



CASE NO.: CA

31/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SALVADOR ANGELO HIEFELA

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: NDAUENDAPO, J et SIBOLEKA, J

Heard on: 2012 June 11

Delivered on: 2012 June 21

APPEAL JUDGMENT

SIBOLEKA, J

[1] On 11 June 2012, the Court after carefully considering arguments from both counsel and the documents filed of record allowed the appeal to succeed, and made the following order:

[2] The sentence imposed by the learned Regional Court Magistrate, Rundu is set aside and substituted with the following:

Five years' imprisonment of which three years' are suspended for five years' on condition that the accused is not convicted of possession or dealing in cannabis in contravention of section 2(a) or (b) of the Abuse of Dependence - Producing Substances and Rehabilitation Centres Act, Act no. 41 of 1971, committed during the period of suspension. The sentence is antedated to 18 June 2010.

[3] We had indicated then that our reasons will follow later, they are now available and are as follows:

[4] The appellant, an Angolan national and police officer in Angola was convicted on possession of 29kg cannabis in contravention of section 2(b) of Act 41 of 1971 as amended and was sentenced to five years' imprisonment in the Regional Court, Rundu.

[5] He now appeals against the sentence.

[6] When the appeal appeared before us for hearing Mr. Greyling acted for the appellant and Mr. Nyambe for the respondent. The Court wishes to express its gratitude to both counsel's valuable heads of argument in this matter. The appellant was convicted on 17 June 2010 and sentenced on 18 June 2010.

[7] By agreement between both counsel the application for condonation for the late filing of the appellant's amended notice of appeal was not opposed. The parties proceeded to argue the matter on the merits.

The grounds of appeal are as follows:

"AD THE SENTENCE:

1. The Learned Magistrate failed to consider alternatively did not add sufficient weight to the following: that -
 - 1.1the Appellant was a first offender;
 - 1.2the Appellant is a father of 6 children;
 - 1.3four of the children are in school, and the other two are still infants;
 - 1.4the Appellant is the sole breadwinner of the family;
 - 1.5the Appellant is an Angolan resident and will lose his employment with the Government of Angola if an custodial sentence are to be imposed;
 - 1.6the implications on Appellant's family members if a custodial sentence are to imposed;
 - 1.7the Appellant pleaded guilty;
 - 1.8prior to sentencing, Appellant was kept in police custody for approximately 1 (one) month and 24 (twenty four) days;

- 1.9the Appellant had nothing financially to gain from the offence, and his motive to commit the offence was to take care of his farm stock, which in terms of Angolan law is not a criminal offence.
2. The Learned Magistrate erred and/or misdirected himself by over-emphasizing the following aspects:
- 2.1a relative large quantity of cannabis at the expense of the Appellant's personal circumstances;
 - 2.2the seriousness of the offence and the interest of the society;
 - 2.3the manner in which the offence was committed;
 - 2.4the extent Appellant used to conceal the cannabis;
 - 2.5that any other form of punishment apart from a custodial sentence, would cast the administration of justice in disrepute;
 - 2.6that due to the penalty clause, the offence should be viewed in a very serious light.

By inserting the following as the new paragraph 3 of Appellant's Notice of Appeal:

3. The Learned Magistrate erred in considering the following to be aggravating circumstances, alternatively lent too much weight to it in that:
- 3.1the statement by the prosecutor that Appellant used his position as a police officer to conceal the cannabis, notwithstanding that no evidence was led to support such statement;
 - 3.2the statement by the prosecutor that goats and cattle can not be treated by cannabis, as evidence was led to support such statement, and the prosecutor failed to cross-examine the Appellant on such evidence ;
 - 3.3the statement by the prosecutor that cannabis are harmful to the youth and society, given the peculiar circumstances present in this matter;
 - 3.4the statement by the prosecutor that due to the penalty clause, the offence should be viewed in a very serious light;
 - 3.5the evidence of Sgt. Linus Mbala that the cannabis were set to be transported to Windhoek, notwithstanding the fact that

- Appellant pleaded guilty of possession and not that of dealing in cannabis;
- 3.6 the evidence of Sgt. Linus Mbala regarding the street value of the cannabis, notwithstanding the fact that Appellant pleaded guilty of possession and not of dealing in cannabis;
- 3.7 that the value of the cannabis outweigh the maximum fine of N\$20,000.00 and thus a custodial sentence is therefore inescapable;
- 3.8 the evidence of Sgt. Linus Mbala in respect of cannabis statistics, without informing the undefended Appellant that the Learned Magistrate intended considering during sentencing the said statistics, and the Appellant was therefore not afforded the opportunity to lead evidence in respect thereof, or to present argument to the trial Court;
- 3.9 the evidence of Sgt. Linus Mbala in respect of cannabis cases and sentences imposed by the courts, without soliciting in depth evidence from Sgt. Mbala as to the prevailing circumstances of each particular case;
4. That the sentence passed by the learned Magistrate in general was shockingly inappropriate.”

