

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO: HC-MD-CRI-APP-CAL-2018/00029

In the matter between:

PETRUS PATERSON VAN WYK

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Van Wyk v S* (HC-MD-CRI-APP-CAL-2018/00029) [2018]
NAHCMD 285 (14 September 2018)

Coram: LIEBENBERG J et SIBOLEKA J

Heard on: 17 August 2018

Delivered on: 14 September 2018

Flynote: Criminal law: Drugs – Possession of dependence – producing substance to wit a small quantity of cannabis, street valued N\$100 found at the driver's foot rest mat in the car driven by the appellant. The conviction is in order. However, the sentence of three months' imprisonment without an option of a fine is inappropriate. Conviction confirmed – sentence altered accordingly.

Summary: A small quantity of cannabis street valued at N\$100 was found underneath the foot rest mat of the vehicle the appellant was driving. The trial Court

however, ignored the prosecution counsel's request for a sentence coupled with an option of a fine, as well as the appellant's ability to pay and sentenced him to three (3) months imprisonment.

Held: Sentence shockingly inappropriate thereby warranting interference.

ORDER

In the result we make the following order:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The appellant is sentenced to a fine of N\$800 or in default, three (3) months imprisonment.
4. The appellant to report himself to the Clerk of Court Karasburg within 7 days of delivery of judgment.
5. Appellant's bail extended by one week.

APPEAL JUDGMENT

SIBOLEKA J (LIEBENBERG J concurring):

[1] The appellant, who was unrepresented in the Court *a quo* was convicted by the Noordoewer Magistrate's Court on the charge of possession of cannabis in contravention of section 2(b) read with section 1, 2(i) and or 2(iv), 7, 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1971, as amended. He was sentenced to

three (3) months imprisonment without an option of a fine. He now appeals against both conviction and sentence.

[2] The grounds of appeal are briefly as follows:

Conviction

- (a) The appellant was not found in possession of cannabis.
- (b) The police first discovered the cannabis and only thereafter took it to the appellant.
- (c) The Magistrate did not avail the appellant the opportunity to address Court before judgment.
- (d) During trial in the Court *a quo* the appellant stated that there was no way he would have crossed the border with the cannabis since he was searched on both South African and Namibian sides of the border. The trial Court nonetheless silenced the appellant when he attempted to correct the erroneous interpretation thereof saying he was only disputing the weight of the cannabis and not possession thereof because he brought the cannabis along across the border.

On Sentence

- (e) The trial Court found against the appellant that he wasted its time by not pleading guilty when in actual fact he has a constitutional right to do so.
- (f) The trial Court misdirected itself by imposing a sentence of direct imprisonment on a first offender for an undeterminable small quantity of cannabis and a sole breadwinner for four minor children. This is coupled with the fact that the State requested for a fine and the appellant was in fact in a position to pay a fine. In the premises the sentence was shockingly inappropriate.

[3] The undefended appellant pleaded not guilty and the prosecution called

Sgt. Katherandu Kepira Paulus, a police officer at Noordoewer Police Station. On 8 December 2017 in the morning the officer saw the appellant in the Noordoewer suburb. However, when he again saw him at 13h00 that same day, he looked suspicious. This officer was together with two others when they approached the appellant. The officer asked the appellant's permission for a body search and he allowed it. Nothing was found on him. He asked the appellant to go with him and his two colleagues to his vehicle. In the witness's full view Sgt. Nandaya started searching on the driver's side and under the carpet where the driver rests his feet, the officer found a small plastic sachet of cannabis.

[4] According to Sgt. Paulus, Sgt. Nandaya asked the appellant to whom the cannabis belonged and the appellant said it was his. Sgt. Nandaya formally arrested the appellant for possession of the cannabis. The cannabis was too little to be weighed on the scanner, hence its weight is unrecorded, and the value thereof is N \$100. The kind of cannabis found on the appellant is called "skunk". Its price in Noordoewer and in the Karas Region in general was N\$100 at the time. The officer testified that in his capacity as a police officer he has been attending to numerous cannabis related matters, as well as workshops. The skunk type of cannabis has a unique smell, and has a brownish/greenish colour in a dry form.

[5] During cross-examination the appellant asked the officer why they did not search the man who was together with him in the vehicle. The officer stated that the man is always seen roaming around the streets in Noordoewer, as he is mentally disturbed. This is the reason the officer did not find it necessary to search him. We don't find anything wrong with that given the fact that the cannabis was found underneath the foot mat of the driver. The failure to search the man does not effect or change the credibility finding of the trial court.

