

<b>Case Title:</b> <i>The State v Benoit Swart</i>	<b>Case No:</b> CR 01/2020
<b>High Court MD Review No:</b> 701/2019	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Mr Justice Liebenberg <i>et</i> Mr Justice Sibeya (Acting)	<b>Delivered on:</b> 17 January 2020
<b>Neutral citation:</b> <i>S v Swart</i> (CR 01/2019) [2019] NAHCMD 02 (17 January 2020)	
<b>The order:</b> <ol style="list-style-type: none"> <li>a) The conviction is confirmed but the sentence is set aside and substituted with the following: ‘The accused is sentenced to payment of a fine of N\$500 or, in default, 60 days’ imprisonment.’</li> <li>b) The sentence is ante-dated to 22 October 2019.</li> <li>c) The Clerk of the Criminal Court is directed to bring this judgment to the attention to the accused and to refund him with the amount exceeding N\$500.</li> <li>d) This judgment to be brought to the attention of the Chief Magistrate who, in turn, must circulate it among magistrates under her jurisdiction.</li> </ol>	
<b>Reasons for order:</b>	
LIEBENBERG, J (concurring SIBEYA, AJ) <ol style="list-style-type: none"> <li>1. This is a review in terms of s 302 (1) of the Criminal Procedure Act 51 of 1977 (the CPA) as amended.</li> <li>2. The accused was charged in the magistrate’s court for the district of Keetmanshoop with possession of dependence-producing drugs to wit, 2 grams of cannabis valued at N\$20, in contravention of section 2(b) r/w 1, 2(i) and/or 2(iv), 7, 8, 10, 14 and Part I of the Schedule of Act 41 of 1971, as amended.</li> <li>3. The facts of this case are that the police, acting on a tipoff, approached the accused whilst sitting on</li> </ol>	

the porch at home. Before they could body search the accused, he undressed himself and dropped his clothes to the floor. A 'zol' (a hand-rolled cigarette, containing cannabis) was then found lying next to the accused person's clothes. He was charged and the matter went on trial.

4. The accused pleaded not guilty but after evidence was led and it had been proved that the 'zol' belonged to the accused, he was found guilty as charged and sentenced to a fine of N\$4 000 or, in default of payment, 2 (two) years' imprisonment.
5. The conviction is in order and will be confirmed. However, the gravamen lies with the sentence imposed by the trial court.
6. In view of the severity of the sentence imposed and the magistrate's *ex tempore* reasons on sentence, a statement from the magistrate in terms of s 304(2)(a) of the CPA setting out the reasons for her sentence, in our view, is not required as the accused will be prejudiced if the matter is not expeditiously dealt with by this court.
7. It has been held that one of the factors that may persuade a court to interfere with a sentence is where a trial court has failed to take into account a material fact, or has overemphasized the importance of one factor at the expense of another.<sup>1</sup>
8. During sentencing proceedings the accused addressed the court in mitigation to the effect that he is a 45 year old first offender; he is employed as a plumber earning a salary of N\$1300 per month and the only breadwinner of his family. Furthermore, the accused implored the trial court to impose a fine of N\$ 400 or 1(one) month imprisonment because this was all he could afford.
9. In the magistrate's sentencing judgment she emphasized the prevalence of alcohol and drugs in the community of Keetmanshoop and the fact that the accused was not remorseful. In the end the trial court imposed a fine which the accused was clearly unable to pay, resulting in him having to serve

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<sup>1</sup> S v *Tjiho* 1991 NR 361 (H) at page 366A-B.

the alternative of two years' imprisonment.

10. With regards to sentencing in drug related cases the court in *S v Swatz*<sup>2</sup> stressed that courts have to send out a clear message that crimes of this nature will attract severe sentences. However, the court equally noted that all possible evidence should be put before the court in order to place the presiding officer in the best position to impose an appropriate sentence, based on the facts and circumstances of the particular case. It is trite that a court of appeal or review will not readily interfere with the discretion of the trial court when it comes to sentence, provided the court exercised its discretion judiciously and properly in sentencing.
11. With regards to the appropriateness of imposing a fine which an accused could afford, the court in *S v Mynhardt; S v Kuinab*<sup>3</sup> set out the following guidelines when considering the imposition of a fine:
- a) 'Fines should be used mainly as punishment for lesser offences.
  - b) The imposition of a fine is an alternative punishment, ie the purpose of a fine is to punish an accused without incarcerating him. To impose a fine which an accused can obviously not pay is to impose direct imprisonment in the guise of an alternative term of imprisonment.
  - c) Although not capable of exact calculation the alternative of imprisonment must be proportionate to the fine and the gravity of the offence.
  - d) The presiding officer must obtain the necessary facts before deciding upon a fine. ... Of vital importance is the ability of the accused to pay a fine. Here, not only the accused's income is of importance, but also his assets and liabilities and other means of obtaining funds.
  - e) The amount should usually fall within the ability of the accused...'

