

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CR No: 86/2018

In the matter between

THE STATE

v

JEREME SWATZ

ACCUSED

(HIGH COURT MD REVIEW CASE NO. 1602/2018)

Neutral citation: *S v Swatz* (CR 86/2018) [2018] NAHCMD 343 (30 October 2018)

CORAM: DAMASEB JP *et* LIEBENBERG J

DELIVERED: 30 October 2018

Flynote: Criminal Procedure – Review – Crimes of dealing in and possession of dangerous and dependence-producing substances on the increase – By invoking section 112(1)(a) of the Criminal Procedure Act 51 of 1977 the impression is created that offence is less serious or minor – Court’s sentencing option thereby limited – The objective of punishment in matters of this nature is deterrence – There is a need for change in the courts’ stance on drug related cases and to accord the necessary weight to the seriousness of the offence and its prevalence in society.

Summary: The accused appeared before the trial court on two counts namely for Possession of dependence-producing substance c/s 2(b) of Act 41 of 1971 (count 1) and Dealing in dependence-producing substance c/s 2(a) of Act 41 of 1971 (count 2). On the accused’s first appearance the prosecutor informed the court that the State strongly objected to bail at that stage, as the accused attempted to sell drugs to children at a primary school in Windhoek. On date of the trial (three days later) only the count of possession was put to the accused, to which he pleaded guilty. The prosecutor then proposed that the provisions of s 112(1)(a) of the Criminal Procedure Act 51 of 1977 be invoked. During mitigation of sentence accused responded by saying that it was the first time children at school bought drugs from him.

Held, that, it is evident that crimes of dealing in and possession of dangerous and dependence-producing substances have taken on alarming proportions throughout Namibia.

Held, further that, the objective of punishment in matters of this nature should fall on deterrence. In order to achieve this objective the sentences imposed must be such that the accused is personally deterred of reoffending, while at the same time, it should serve as a deterrence to other would-be offenders.

Held, further that, it is worrisome that cases are finalised in terms of s 112(1)(a) of the Criminal Procedure Act 51 of 1977 when it involves dangerous dependence producing substances like cocaine and mandrax, containing methaqualone.

Held, further that, the recent increase in drug related cases and particularly the noticeable step-up from dependence-producing substances to dangerous dependence-producing substances, can no longer be ignored by the prosecution and the courts, and undoubtedly calls for intervention.

ORDER

The conviction and sentence, albeit reluctantly, are confirmed.

JUDGMENT

LIEBENBERG J: (concurring DAMASEB JP)

[1] This matter came before court on automatic review and although the proceedings are procedurally in accordance with justice, it raises serious concerns as to whether the correct approach was followed to dispose of the matter. The purpose of the judgment is to emphasise among prosecutors and presiding officers the need to reflect on the approach currently adopted in the lower courts in drug related cases which, unfortunately, often operates against the interests of justice. The present instance is one such case.

[2] The accused appeared before court on two counts namely Count 1: Possession of dependence-producing substances (c/s 2(b) of Act 41 of 1971) and Count 2: Dealing in dependence-producing substances (c/s 2(a) of Act 41 of 1971). The substance involved in this instance is cannabis (3 balies). The charge in count 2 (dealing) was prior to pleading amended to form the *alternative* to count 1 (possession).

[3] On his first appearance the prosecutor informed the court that the State strongly objects to bail being granted to the accused at that stage as he attempted to sell drugs to children at a primary school in Windhoek. A letter from the school was handed up in

opposition to the granting of bail. The matter was remanded for trial three days later and came before a differently constituted court.

[4] In a strongly worded letter the principal of the school expressed the view that the school has a legal responsibility to provide a safe and healthy environment for its learners and teachers and that the accused's actions must be condemned in the strongest of terms. Particular concern was raised about endangering the lives of learners and teachers at the school by providing drugs to them, with an increased risk of their safety and security. Moreover, where the accused has used minors as dealers of illegal and prohibited substances.

[5] The record of proceedings of 24 September 2018 reflects that only the count of possession was put to the accused, to which he pleaded guilty. The prosecutor then proposed that the provisions of s 112(1)(a) of the Criminal Procedure Act 51 of 1977 (the Act) be invoked. The magistrate obliged and the accused was convicted on his mere plea of guilty. It was only during mitigation of sentence that the court made reference to the letter earlier handed in, to which the accused responded by saying that it was the first time the children bought drugs from him.

