

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2017/00012

LORENZO LEONARDO PLATT

APPELLANT

v

THE STATE

RESPONDENT

**Neutral citation:** *Platt v S* (HC-MD-CRI-APP-CAL-2017/00012) [2018] NAHCMD 38  
(26 February 2018)

**Coram:** SHIVUTE, J et UNENGU, AJ

**Heard:** 29 January 2018

**Delivered:** 26 February 2018

**Flynote:** Criminal – Procedure – Appeal against sentence – Drug offences – accused found in possession of cocaine worth N\$14 000.00 – s 2 (d) read with s 1, 2, (2) and or 2 (iv) 7, 8, 10, 14, and Part 11 of Schedule A of Act 41 of 1971 as amended – Accused a youthful and first offender – Sentence to 24 months imprisonment of which half thereof suspended for a period of five years on the usual conditions not interfered with on appeal and dismissed the appeal.

**Summary:** The appellant, 17 years old at the time when the offence was committed but 18 years at the time of sentencing and first offender is appealing against his sentence of 24 months' imprisonment of which half thereof was suspended for a period of five years on the usual conditions following a conviction of

possession of cocaine worth N\$14 000.00 in contravention of s 2 (d) read with s 1, 2 (2), and or 2 (iv), 7, 8, 10, 14, Part II of Schedule A of Act 41 of 1971 as amended. On appeal the court refused to interfere with the sentence and *held* that it was not inappropriate or unreasonable to pass the sentence imposed by the learned magistrate considering the facts of the matter.

Held further that courts will fail in their duties to punish possession of drugs if those convicted with the offence are given a slap on the wrist.

Held further that in the record of the proceedings, nothing could be found to justify the allegations made by the appellant in other grounds of appeal and dismissed the appeal.

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### **ORDER**

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The appeal is dismissed.

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### **JUDGMENT**

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UNENGU, AJ (SHIVUTE, J concurring):

[1] This is an appeal against the sentence imposed on the appellant by the learned magistrate in the court below. The grounds of the appeal will follow soon in the judgment. The appeal was heard on 29 January 2018. The appellant is represented by Mr Nambahu, while the respondent is represented by Ms Jacobs from the Office of the Prosecutor-General. After hearing counsel, we postponed the matter until 26 February 2018 for judgment.

[2] Initially, the appellant accused No. 1 in the court below, was charged with two others with the offence of possession of 4 x doses of crack cocaine with a value of N\$14 000.00 i.e. contravening s 2 (d) read with s 1, 2 (2) and or 2 (iv), 7, 8, 10, 14 and Part II of the Schedule A of Act 41 of 1971, as amended. However, the State decided to pursue against the appellant alone who pleaded guilty to the charge during the trial and submitted a statement in terms of s 112 (2) of the Criminal

Procedure Act<sup>1</sup> (the CPA), in which he explained amongst others, that he found the 4 x doses of crack cocaine in the riverbed behind his residence. He said that he recognized the substance as crack cocaine from drug awareness programs the Namibia Police conducted at his school which programs included information about penalties for buying and possession of illegal drugs.

[3] The appellant further admitted that he took the drugs and put it in his vehicle next to him where the Police found the bag. He knew well what could happen to him if found in possession of the drugs. The appellant was convicted of the offence based on the statement he submitted to court.

[4] After conviction, the appellant was sentenced to 24 months imprisonment of which half thereof was suspended for a period of five years conditionally. Aggrieved, by the sentence, the appellant is now appealing against it on the grounds listed hereunder:

- '1.1. The learned magistrate erred in law and/or fact in the following respects;
  - 1.2. He did not accord due weight to all the mitigating factors for the purpose of sentencing, more specifically:
    - 1.2.1 The appellant admitted guilt
    - 1.2.2 The appellant was 17 years old at the time offence was committed
    - 1.2.3 The appellant is a first offender, with no history of substance abuse, as indicated in the presentence report.
    - 1.2.4 The appellant showed genuine remorse by asking for forgiveness.
  - 1.3. The learned magistrate misdirected himself and erred in law in concluding that deterrence is the most important purpose of punishment and thereby 'scapegoating' the appellant.
  - 1.4. The learned magistrate erred in law by ruling that a custodial sentence is appropriate to deter the offender.
  - 1.5. The magistrate paid mere lip service when referring to the Appellant's personal circumstances.
  - 1.6. The court erred in drawing parallel between this matter and the matter of S v Ude (CA 12/2011) 2013 NAHCMD 149 in which a custodial sentence was imposed. The facts, amounts involved and reasoning of the presiding officer cannot be applied to the facts in casu.'

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<sup>1</sup> Act 51 of 1977.

[5] As pointed out above, before us, Mr Nambahu and Ms Jacobs argued the matter for the appellant and the respondent respectively. Both counsel filed written heads of argument which they expanded on during oral submissions at the hearing of the appeal.

[6] It is trite law that sentencing, above all, lies in the discretion of the trial court alone and there had to be a good cause, like a misdirection on the law or fact for the court of appeal to interfere with the sentence imposed. Put differently, the sentence imposed by the magistrate may be interfered with on appeal, only if such sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. In the matter of *S v Tjiho*<sup>2</sup> Levy, J laid guidelines under which circumstances a sentence of a lower court may be interfered with on appeal or review: These are:

- '(i) (if) the trial court misdirected itself on the facts or the law;
- (ii) an irregularity which was material occurred during the sentence proceedings;
- (iii) the trial court failed to take into account material facts or over-emphasised 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 the court of appeal.'

