



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case No.: CA 33/2016

SIMON NANGAKU

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Nangaku v S* (CA 33-2016) [2017] NAHCMD 123 (21 April 2017)

Coram: NDAUENDAPO, J *et* SHIVUTE, J

Heard: 23 January 2017

Delivered: 21 April 2017

Flynote: Criminal Procedure – Appeal – Conviction and Sentence – Dealing in cannabis – Considering the evidence against the appellant – Dealing proven beyond a reasonable doubt – Sentence of twelve years is not shocking nor startlingly inappropriate – Appeal against conviction and sentence dismissed.

Summary: The appellant was convicted in the trial court of dealing in cannabis. The cannabis weighing 406 830 Kg was worth N\$ 1 220 490.00. The appellant averred that he was not resident at the house where the cannabis was found however, his son

referred to the room where the cannabis was found as his father's room. The police officers who arrested the appellant also maintained that the appellant had the keys to the house where the cannabis was found and unlocked the door to the house and the door to the bedroom where the cannabis was found. At the time of this discovery, the appellant did not ones attempt to deny his ownership of this cannabis nor did he inform the police officers that his brother might be the owner of the same. It was only after the brother had died that the appellant conveniently tried to pin the cannabis on his deceased brother. The appellant had two bail applications before the matter went to trial, but even during these two bail applications the appellant failed to mention the fact that the cannabis was not his, but was his brother's.

Held; in the circumstances the court is satisfied that the trial court cannot be faulted for convicting the appellant as charged.

Held; the sentence of twelve years of which four years were conditionally suspended was appropriate and this court will not interfere.

ORDER

In the result,

1. The appeal against the conviction is dismissed.
 2. The appeal against the sentence is dismissed.
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APPEAL JUDGMENT

NDAUENDAPO, J (SHIVUTE, J concurring):

Introduction

[1] The appellant was convicted and sentenced on 12 February 2016 in the Windhoek Regional Court of:

- 1.1 Dealing in a dependence producing substance, to wit: cannabis, weighing 406 830 Kg and valued at N\$ 1 220 490.00, in contravention of s 2(a) read with ss 1, 2(i), 2

(ii), 8, 10, 14 and Part 1 of the Schedule of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 (hereafter, the Act).¹

[2] The appellant was sentenced to 12 years imprisonment of which 4 years were conditionally suspended.

[3] On 26 February 2016, the appellant lodged an appeal against both the conviction and the sentence. The appellant appeared in person while Mr. Nduna appeared for the respondent.

[4] The appellant's grounds of appeal are:

Ad Conviction

That the learned magistrate erred in law and/ or facts by:

- a) Convicting the appellant on the charge of dealing in dependence producing drugs;
- b) Rejecting the appellant's and his witnesses' evidence totally;
- c) Failing to find that the appellant was not staying at the house where the drugs were found;
- d) Totally ignoring the death certificate;
- e) Finding that the respondent had proven its case;
- f) Failing to properly analyze the respondent's case.

Ad Sentence

That the learned magistrate erred in fact and or law by:

- a) Over-emphasizing the seriousness of the offence and the interests of society;
- b) Not imposing a fine or a suspended sentence coupled with a fine.

Point in Limine

¹ Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 41 of 1971 as amended.

[5] The respondent raised a point in limine that grounds (a), (e) and (f) above be struck off as they do not comply with Rule 67(1) of the Rules of the Magistrate Court. The purpose of a notice of appeal is to inform the respondent what case it has to meet. Furthermore, it 'crystallizes the dispute and determines the parameters within which the court of appeal will have to decide the case'.² The court is alive to the fact that the appellant is acting in person and that the notice of appeal filed by him should thus be construed generously in the light most favorable to the appellant.³ However, the court cannot take this proposition 'too far, as to cover... situations where a peremptory statutory provision has not been complied with'.⁴ Rule 67(1) of the Magistrates Court Rules provides that: '(1) A convicted person desiring to appeal under section 103 (1) of the Act, shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based [my emphasis]: Provided that if such appeal is noted by a legal practitioner on behalf of a convicted person he shall simultaneously with the lodging of the notice of appeal lodge a power of attorney authorizing him to note an appeal and to act on behalf of the convicted person. A convicted person who, after a judge of the court of appeal has refused to certify that there are reasonable grounds for appeal, still desires to prosecute an appeal which he has noted shall, within 14 days after being notified of such refusal, in writing indicate or cause to be indicated to the clerk of the court whether he intends prosecuting the appeal other than in person and unless he so indicates and takes the necessary steps to prosecute the appeal within the said period, the noted appeal shall be deemed to have lapsed.'

