

REPORTABLE

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO.: CA 111/2016

In the matter between:

DANIEL KABENDA

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Kabenda // The State* (CA 111/2016) [2017] NAHCMD 139 (12 May 2017)

CORAM: NDAUENDAPO, J and LIEBENBERG, J

Heard: 14 December 2016

Delivered: 12 May 2017

Flynote: Criminal Procedure – Appeal against conviction and sentence - drug offences – dealing in cocaine in contravention of s 2 (c) of Abuse of Dependence Producing Substances and Rehabilitation Act 41 of 1971.

Summary: The appellant was convicted of dealing in cocaine in contravention of s 2 (c) read with ss 1, 2(1) and/or 2 (ii), 8, 10, 14 and part II of the schedule of Abuse of Dependence Producing Substances and Rehabilitation Act 41 of 1971, as amended. He was sentenced to 7 years imprisonment of which 3 years were suspended on the usual condition. The notice of appeal was filed out of time. The explanation for the late noting is reasonable and acceptable, but there are no prospects of success on appeal and cannot be granted. The appellant was renting a house in which plastic bags containing cocaine were found. Some bags were also found hidden in the ground of the yard. The bags were forwarded to the National Forensic Science Institute for analysis and were found to contain cocaine. When the exhibits were returned from the National Forensic Science Institute to the Drug Enforcement Unit, they got stolen and therefore could not be presented at court as exhibits during trial. Appellant argued that the chain of custody was broken and the exhibits were tampered with. The appellant also argued that the prosecution did not prove its case beyond a reasonable doubt and that the version of the appellant was reasonably possibly true. Appellant also argued that the sentence induces a sense of shock.

Held that, the chain of custody of the exhibits was not broken and the exhibits were properly handled, analyzed and it was found to contain cocaine and there was no misdirection on the part of the magistrate.

Held, further that the appellant was in control of the house where the cocaine was found and therefore the magistrate was right to find as such.

Held, further that the sentence does not induce a sense of shock.

Held, that the condonation for the late filing of the appeal is refused and the matter is accordingly struck from the roll.

ORDER

1. The condonation against the late noting of the appeal is refused.
 2. The matter is struck from the roll.
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APPEAL JUDGMENT

NDAUENDAPO, J (LIEBENBERG, J concurring):

[1] The appellant was convicted of dealing in cocaine in contravention of s 2 (c) read with ss 1, 2 (i) and/or 2 (ii), 8, 10, 14 and part II of the Schedule of Abuse of Dependence Producing Substances and Rehabilitation Act 41 of 1971, as amended, (hereafter, the Act). He was sentenced to 7 years' imprisonment of which 3 years were suspended on the usual conditions. Disenchanted with the conviction and sentence, he filed this appeal.

[2] The grounds of appeal are as follows:

Ad conviction

1. The learned Magistrate misdirected herself in law and in fact when she relied on, evidence that has been stolen and tempered (sic) with and the fact that the original exhibits were not in court during the trial;
2. The learned Magistrate misdirected herself in law and in fact by rejecting the version of the appellant person despite the fact that it was reasonably possibly true;
3. The learned Magistrate misdirected herself in law by finding that the state proved its case beyond a reasonable doubt;

4. The learned Magistrate erred in law by finding that the chain of custody in handling of the alleged cocaine was not broken;

5. The learned Magistrate misdirected herself by finding that the value of the cocaine was one million two hundred and sixty thousand Namibian dollars.'

Ad Sentence

'1. The learned Magistrate misdirected herself by imposing a sentence which is wholly unfair and completely unwarranted in the circumstances and which induces a sense of shock.

Appellant reserved his right to supplement his ground of appeal.'