<sup>2</sup> Unreported Judgement (CR 86/2018) [2018] NAHCMD 343 (30 October 2018) at para 11.

<sup>3</sup> 1991 NR 336 (HC).

(Emphasis provided)

12. There can be no doubt that the fine imposed by the court fell well outside the financial means of the accused, thereby effectively imposing a sentence of two years' imprisonment for two grams of cannabis valued at N\$20. The magistrate was clearly unfazed by the small quantity of cannabis found

on the accused as she simply stated that it was 'irrelevant' as the accused was in possession of a dependence-producing drug. The bold conclusion reached by the magistrate is not substantiated by current case law on sentencing in matters of this nature where the quantity of drugs convicted of is considered to be a material factor at sentencing. Logic dictates that a person found with 2 grams of cannabis should receive a lesser sentence than a person found with 2kg of cannabis. The quantity of the prohibited substance would inevitably impact on the seriousness of the offence committed which, in turn, would reflect on the punishment meted out. To this end the magistrate clearly misdirected herself which directly impacted on the severity of the sentence imposed.

13. With regards to the interests of society, the reasons advanced by the magistrate that a deterrent sentence was called for is clearly not consistent with the facts placed before the court. The magistrate associated the accused's possession of cannabis with children being exposed to drugs; offences like rape, murder, culpable homicide and robbery; whilst putting the safety of the community generally at risk. There is simply no basis for connecting the crime committed by the accused with any of these circumstances considered to be aggravating and he was clearly sacrificed on the proverbial altar of deterrence. The court further found that the accused 'has not taken responsibility for his conduct', thus lacking repentance. This the court interpreted as an aggravating factor; another misdirection on the part of the court as the lack of remorse is not *per se* considered an aggravating factor. The one-sided approach followed by the magistrate is borne out by her erroneous reasoning pertaining to the element of mercy, stated in the following terms:

'Therefore, as an extension of the Court's mercy Accused will not be exposed to the full penalty clause

and will be given the option to pay a fine today. Accused person's fine will therefore be a mirror of his conduct and a blatant display of his persistence and the lawfulness of his conduct.'

(Emphasis provided)

14. These remarks were made not only out of context, but are neither supported by the facts. How the magistrate could possibly think that this is an instance where the accused should be visited with the full extent of the law, is beyond comprehension. Furthermore, to describe the accused's conduct as 'blatant' and 'persistent' denotes that he is not a first offender. Although briefly summarising the accused's personal circumstances, the court failed to give the necessary weight to the fact that the accused was a first offender; employed; and sole breadwinner of his family. The fact that he was unable to pay a substantial fine was also ignored, alternatively, given insufficient weight.
15. From a reading of the court's reasons on sentence, it is evident that mere lip service was paid to the accused's personal circumstances which were not accorded sufficient weight. This unfortunately resulted in the court over-emphasising the seriousness of the offence and the interests of society. By so doing, the court failed to exercise its discretion on sentence judiciously. The sentence imposed in this instance is so shockingly inappropriate that it borders on a failure of justice.
16. In these circumstances, we find the sentence imposed shockingly inappropriate and it falls to be set aside. In our view the imposition of a fine of a much lesser amount, coupled with an appropriate alternative term of imprisonment, would be justified and proper.
17. Lastly, upon enquiry, the Clerk of the Criminal Court Keetmanshoop confirmed that the accused paid the fine only on the 24<sup>th</sup> October 2019, two days after his incarceration. Being a part-fine, this

rendered the matter still reviewable under s 302(3) of the CPA.<sup>4</sup>

18. In the result, the following order is made:

- a) The conviction is confirmed but the sentence is set aside and substituted with the following:  
‘The accused is sentenced to payment of a fine of N\$500 or, in default, 60 days’ imprisonment.’
- b) The sentence is ante-dated to 22 October 2019.
- c) The Clerk of the Criminal Court is directed to bring this judgment to the attention to the accused and to refund him with the amount exceeding N\$500.
- d) This judgment to be brought to the attention of the Chief Magistrate who, in turn, must circulate it among magistrates under her jurisdiction.

<b>J C LIEBENBERG</b> <b>JUDGE</b>	<b>O SIBEYA</b> <b>ACTING JUDGE</b>

<sup>4</sup> The provisions of subsection (1) shall only apply-

- (a) with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser;
- (b) where a fine is imposed, if a sentence of imprisonment is imposed in terms of section 287 as a punishment alternative to such fine, and such fine is not paid or if time is not given for the payment thereof before the person convicted is received into a prison. . .