[8] Looking at all the above grounds of appeal the main contention of the appellant is that the five years' imprisonment imposed on him by the Regional Court Magistrate in Rundu is according to him “shockingly inappropriate”.

[9] Briefly the circumstances of this case were that the appellant was charged with dealing in cannabis as the main count. His plea of guilty on the alternative (possession) was accepted.

[10] He mitigated under oath in the Court *a quo* that he transported the cannabis from Minonje in Angola to treat his goats at Mayongora here in Namibia. During cross-examination he confirmed that he packed the cannabis, concealed it in Omo boxes to create an impression that it was not cannabis. Indeed the officers on both sides at the border thought it was Omo, and they allowed the parcel into Namibia. At Rundu the Appellant marked the cannabis boxes as CD player discs. He told Parcel Force officials where he handed the parcel to be couriered that the contents were playing discs. However, when one of the officers confronted him about a smell coming from the boxes, and whether the contents were indeed disc players and not cannabis he ran away and was later caught and arrested.

[11] In my view when regard is had to the way the Appellant had carefully planned the shipment of the cannabis from Angola into Namibia as alluded to above, coupled with the fact that as a police officer he is required to guard, protect, and arrest those who possess cannabis, this Court does not view the five years' sentence to such a degree that it can be described as "shockingly inappropriate". Instead it only finds it to be just a little bit harsh for a thirty year old first offender, who pleaded guilty, has six children, was convicted of possession and not dealing in cannabis.

[12] Having considered the aforementioned observations, and taking the mitigating and aggravating factors into account it is my considered view that the learned Magistrate should have suspended part of the sentence. This would give the Appellant an opportunity to re-consider his position and stay away from dependence producing substances.

[13] One of the factors that may persuade a Court of Appeal to interfere with sentence is where as it is in this matter that the trial Court has failed to take into account a material fact, or has overemphasized the importance of another factor at the expense of the other. (See *S v Tjiho* 1991 NR 361 (H) at page 366 A-B.)

[14] It is my considered view that the learned Magistrate was to a certain extent harsh, in that he overemphasized the seriousness of the offence and did not give sufficient attention to the fact that the accused was only a first offender, convicted on the alternative to dealing in cannabis. The five years' sentence, in my view, would have been appropriate for dealing in cannabis even to a first offender such as the Appellant.

[15] In *S v Scont* 1969(1) SA 545 ECD, the Appellant, a first offender, pleaded guilty, was convicted for unlawful possession of two firearms inherited from his late father for which he neglected to legalize his

possession. The Magistrate's Court sentenced him to R200.00 or six months imprisonment. Following the normal procedure, the case was sent on review and was confirmed as being in accordance with justice. In the meantime an appeal had been noted against the severity of the sentence. Later the Magistrate realized that the Appellant was wrongly charged and that the correct charge does not provide for an option of a fine. He was also not aware of the pending appeal and as such he only advised the Registrar in his covering letter that the fine be deleted by a Reviewing Judge, and that was accordingly done.

[15.1] The effect of the deletion was that the appellant was sentenced to six months without an option of a fine. The Court stated the following regarding first offenders at page 547 F-G:

"It is a well-known and a well-recognized principle which is constantly adhered to and followed in our Courts, that a first offender, particularly one who is no longer a young man and has led a blameless life, who has a clear record should not easily or lightly be sent to goal without the option of a fine. The underlying principle would appear to be that persons of that nature who have demonstrated by their way of life that they are law abiding citizens should not lightly be sent to goal. This is a salutary principle and one which I think ought to be followed even in case of this nature where the Legislature regard the crime as a serious one."

[16] For the above reasons the appeal against sentence succeeded.

SIBOLEKA, J

I agree.

NDAUENDAPO, J

COUNSEL ON BEHALF OF THE APPELLANT: Mr.

GREYLING

INSTRUCTED BY: GREYLING &

ASSOCIATES

COUNSEL ON BEHALF OF THE RESPONDENT: ADV.

NYAMBE

**INSTRUCTED BY: THE OFFICE OF THE PROSECUTOR-
GENERAL**