Condonation

[3] The notice of appeal was filed out of time by 5 months. The appellant was sentenced on 26 November 2015 and the notice of appeal filed on 19 May 2016. The appellant also filed an application for condonation accompanied by an extensive affidavit explaining why the notice of appeal was filed out of time. In summary, the appellant who is Angolan and speaks Portuguese, explained that he was represented by Mr. Lino who is fluent in Portuguese. After the trial and during the noting of the verdict, Mr. Lino was not present and instead sent another lawyer to represent him. During the sentencing Mr. Lino also did not appear and he sent another lawyer, Mr. Ujaha to represent him. The lawyer did not fully explain to him his rights to an appeal. In January 2016, he made contact with Mr. Lino whom he heard that his fidelity fund certificate was not re-issued by the Law Society and therefore could not appear in court. He had to engage another lawyer who demanded a fee of N\$35 000 to represent him. He had to contact his family in Angola to raise the funds and when he got the funds, the new lawyer, Mr. Amoomo, also needed time to go through the record before the notice of appeal could be filed. He further stated that he had good prospects of success on appeal because the exhibits purported to be cocaine were not handed up and the chain of custody in that respect was severely compromised by the fact that the exhibits that were handed up were not sealed. He further stated that 'the chain of evidence has not linked the evidence to the crime; and has not linked the evidence to the sample analysis, nor

has it demonstrated that the evidence was properly safeguarded, and not contaminated in any way.'

[4] The respondent did not oppose the application for condonation. Although the explanation may be reasonable and acceptable, there are clearly no prospects of success on appeal as it will be shown below. Condonation can therefore not be granted.

Background facts

[5] Ms. Cloete, an estate agent, testified that she rented the house at erf 186 Long street, Rocky Crest to a certain Kashee an Angolan national. The lease agreement was from 12 April 2012 until 12 March 2013. The rent payable was N\$5 720 per month. In December 2012 Mr. Kashee did not pay rent and she was forced to go to the house to enquire about the outstanding rent. At the house she found the appellant who told her that Mr. Kashee had gone to Angola. The appellant then asked her whether he could stay in the house and continue paying the rent. She agreed on condition that he paid the arrears amount on the lease and once the lease agreement of Mr. Kashee expired, he could enter into a new lease agreement. She further testified that the appellant paid the arrears for December 2012 and January 2013. The appellant then paid rent up until April 2013.

[6] Warrant Officer Sylvester testified that on 30 April 2013 at around 14h00, she together with Detective Sergeant Nuule and Constable Shando went to the house at erf 186, Long Street, Rocky Crest. They found the house locked and they went into the neighbour's house to do some observations. After 30 minutes, a taxi stopped in front of the house and the appellant disembarked from the taxi and opened the pad locks of the yard. He walked to the kitchen door and opened it. They then jumped over the precast fence and Detective Sergeant Nuule went to the appellant and blocked the appellant from closing the kitchen door. They entered the kitchen and introduced themselves as police officers. Detective Sergeant Nuule asked the appellant whether he could do a body and house search to which the appellant agreed. Detective Sergeant Nuule asked the appellant where his bedroom was and he showed that to him. The appellant proceeded to the bedroom, took out a key from his pocket and unlocked the door. They entered the room and started searching the room. Detective Sergeant Nuule was doing

the search whilst she was observing the appellant. In the wardrobe Detective Sergeant Nuule found a small black suitcase and when he opened it, she observed white powdery residue packages which she suspected to be cocaine because of the distinctive smell, 'it had a sweet chemical smell, very sharp.' Also on the other side of the wardrobe, a large sum of money was found by Constable Shambo. Detective Sergeant Nuule asked the appellant about the large sum of money and he said that he was a businessman selling clothes. They proceeded outside the house to the yard where they conducted a search using sticks to poke the ground and Detective Sergeant Nuule found a hole in the ground from which he pulled out a white plastic bag which contained several plastic bags. He opened the bag in their presence and she saw several transparent bags with a white powdery substance which she suspected to be cocaine.

[7] Detective Sergeant Nuule then warned the appellant of his rights and asked him about the contents of the bags found and he said it was cocaine which he bought in Angola for U\$40 000 and that he was selling it to generate income. The appellant then pointed out another spot and Detective Sergeant Nuule dug in the ground and found another plastic bag with the same powdery substance. The total cash found in the wardrobe and on the appellant was N\$21 650. The appellant was then arrested and taken to the Drug Enforcement Unit where Detective Sergeant Nuule conducted a field test on the powdery substance confiscated from the house and it turned blueish in colour and that was a positive test for cocaine. The cocaine was then weighed in the presence of the appellant and it weighed around 2.520kg with the street value of around N\$500 per gram making it N\$1 260 000.00 in value. The cocaine was then placed in the exhibit bags and signed by the three of them including the appellant.