[6] Rule 67(1) of the Rules of the Magistrates Court is a peremptory requirement.⁵ The appellant did not object to the application by the respondent to have the three grounds of appeal struck. It is for the above reasons that grounds (a), (e) and (f) above are struck off as they are merely conclusions drawn by the appellant for reasons privy only to himself.

The appeal against the conviction on the remaining grounds of appeal

² *Samuel Mrajiandile v State*, Case No.:54/2009 delivered on 26 October 2010.

³ *Boois v State* (CA 76/2014) [2015] NAHCMD 131 (8 June 2015) at para. 2.

⁴ *Boois v State* at para 4.

⁵ *Boois v State* at para 4.

Submissions by the appellant

[7] The appellant submitted that the house where the cannabis was found, erf 114, Hakahana was his house, but that he was not residing at that house at the time the cannabis was found there. It was his submission that at the relevant time his brother resided at that house with other people. Furthermore, that at the time of the appellant's conviction, his brother was alive, however at the time of his sentence the brother had passed on.⁶ This submission by the appellant cannot be correct as he was convicted and sentenced on the same day, being 19 February 2016 and according to the record of proceedings of the trial court, the appellant's brother had passed away on 18 September 2012.⁷ The appellant further submitted that, although he had informed his lawyer during the bail application that his brother (who is now deceased) occupied Erf 114, Hakahana, he failed to inform the arresting officers of this fact. He further submitted that when the police officers fetched him at his place of employment and they arrived at erf 114, Hakahana the police had a key and unlocked the house themselves. When the court enquired why he never mentioned that the cannabis belonged to his brother while he was still alive, the appellant responded that, he only told his lawyer during the bail application and was not sure whether or not the lawyer brought this information to the attention of the magistrate.

Submissions by counsel for the respondent.

[8] It was counsel's submission that the appellant omitted to mention the fact that his brother might be the owner of the cannabis found at erf 114, Hakahana. Counsel further submitted that, during the first bail application the appellant's brother was still alive and his failure to mention his brother's involvement could be due to sibling loyalty, however at the time of the subsequent bail application, the appellant's brother had already been late, so nothing stopped him from raising his brother's involvement at this subsequent bail application. Regarding the appellant's son who was his first witness, there were contradictions between the testimony of the appellant and his son. Whereas the appellant's son testified that the appellant never returned to erf 114 after he moved to

⁶ Page 7, lines 10-22 of the transcribed record of the appeal proceedings.

⁷ Page 84, lines 10-20 of the transcribed record of the proceedings in the court a quo.

erf 290, the appellant testified that he occasionally went to erf 114 to drop off groceries for his children. The appellant's colleague also testified that only he and the appellant lived at erf 290 Hakahana, however the appellant testified that, he lived at erf 209 with his wife and two children one of whom died in 2011. Regarding the death certificate, counsel argued that, the appellant conveniently adduced the death certificate as evidence to 'bolster a false defence', because there was no mention of a brother at the two bail applications nor to the police officers who arrested the appellant.

Briefly the facts which lead to this appeal.

[9] On 5 August 2011, the appellant was fetched by police officer Matali. Upon their arrival at erf 114, Hakahana, the appellant unlocked the door of the main house and then the door to the main bedroom, which by the way the appellant's son in his testimony referred to as his father's room.⁸ Officer Matali testified in the trial court that when the door to the bedroom was opened, he noticed multi colored bags in the room and when he opened the bags he realized that these bags contained cannabis, which weighed 406 830 Kg and was worth N\$ 1 220 490.00. The son of the appellant also testified to having assisted the police officers to carry these bags out of the room. Officer Matali enquired from the appellant, to whom the cannabis belonged, but the appellant only said that they should talk 'man to man'. After his arrest, the appellant had applied for bail twice. At both these bail applications the appellant did not mention a brother nor the fact that the cannabis belonged to his brother.

[10] The appellant also never disclosed to the police that the cannabis found at erf 114, Hakahana belonged to his brother. It was only during the trial that this brother was mentioned, who conveniently at that time was already deceased. During their testimonies, the appellant's witnesses clearly tried to divorce the appellant from any involvement with erf 114 and the cannabis found there. The appellant's son testified that his father never returned to erf 114 since he left in 2000,⁹ whereas the appellant testified that he would usually drop off groceries at erf 114 for the children. Furthermore, the appellant's colleague Mr. Nuhonja testified that, only he and the appellant lived at erf

⁸ Page 58 of the transcribed record of proceedings in the trial court.

⁹ Page 69 of the transcribed record of proceedings in the trial court.