[6] The appellant put it to the officer that he knew where the cannabis was sold in Noordoewer. The male passenger took him there. However, the cannabis

found in his vehicle is not in dispute, because he came with it across the border. He is only disputing the 33 grams weight which, from the record, the officer did not testify on.

[7] On his part, the appellant testified that he and his brother crossed the border at night and his brother was the driver. When they got to Wimpy the appellant wanted to sleep over at another place belonging to a person he recently came to know, while his brother wanted to proceed to Rosh Pinah. It was for this that an argument erupted between them. The appellant left him halfway to the Noordoewer location and he proceeded. However, since his brother did not know Namibia at all he walked back to him at Wimpy where his brother told him, he and the vehicle were thoroughly searched by the police. The appellant told his brother before they proceed to Rosh Pinah he wants to inform the person by whom he wanted to keep up for the night that he was no longer going to do that.

[8] Appellant's brother elected to lay on the lawn at Engen where the appellant would pick him up when he returned from the location. At a shebeen an unknown man got into his car. Suddenly the police stopped him asking why he was no longer with his brother and he explained to them as above. On realizing that they were chasing after him and he was being harassed, he took his passport showing them he was a Namibian citizen. The officers found this move to be arrogant and said they would like to search him. While a body search was being conducted on him, eight police officers were in attendance. The rest of the officers went to search his vehicle. When he came to the vehicle one officer pulled out something, but he did not see where he found the item. He was asked 'what is this colleagues?' He answered he did not know what it was, and was arrested thereon.

[9] During cross-examination the appellant conceded that during a search of his vehicle while it was driven by somebody else, the police found nothing, but

thereafter during a follow-up search while he was the driver, the police found cannabis. On further questioning, the appellant changed his story and said he did not bring in cannabis from across the border because he was searched on both the South African and Namibian side of the border. He further changed his story to say he cannot dispute cannabis was found in his car because he did not see it. He was apparently standing far away at the time of the search and there were a lot of guys in his vehicle, something which he never mentioned in his evidence under oath. It is clear the appellant was fabricating many stories. From the evidence this Court is satisfied that the appellant was correctly convicted on possession of cannabis. Although the failure to avail the accused an opportunity to address Court before judgment is a serious misdirection that can vitiate the proceedings, it did not in our view affect the conviction on this matter.

[10] As regards sentence, the appellant mitigated that he was thirty five years of age, unmarried, he had four minor children. He is an entrepreneur who sells T-shirts, jeans, takkies and is the only breadwinner. He asked for a lenient sentence. The prosecution asked for a sentence of N\$1 000 or three months imprisonment. On its part the trial Court misdirected itself when it pronounced and recorded its intention to teach the appellant not to mess with or disrespect the administration of justice or safety and security of this country'. The source or the reason for all these harsh sentiments is not on record.

[11] In reply to the grounds of appeal which in our considered view and in particular on the facts of the matter appears to be off the line the trial Magistrate intimated that there is no law prohibiting a first offender to be sentenced to imprisonment. She does not agree that the sentence of three (3) months imprisonment was shockingly inappropriate, because according to her, sentencing lies in the discretion of the trial Court.

[12] The trial Court had unjustifiably ignored the request from the prosecution for a sentence of imprisonment coupled with an option of a fine. It also

disregarded a clear indication related to the appellant's ability to pay a fine. All the above, in addition to the fact that the quantity of cannabis was so little, that it could not even be weighed, hence its street value placed on N\$100. This behavior of the trial Court is a material misdirection which shows that it has failed to exercise its sentencing discretion judiciously, thereby attracting/inviting this Court to interfere with its sentence.

[13] The counsel for the respondent also correctly in our view conceded that the sentence of imprisonment without an option of a fine is indeed shockingly inappropriate.

[14] It is on the basis of the above that the appellant's appeal against sentence should in the view of this Court succeed.

[15] In the result, we make the following order:

- a. The appeal against conviction is dismissed.
- b. The appeal against sentence is upheld.
- c. The appellant is sentenced to a fine of N\$800 or in default, three (3) months imprisonment.
- d. The appellant to report himself to the Clerk of Court Karasburg within 7 days of delivery of judgment.
- e. Appellant's bail extended by one week.

A M SIBOLEKA

Judge

J C LIEBENBERG

Judge

APPEARANCES:

FOR THE APPELLANT: Mr. Mc Nally
Lentin, Botma & Van Den Heever Attorneys,
Keetmanshoop

FOR THE RESPONDENT: Mr. H. K. Iipinge
Office of the Prosecutor-General, Windhoek