[7] There is consensus from both counsel regarding the sentencing guidelines above if regard is had to the respective written heads of argument and oral submissions. They also cited and discussed the case law applicable to sentencing in their heads of argument. Therefore, I do not find it necessary to rehearse what counsel already have discussed.

[8] Considering the above sentencing guidelines, the appeal court is entitled to interfere with the sentence imposed by the trial court, if the trial court during sentencing failed to comply with one or more of the guidelines laid down in the *The State v Tjiho* above.

[9] Further, it is a principle of law that the essential inquiry in an appeal against sentence is not, whether the sentence was wrong or right, but whether the court in imposing the sentence, exercised its discretion properly and judicially, because a

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<sup>2</sup> 1991 NR 361 (HC).

mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. The misdirection must be of such a nature, degree or seriousness that it shows directly or inferentially that the court did not exercise it properly or unreasonably (see *S v Pillay 1977 (4) SA 531 (A)*).

[10] In the present appeal we have to establish as to whether the sentence imposed on the appellant by the learned magistrate, is appropriate or reasonable in the circumstances of the matter, if not, then we have to interfere with the sentence because then the court did not exercise its discretion properly or reasonably.

[11] In the matter before us, the trial court considered the following personal circumstances of the appellant that he was a first offender, aged 18 years; was 17 at the time of the commission of the crime that he picked up the drugs in a riverbed; and that the appellant had enrolled for diesel mechanic course in Otjiwarongo which was set to start on 28 August 2017. These mitigating factors were presented from the bar by his legal representative which the learned magistrate considered together with other factors.

[12] Similarly, the State in aggravation of sentence, amongst others, also from the bar argued that people do not just throw drugs worth N\$14 000.00, that dealers use youth to transport drugs, that currently drug offenses in the country is a problem and on the increase. He argued further that the value of the crack cocaine found in the appellant's possession is high and asked the presiding officer to impose a sentence which would deter the appellant and other would be offenders from committing crimes.

[13] The appellant in his grounds of appeal does not allege that the sentence imposed on him is startlingly inappropriate, induces a sense of shock and that there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by this court. It is further apparent from the record of proceedings of the matter that due weight was accorded to all personal and mitigating factors of the appellant including those enumerated in para 1.2. to 1.2.4. of ground 1.

[14] However, the learned magistrate was particularly concerned with the effect of drugs on members of the society and the prevalence of drug offences in his area of jurisdiction, Windhoek and in the country as a whole in general. That being the case and for the sake of interest of society, the learned magistrate expressed the view that it was incumbent upon him to protect society against the scourge of drug abuse which is on the increase and its devastating effect on members of the society and decided to join force with law enforcement agencies in combating the evil by imposing a harsh sentence taking into account the judgment of *Ude v The State* case No. CA 12/2012, delivered on 7 June 2013.

[15] Although, the appellant in the present matter was convicted of possession of the crack cocaine, unlike in the *Ude v The State* matter above, where the appellant was found guilty of dealing in cocaine with a combined value of N\$139 000.07, in our view, it is still a serious offence to be convicted of possession of drugs with a value of N\$14 000.00, coupled with the fact that the appellant on several times was given classes at school by the Police about drugs and the effect thereof. It follows therefore that it is not inappropriate or unreasonable to impose the sentence passed by the trial court.

[16] The penalty clause for the offence of possession of cocaine is provided for in s 2 (d) read with Sections 1, 2, 7, 8, 10, 14 and Part II of the Schedule A of Act 41 of 1971 as amended, which is a fine not exceeding N\$ 20 000.00 or an imprisonment for a period not exceeding 10 years or both the fine and imprisonment in the case of a first conviction. The penalty clause shows that possession of drugs is a serious offence, therefore to be punished heavily to deter would be offenders.

[17] A complaint by the appellant levelled against the magistrate's reference to the *State v Ude* matter, is in our opinion, unfortunate and irrelevant. It is a serious offence to be convicted of possession of drugs just as in the case of a conviction of dealing in drugs. Possessors and users of drugs are the main culprits making the business of dealing in drugs a lucrative business. Courts will fail in their duties to punish the offence of possession of drugs if those convicted with the offence (depending on the circumstances and facts of a particular matter) are given a mere slap on their wrist.

[18] The same goes for youthfulness as a mitigating factor. The learned magistrate did consider it as such. He also gave reasons why he imposed a direct custodial sentence of which half thereof was suspended on the usual conditions. (See *S v Ignatius Petu Muruti* CC 10/2011). As already said, the appellant was very much aware through Police awareness campaigns at his school that he would be punished heavily should he be found in possession of dependence producing drugs like cocaine. The campaigns were aimed at sensitising the appellant and colleagues at school while still young. Not only about the effect thereof alone but also about the consequences which may follow should he or they be found in possession of such drugs. Despite this knowledge, however, the appellant collected cocaine worth N\$ 14000.00 from the riverbed for reasons known to him alone. Why did he take the bag from the riverbed in the first place? To do what with it? He says he did not look in the bag. People including children do not collect things from riverbeds for nothing. They do so either for own use or for the use and benefit of others.

[19] Further, nothing on record of the proceedings could be found to justify allegations made by the appellant in the other grounds of appeal. Therefore and for reasons stated above in the judgment, we come to the conclusion that the appeal must be dismissed.

Accordingly, the following order is made:

The appeal is dismissed.

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E P UNENGU  
Acting Judge

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N N SHIVUTE  
Judge

## APPEARANCES

APPELLANT:

CG NAMBAHU

Of Nambahu &amp; Associates, Windhoek

RESPONDENT:

S JACOBS

Of Office of the Prosecutor-General, Windhoek