[8] The evidence of Warrant Officer Sylvester was corroborated by Detective Sergeant Nuule. He testified that the plastic bags with the contents were placed in the exhibit bags, which he sealed and together with the application forms for scientific examination which he completed, handed it to Chief Inspector Basson to take it to the National Forensic Science Institute.

[9] Mr. Shomeya, an analyst at the National Forensic Science Institute, testified that he analyzed the exhibits which were received in the exhibit bags and found that they contained cocaine. The exhibits were not tampered with when he recovered them and after the analysis he placed them in a sealed bag and they were collected by Detective Sergeant Nuule.

[10] The appellant testified that he was renting a garage at the house where the cocaine was found. He later rented a room inside the said house. He paid the rent with money received from Mr. Kashee. He told the court that Mr. Kashee left for Angola on 28 April 2016. He testified that the police searched the house and found money which was the rent money. In the yard, the police found plastics bags with something inside. He denied dealing in drugs.

[11] Before I consider the grounds of appeal, counsel for the appellant in his written heads, raised three other grounds which were not in the notice of appeal, namely: that the evidence against the appellant was unlawfully obtained and therefore inadmissible, that the judges' rules were not properly explained to the appellant and that the prosecution's failure to call Chief Inspector Basson to testify should have resulted in an adverse inference being drawn against the prosecution's case. Those issues were not raised in the notice of appeal and therefore they will not be considered. The appellant should either 'stand or fall by his notice of appeal.' I now turn to the grounds of appeal.

Grounds of appeal 1 and 4

Submissions by counsel for the appellant

[12] Counsel for the appellant argued in his heads that the chain of custody requires that from the moment the evidence is collected, every transfer of evidence from person to person be documented and that it be provable that nobody else could have accessed that evidence. It is best to keep the number of transfers as low as possible. However, when it was presented in court during the trial, such evidence was 'tempered (sic) with'. Counsel further argued that 'the documentation of evidence is key for maintaining a chain of custody because everything must be listed and whoever came in contact with that piece of evidence is accountable for what happens to it... Due to the withdrawal of a criminal case

against Chief Inspector Basson, we now know that at least one/more unrecorded and unknown persons has/have come in contact with the exhibits thereby tempering (sic) with them. This (sic) is no longer evidence that accused was entitled to confront during the trial – the evidence was tempered (sic).’

Submissions by counsel for the respondent

[13] Counsel for the appellant is suggesting in respect of ground four, that because the confiscated cocaine was not presented by the State as exhibits before court (ostensibly because it was stolen from police custody after it was returned from the National Forensic science institute), the chain of custody was not intact. This argument, it was said, is with the greatest respect as preposterous as saying that the State in a murder trial did not prove that the deceased died from the causes as stipulated in the charge sheet and that the body did not sustain any further injuries from the scene to the mortuary because it did not present the dead body as exhibit before court.

[14] Equally there is no merit in the appellant's contention in respect of ground one, that the magistrate relied on evidence that was stolen and tampered with. The magistrate relied on the lab report indicating that the samples analysed contained cocaine. She further relied on the testimony of Mr. Shomeya that he was satisfied that the exhibits were not tampered with as the seals were unbroken when he received them from the police. She further relied on the evidence of the police that the exhibits confiscated from the accused are the same exhibits which were taken to the lab and that it was not tampered with in the process.

