



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

HC-MD-CRI-APP-CAL-2018/00040

In the matter between:

VEVANGATJIKE TJHAMBUMA

APPELLANT

v

THE
RESPONDENT

STATE

Neutral citation: *Tjihambuma v S* (HC-MD-CRI-APP-CAL-2018/00040) [2019]
NAHCMD 95 (12 April 2019)

Coram: USIKU J and SIBOLEKA AJ

Heard: 7 December 2018

Delivered: 12 April 2019

Flynote: Criminal Law – Drug Offences – First time offenders - Appeal against sentence on a charge of Possession or use of Prohibited Dependence-Producing Drugs 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 1977 as amended – Custodial sentences the norm in cases of dealing with Drugs, even in cases of first time offenders – The sentence imposed is not surprisingly inappropriate, neither does it induce a sense of shock –There was no over emphasis on the seriousness of the crime at the expense of the personal circumstances of the offender – No basis for the Court to interfere with the sentence – Appeal against sentence dismissed.

Summary: The appellant, being a first offender, was convicted on his own plea of guilty in the Magistrate’s Court for the District of Tsumkwe on a charge of Possession of Prohibited Dependence-Producing Drugs, namely 755.0 grams of cannabis valued at N\$ 7 550.00, 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 1977 as amended. The appellant was then sentenced to 14 months direct imprisonment without the option of a fine.

ORDER

The appeal against sentence is dismissed.

APPEAL JUDGMENT

USIKU J, (SIBOLEKA J concurring)

Background

[1] The appellant, being a first time offender and legally unrepresented, appeared before the Magistrate’s Court for the District of Tsumkwe on charges of Dealing in

Prohibited Dependence-Producing Drugs in contravention of section 2(a) of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 as amended, alternatively, Possession or use of Prohibited Dependence-Producing Drugs in contravention of section 2 (b) of the said Act. The appellant pleaded not guilty to the main count of Dealing in Prohibited Dependence-Producing Drugs but pleaded guilty to the alternative count of Possession of Prohibited Dependence-Producing Drugs, namely 755.0 grams of cannabis valued at N\$ 7 550.

[2] The State accepted the guilty plea and after questioning in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977, the appellant was found guilty as charged and convicted accordingly. He was sentenced to 14 months imprisonment without the option of a fine.

[3] The appellant subsequently filed a notice of appeal styled 'Notice for leave to appeal' on 8 June 2018 in which he sought leave to appeal against sentence only. The following grievances were listed against the sentence:

1. The Learned Magistrate erred and/or misdirected herself in law and/or facts by over emphasising the seriousness of the offence at the expense of the personal circumstances of the accused as well as the circumstances of the case, more in particular that the appellant is a first offender at 32 years of age.
2. The Learned Magistrate erred and/or misdirected herself in law and/or facts by failing to follow the norm set by other Courts (superior) when sentencing in cases of a similar nature.
3. The sentence imposed is too excessive, shocking, harsh and inappropriate in that it is too severe when regard is had to the nature of the case, the offence, the personal circumstances of the accused and the sentences imposed by the other Courts (superior) when sentencing in cases of a similar nature.

4. The Learned Magistrate erred and/or misdirected herself in law and/or facts by failing to assist the unrepresented accused in placing sufficient mitigating factors, more particularly the continued well-being of the appellant's child and his ability to pay a fine and in what amount as well as his educational background.

[4] At the hearing, Mr Ntinda appeared for the appellant and Mr Muhongo for the respondent (the State).

Applicable Law

[5] It is settled law that the courts of appeal will not lightly interfere with the sentence imposed by the lower court unless the court *a quo* did not properly exercise its sentencing discretion judiciously. It further follows that such discretion would not be judicially exercised if the court misdirected itself on facts and/or law; if a material irregularity occurred during sentencing; if the trial court failed to take into account material facts or overemphasized the importance of others and/or if the sentence imposed is startlingly inappropriate or induces shock.¹

[6] The appellant's legal practitioner argued that Courts are generally reluctant to send first offenders to prison unless the circumstances of the case so dictates. The fact that the appellant is a first offender, together with his age, should have been a mitigating factor. This Court does not dispute the above submissions by the appellant's legal practitioner, however, the case before court is in relation to a drug offence. Drug offences are considered to be very serious as they pose a danger to our communities and a message must be sent out that these transgressions will be met with severe penalties. The Courts have held that to impose a fine in cases of this nature might create the wrong impression, that the offence is not at all that serious thereby making it financially worth taking a chance.² The appellant was sentenced to 14 months imprisonment without the option for a fine, this in my view, the court *a quo* did so taking all the factors in to account, especially the fact that first offenders

¹ S v Tjiho 1991 NR 361 (HC).

² Dlamini and Another v State (CA 126.2016) [2017] NAHCMD 75 (13 March 2017).

should not be given the impression that they will always be given a choice between direct imprisonment or a fine.

[7] In the recent judgment of *Platt v S*,³ Shivute J together with Unegu AJ concurring, held the following:

'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.' (Underlined, my own emphasis.)

[8] Having regard to the above sentiments, Courts are under an obligation to consider uniformity in sentencing with regard to similar cases. This not only displays the fairness of the courts, but encourages the public's confidence in the impartiality of the courts. The 14 months imprisonment imposed by the court *a quo* cannot be said to be startlingly inappropriate, neither does it induce a sense of shock. The Learned Magistrate can therefore not be said to have erred and/or misdirected herself in law and/or facts by failing to follow the norm set by superior courts when sentencing in cases of similar nature. She clearly followed precedence.

[9] Furthermore, counsel for the appellant argued that the Learned Magistrate erred and/or misdirected herself in law and/or facts by failing to assist the unrepresented accused in placing sufficient mitigating factors, more particularly the continued well-being of the appellant's child and his ability to pay a fine, in what amount as well as his educational background. From the record of proceedings in the court *a quo*, the appellant indeed mentioned that he has one 7 year old child and that he is unemployed. He takes care of his parents who are pensioners and assists them with selling their cattle at auctions to earn some money. Furthermore, he mentioned that he was called for interviews at the Veterinary offices and that the sentence imposed would affect his quest for appointment. The fact remain that the

³ (HC-MD-CRI-APP-CAL-2017/00012) [2018] NAHCMD 38 (26 February 2018).

offence is serious and prevalent in the area. The use of drugs leads to members of society becoming non-productive.

[10] Having found no misdirection by the learned magistrate either in law or on facts, there is therefore no basis for this Court to interfere with the sentence imposed.

In the result, the appeal against sentence is dismissed.

D N USIKU
Judge

A SIBOLEKA
Acting Judge

APPEARANCES:

APPELLANT:

Mr Ntinda

Sisa Namandje & Co, Windhoek

RESPONDENT:

Mr Muhongo

Office of the Prosecutor-General, Windhoek