Sibeya's submission that there is no rule of law which provides that first offenders should not be subjected to custodial punishment; and as was said in *S v Hightower* 1992 (1) SACR 420 (W) and approved by the Court in *S v Sibonyoni* supra at 24E, it will 'depend upon the circumstances and only in the most exceptional and extremely serious cases will this happen'; that is, the imposition of custodial punishment.

[14] From all the aforegoing; what are the aggravating factors weighing against

the accused persons? The only aggravating factor I see is the amount of cocaine and the value thereof; and that must stand against the accused persons, as Mr Sibeya submitted. Mr Namandje, on the other hand, submitted in the opposite way. He says that the value of the cocaine should not 'be used to inappropriately aggravate the sentence' because the value of the cocaine is not an element of the offence. I agree, but as Hoff AJ (as he then was) said in *S v Sibonyoni* supra, the value of the drug 'is usually of importance' because it would assist the Court to gauge what possible financial benefits might have accrued to the accused person. From all this, it is my opinion that while the value of the drug concerned is an important factor weighing against the accused, its importance should not be stretched unduly because unlike, for instance, the Stock Theft Amendment Act, 2004 (Act No. 19 of 2004) the sentence to be imposed in terms of Act 41 of 1971 is not dependent upon the value of the drugs involved. What are the mitigating factors? The accused persons are first offenders; they had lived tough times in a war situation in a war zone; their 'dealing in' the cocaine consisted of the exportation of the cocaine to South Africa; and, above all, they have spent three years and some three months in custody awaiting trial. This aspect must count in the accused persons' favour. In *Sibonyoni* supra the accused persons had spent 16 months in custody, awaiting trial, and the evidence there was not conclusive that the drug involved was destined for South Africa; for as Hoff AJ (as he then was) opined, the cocaine was smuggled 'into Namibia for the purpose of *apparently* selling it in South Africa.' (Italicited for emphasis) In the instant case, as I have said more than once, the factual finding I made in the judgment on conviction was that the cocaine was being exported, i.e. on its way, to South Africa. That some might have remained in Namibia, as De Klerk suggested in his testimony, is De Klerk's speculative thought, unsupported by any evidence.

[15] Taking all the aforegoing factors and reasoning and conclusions into account, including the fact that the accused persons have been held in custody for three years and some three months, awaiting trial, I think the sentence set out below meets the justice of this case.

[16] Whereupon:

(1) I sentence -

(a) you, Daniel Joao Paulo, to ten years' imprisonment of which four years are suspended for five years on condition that you are not convicted of the offence of contravening s. 2(c), 2(d) read with ss. 1, 2(1) and/or 2(ii), 8, 10, 14 and Part II of the Schedule, of Act 41 of 1971, committed during the period of suspension.

(b) you, Josue Manuel Antonio, to ten years' imprisonment of which four years are suspended for five years on condition that you are not convicted of the offence of contravening s. 2(c), 2(d) read with ss. 1, 2(1) and/or 2(ii), 8, 10, 14 and Part II of the Schedule, of Act 41 of 1971, committed during the period of suspension.

2) I declare the aforementioned 31.1 kg of cocaine to be forfeited to the State.

3) I declare the motor vehicle, registration number KEA 88-61, used for the purpose, and in connection with, the commission of the offence, to be forfeited to the State.

PARKER J

COUNSEL ON BEHALF OF THE STATE:

Mr O Sibeya

Instructed by: Office of the Prosecutor-General

COUNSEL ON BEHALF OF THE ACCUSEDS:

Mr S Namandje

Instructed by: Sisa Namandje & Co. Inc.