[15] The testimony of Detective Sergeant Nuule was that the plastic bags containing powdery substances which were found at the house at erf 186, Long street, Rocky Crest where the appellant was residing were put in a bag and taken to the police station where he conducted a field test, weighed the substances and sealed them in the exhibit bags and he, the appellant and Warrant Officer Sylvester all signed the sealed bags. The bags numbers were also reflected on the National Forensic Science laboratory application form which accompanied the bags. The bags were marked as follows:

A. NFO 12428 contain 1005kg suspected cocaine

- B. NFO 12429 contain 995grams suspected cocaine
- C. NFB 22296 contain 110grams suspected cocaine
- D. NFB 22298 contain 70grams suspected cocaine
- E. NFB 22300 contain 305grams phenacetin

[16] He further testified that after he completed the lab application form, the sealed bag with exhibits were handed to Detective Chief Inspector Basson, the then Unit Commander. He further testified that in October 2013 he collected the lab results from Mr. Shomeya from the National Forensic Science Institute as they were needed during the bail application. He then locked them in his safe as the unit commander was not in town. Later on the exhibits containing the cocaine were stolen and could not be presented at court during the trial.

[17] Mr. Shomeya testified that he is an analyst at the National Science Institute. On the 20th May 2013 he received six exhibits from Chief Inspector Basson. They were six sealed bags with reference numbers. The numbers were as follows: A. NFO 12428, B.NFO 12429, C. NFB 22296, D. NFB 22298, E. NFB 22297, F. NFB 22300. He further testified that after analyzing the exhibits, he found that exhibits A – E contained cocaine while exhibit F contained phenacetin. After analyzing the exhibits, they were put in a sealed bag with reference number NFE 07811. That sealed bag was collected by Detective Sergeant Nuule. Based on the aforesaid analysis of the evidence, the fact that Chief Inspector Basson who took the exhibits to the National Forensic Science Institute did not testify may have broken the chain of custody. However, the fact remains that the bags were properly sealed and numbered by Detective Sergeant Nuule when they were received at the National Forensic Institute and after analysis, he collected the bags and they were as he numbered them and there was no tampering with the bags. Mr. Shomeya testified that the exhibits received from Chief Inspector Basson were in a sealed bag with numbers corresponding to the one on the application form and after his analysis, he found that the exhibits contained cocaine and it was the same exhibits that were handed back to Detective Sergeant Nuule. The fact that the exhibits were not presented at court during trial does not mean that the prosecution could not lead evidence to show that what was confiscated from the house rented by the appellant was indeed cocaine. There was no evidence that the exhibits were tampered with. The *viva*

voce evidence was also corroborated by the documentary evidence. The application form to the National Forensic Science Institute which accompanied the exhibits, was completed by Detective Sergeant Nuule. There was no misdirection on the part of the court *a quo* to have found that the chain of custody was unbroken. Those grounds of appeal are meritless.

Grounds of appeal 2 and 3

[18] These are not grounds of appeal as contemplated by Rule 67 (1) of the Magistrates Court Rules and amount to conclusions drawn by the appellant. In *Tuhafeni Kakolo v The State*¹ Maritz, J as he then was said the following:

‘Rule 67(1) of the Magistrate court Rules, requires that convicted persons desiring to appeal under s 309(1) of the Criminal Procedure Act, 1977 “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.

The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall (*S v Khoza*, 1979 (4) SA 757 (N) at 758B). It serves to inform the trial magistrate in clear and specific terms which part of his or her judgment is being appealed against, what the grounds are on which the appeal is being brought and whether they relate to issues of law or fact or both. It is with reference to the grounds of appeal specifically relied on that the magistrate is required to frame his or her reasons under Magistrate’s Court Rule 67 (3). Once those reasons have been given, the appellant may amend the notice of appeal under sub-rule (5) and the Magistrate may again respond to the amended grounds of appeal.

The notice also serves to inform the respondent of the case it is required to meet and regard being had to the record and the Magistrate’s reasons, whether it should concede or oppose the appeal. Finally it crystallizes the disputes and determines the parameters within which the court of appeal will have to decide the case.’

[19] The prosecution case against the appellant was proven beyond a reasonable doubt. The witnesses for the state testified that they found plastic bags in the house and

¹ *State v Kakolo* 2004 NR 7.

in the yard of the house rented by the appellant. He was in control of that house. On analysis by the National Forensic Science Institute it was found that what was in those bags was cocaine weighing 2.520kg with a street value of N\$1 260 000.