290, Hakahana, whereas the appellant testified that he lived at that address with his wife and children.¹⁰ If indeed the appellant lived at erf 290, one would expect that both the appellant and Mr. Nuhonja would give the same account of all the people who reside there with them. This was not the case.

[11] Considering the contradictions in the appellant's case, the fact that the appellant only raised the issue that the cannabis belonged to his brother (who is now deceased) after the brother's demise, the weight and value of the cannabis found at erf 114, the trial court convicted the appellant of dealing in potentially dangerous dependence producing substances and subsequently sentenced him to twelve years imprisonment of which four years were conditionally suspended as no previous convictions were proven against the appellant at the time.

[12] Throughout the whole ordeal of being fetched at his place of employment by a police officer, going to the house which is registered in his name and witnessing the police find cannabis in that house, the appellant not only told the police officers that the cannabis was not his and that he in fact does not live at that house. A person who has no knowledge of a criminal act which if he was implicated in it would cause him to lose his employment, get a criminal record and even subject him to incarceration would not be slow to point out that he does not live at the house in question and that someone else lives there. The appellant failed to inform the police the moment the cannabis was discovered that it was not his and could be his brother's. Even if his silence during the first bail application was owing to sibling loyalty, this court is in agreement with counsel for the respondent in that, according to the death certificate the appellant's brother was already deceased when the second bail application took place, the appellant's silence at this subsequent bail application cannot thus be attributed to sibling loyalty. This court cannot therefore fault the conviction by the trial court.

Submissions relevant to the appeal against the sentence

The Appellant

¹⁰ Page 70 of the transcribed record of proceedings in the trial court.

[13] Regarding the appeal against the sentence, the appellant submitted that he had been in custody awaiting trial for four years and when he was sentenced, he was sentenced to twelve years of which four years were conditionally suspended. He is desirous of having this custodial sentence set aside and replaced with either a fine or a suspended sentence.

Counsel for the Respondent

[14] Regarding the sentence, it was counsel's argument that if the trial court erred in its sentence, it erred on the side of leniency, considering similar cases of dealing in cannabis where the quantity of the cannabis was lesser than the quantity of the cannabis in this case.

The appeal against the sentence

[15] A court of appeal has limited power to interfere with the sentencing discretion of the trial court. The court of appeal may only interfere with this discretion in following circumstances:

- a) 'when there was a material irregularity; or
- b) a material misdirection on the facts or on the law; or
- c) where the sentence was startlingly inappropriate; or
- d) induced a sense of shock; or
- e) was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;
- f) Irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.¹¹

[16] The penalty clause s 2(i) of the Act,¹² provides that 'in the case of a first conviction for a contravention of any provision of paragraph (a) or (c), to a fine not exceeding thirty thousand rands or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.' The fact that this clause provides that the court may impose

¹¹ *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G.

¹² Abuse of Dependence Producing Substances and Rehabilitation Centres Act, 41 of 1971.

a fine, does not mean that a fine should necessarily be imposed in all cases.¹³ Furthermore, the offence of dealing in cannabis is a serious one and the scourge of drugs on our communities is devastating. To merely impose a fine might create the wrong impression that those with money can avoid jail time. Considering, the value of the cannabis in this case, a fine would not have been an appropriate sentence. One of the objects of punishment is deterrence. This presupposes that, crime should never be profitable. Considering the quantity and value of the cannabis in this case, this court is not satisfied that a fine would disclose the futility of the crime in question, in fact it might have the opposite effect. It might even create an incentive for others to engage in similar activities. Furthermore, considering the facts of this case, this court is not satisfied that the appellant would be deterred from engaging in similar conduct in future, nor is there little hope of rehabilitation if a fine is imposed. Some time away from society might give the appellant an opportunity to re-evaluate his life and decisions and perhaps return a reformed citizen.

[17] The trial court was mindful of the appellant's personal circumstances, the interest of society and the offence committed and sentenced the appellant to twelve years' imprisonment of which four years were conditionally suspended.

[18] This court is not satisfied that the sentence imposed by the trial court was shocking or startlingly inappropriate or that the learned magistrate failed to exercise her discretion judiciously.

[19] In the result, the appeal against the conviction and the sentence is dismissed.

G N NDAUENDAPO

Judge

¹³ *Dlamini and Another v State* (CA 126/2016) [2017] NAHCMD 75 (13 March 2017).

N N SHIVUTE

Judge

APPEARANCES

APPELLANT:

S Nangaku

In Person

RESPONDENT:

S Nduna

Of Office of the Prosecutor General