[6] As has now become the norm in cases of this nature, the prosecutor in his/her submissions on sentence would emphasise the *seriousness and prevalence* of this type of offence and that a deterrent sentence should be imposed. In this instance it was further submitted that 'society cries foul with such offences' and that it may result in loss of lives. In her reasons on sentence the magistrate, besides referring to the objectives of punishment remarked that the offence is prevalent of late and 'has a great effect on our economy'.

[7] The observation made about the prevalence of drug related cases has merit as there is a significant increase in the number of review matters received in the High Court. Bearing in mind that not all cases end up with reviewable sentences, it is evident that crimes of dealing in and possession of dangerous and dependence-producing substances has taken on alarming proportions in this jurisdiction. As from the period January to October 2018 a total of 167 drug related cases came on review.

[8] As to be expected, the objective of punishment in matters of this nature is deterrence. In order to achieve this objective the sentences imposed must be such that the accused is personally deterred from reoffending while at the same time it should serve as a deterrence to other would-be offenders. Although this approach cannot be faulted, the effectiveness thereof is questionable if cases are thoughtlessly disposed of in terms of s 112(1)(a) of the Act merely for the sake of finalising the matter and without having proper regard to the nature of the offence and the particulars of the charge (See *S v Onesmus*).¹ By invoking the said section, the court creates the impression that the offence is considered to be minor and less serious as the court's sentencing option is now limited to that of a fine. It is worrisome that there are instances where matters are finalised in this fashion even where it involves dangerous dependence producing substances like cocaine and mandrax, containing methaqualone. This would undoubtedly send out the wrong message where an accused person's freedom could readily be regained by the payment of a fine, and seems to defeat the whole purpose of imposing deterrent sentences.

[9] Had the prosecutor in the present instance familiarised herself with the circumstances in which the offence was committed and that the accused was busy dealing at the school and not merely found in possession of cannabis, she would have charged the accused according to the facts the State would have been able to prove. Similarly, had the magistrate questioned the accused in terms of s 112(1)(b), she would have explored the circumstances under which the offence was committed and, in all likelihood, have had a fuller picture of the offence charged and responded thereto differently in sentencing. In my view the sentence ultimately imposed does not reflect the seriousness of the offence and could hardly be seen as deterrent. A custodial sentence, albeit in addition to a fine, would in the circumstances have been justified.

[10] The recent increase in drug related cases and particularly the noticeable step-up from dependence-producing substances to dangerous dependence-producing substances, can no longer be ignored by the prosecution or the courts, and undoubtedly calls for intervention. In *Dlamini and Another v State*² the appeal court dealt with the

¹ 2011(2) NR 437 (HC).

² (CA 126/2016) [2017] NAHCMD (12 March 2017).

question whether the trial court misdirected itself by sentencing the accused to a custodial sentence as opposed to an option of a fine. The court held that the scourge of drug abuse was on the increase in society, and that courts had to join forces with law enforcement agencies in combating the evil of drug related cases by imposing harsher sentences on drug dealers.³ The appeal was subsequently dismissed. Even though that case dealt with the offence of dealing in cannabis, this court shares the same sentiments which, equally, finds application to all drug related cases.

[11] In conclusion, it is our considered opinion that there is a dire need for change in the courts' stance on drug related matters and to accord the necessary weight to the seriousness of the particular offence and its prevalence in society. To this end all possible evidence should be submitted in order to place the presiding officer in the best position to fully appreciate the offence before court and to impose an appropriate sentence. Though the personal circumstances of the accused should be accorded the necessary weight and taken into account, the nature and extent of the crime, as well as the need of society to root out the evil of drugs in its midst, should equally be given proper consideration. In doing so, sentences should reflect the determination of our courts to play their part in curbing this evil that is only aimed at destroying human lives and the more vulnerable members of society like the youth. A clear and unequivocal message should emerge from the courts that crimes of this nature will not be tolerated any longer and sentences will henceforth be appropriately severe.

[12] In the result, the conviction and sentence, albeit reluctantly, are confirmed.

³ Ibid at para 14.

J C LIEBENBERG

JUDGE

P T DAMASEB

JUDGE PRESIDENT