[20] His version was found to be false beyond a reasonable doubt and rejected. The learned magistrate reasoned that he was the one who paid the arrear rent of Mr. Kashee for the house at erf 186, Long Street, Rocky Crest and he continued to pay the rent for March and April 2013 after Mr. Kashee had left for Angola in January 2013. The learned magistrate also found that when the police officers entered the house, he is the one who took out the keys from his pocket and unlocked the bedroom door in which some of the cocaine was found. He also showed the hole in the ground where the other plastic bags containing the cocaine were found. The learned magistrate was accordingly right to find that he was in control of the house where the cocaine was found.

Ground 5

[21] Detective Sergeant Nuule testified that based on his experience as a drug law enforcement officer with 15 years' experience, the street value of cocaine was based on N\$500 a gram and for 2.520kg, the value would amount to N\$1 260 000. There was no misdirection by the magistrate to find that the value of the cocaine was N\$1 260 000 as she relied on expert evidence. There is no merit in that ground.

Ad sentence

[22] Counsel for the appellant argued that the court did not give sufficient weight to the fact that the appellant was a first offender, a university student and assisted the police 'engineer' the evidence that is now being against him. It was further argued that the court should extend a measure of mercy to the appellant for the above reasons.

[23] Counsel for the respondent argued that in sentencing, the court had regard to the nature of the substance (being the cocaine) and the quantity thereof. It was further argued that if one had regard to comparable cases, the trial court cannot be faulted in the sentence it imposed upon the appellant.

[24] It is trite that sentencing is pre-eminently in the discretion of the trial court. The court of appeal will only interfere with the sentence if:

- (i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentencing proceedings;
- (iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;
- (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by a court of appeal.²

[25] In *S v Ndikwetepo and others*³ Chomba AJA (as he then was) said the following:

‘. . . the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection.’

[26] Section 2(c)(i) of the Act⁴ 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 rand or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment’.

[27] In *S v Sibonyoni*⁵ the appellant had been convicted in terms of s 2(c) of the Act, namely dealing in 1797Kg of cocaine. The appellant was sentenced to thirteen years of which three years were conditionally suspended. On appeal, after considering similar cases and the fact that the appellant spent sixteen months in custody awaiting trial, altered the sentence. He was then sentenced to ten years imprisonment of which two years were conditionally suspended for five years.

[28] In the present case, the argument by the appellant’s counsel that if the appellant’s sentence is set aside and replaced with a wholly suspended sentence, he would not ‘do anything to jeopardize his studies’ does not hold water. At the time the appellant committed this offence, he was a student yet being a student did not stop him

² *S v Tjiho* 1991 NR 361 (HC) at 366 A-B.

³ *S v Ndikwetepo and Others* (SA 3/93) [1993] NASC 3 (15 October 1993).

⁴ Abuse of Dependence Producing Substances and Rehabilitation Act 41 of 1971, as amended.

⁵ *S v Sibonyoni* 2001 NR 22 (HC).

from committing the offence. If his studies meant anything to him, there would have been no need for his arrest and subsequent conviction and sentence.

[29] The learned magistrate considered the personal circumstances of the appellant, that is, the age of the appellant, that he was a father of three children, was a first offender and a university student. The trial court also took into account the interest of society and the nature of the crime. She also considered the devastating effects drugs have on our communities. Furthermore, the court was mindful of the large quantity of the cocaine in this case and the fact that the appellant had been in custody since 30 April 2013. In my view, the magistrate exercised her discretion judicially in sentencing the appellant and it does not induce a sense of shock. In considering the seriousness of the crime, the quantity and value of cocaine concerned and that being a student did not stop the appellant from committing an offence in the first place, the magistrate cannot be faulted in the sentence she imposed on the appellant.

[30] In the result the following order is made:

1. The condonation against the late noting of the appeal is refused.
2. The matter is struck from the roll.

G N NDAUENDAPO

Judge

J C LIEBENBERG

Judge

APPEARANCES

FOR THE APPELLANT:

Mr. K. Amoomo

Of Kadhila-Amoomo Legal Practitioners

FOR THE RESPONDENT:

Ms Husselmann

Of the Office Of The Prosecutor General