



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2019/00093

In the matter between

STIMELA FRANSISKUS MOKHATU

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mokhatu v S* (HC-MD-CRI-APP-CAL-2019/00093) [2020] NAHCMD
232 (19 June 2020)

Coram: SHIVUTE J et CLAASEN J

Heard: 15 May 2020

Delivered: 19 June 2020

Flynote: Appeal against sentence - Imprisonment without option of fine – Drug offense – Accused found in possession of 1445 grams of cannabis to the value of N\$ 14 450-00 and 49 mandrax tablets that contains methaqualone to the value of N\$ 4 900.

Sentence of 36 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual conditions.

Held - Though possession of drugs is regarded as less serious than the offense of dealing in drugs, it cannot be overlooked that a transporter is an instrumental cog in the wheel of the drug supply chain and cannot get away with a mere slap on the wrist.

Held – No material misdirection in the sentence of the *court a quo* - Appeal dismissed.

APPEAL JUDGMENT

- a) The appeal against sentence is dismissed.
- b) The appellant's bail is extended until 29 June 2020 on condition that the appellant reports himself to the Clerk of Court at the Aranos Magistrates Court for the Magistrate to issue a warrant of committal.

JUDGMENT

CLAASEN J (SHIVUTE J concurring)

Introduction

[1] The appellant pleaded guilty and was convicted in the District Court in Aranos of contravening section 2(b) of the Abuse of Dependence Producing Substances and Rehabilitation Act 41 of 1971 as amended, to wit possession of 1445 grams of cannabis to the value of N\$ 14 450 and 49 mandrax tablets that contains methaqualone to the value of N\$ 4 900.

[2] The appellant was sentenced to 36 months imprisonment of which 12 months was suspended for 5 years on the usual conditions and the drugs were forfeited to the State. Dissatisfied with the sentence, the appellant, at the time represented by Mr Garbers, filed a Notice of Appeal on 28 August 2019.

[3] Subsequent thereto on 8 November 2019 the appellant applied and was granted bail pending appeal by the Magistrate that presided over the matter.

[4] The appeal matter was initially enrolled for hearing a date that fell within the period of the COVID-19 lockdown. Both Mr Kauari, counsel instructed by Legal Aid for the appellant and Mr litula, counsel for the respondent, agreed to waive oral arguments. Thus the matter was determined on the written heads of arguments.

[5] Counsel for the appellant sought condonation for the late filing of his heads of argument. In the supporting affidavit he explained that the due date for the heads of argument already passed by the date that the file was received from the erstwhile legal representative. The explanation is accepted and condonation is granted.

Grounds of appeal

- [6] The grounds of the grievance against the sentence were formulated as follows:
- a) The magistrate erred in overemphasising the element of retribution for purpose of sentencing;
 - b) The magistrate erred in law and fact by according too much weight to community interest, alternatively committed a misdirection in finding that it was in the community interest to impose imprisonment without the option of a fine;
 - c) The magistrate erred in law by overemphasising the quantity of the contraband with the sole purpose to justify direct imprisonment;
 - d) The magistrate did not afford adequate weight to the substantial factors in mitigation; and that
 - e) The sentence is harsh, unreasonable and induces a sense of shock.

Magistrate's reasons for sentence

[7] The magistrate motivated the sentence by referring amongst others to the accused's personal circumstances, to the appellant being a transporter of the drugs from Windhoek to their district, to the quantity and value of the drugs in question not being small, to the prevalence of the offense in their district and to the destructive effect of drugs in the community.

[8] The *court a quo* also cited *Ude v S*¹ wherein it was stated that drug abuse is on the increase and there is a call upon courts to combat the evil by imposing harsh sentences on drug dealers.

Submissions by Counsel for the Appellant

[9] Counsel for the appellant emphasized the sentencing principle that first offenders should not be sent to prison without the option of a fine. This was offered in support of their arguments that the magistrate's failure to give a fine amounts to a material misdirection and that the community interest and retribution was overvalued at the cost of insufficient weight being accorded to the aspects in mitigation of sentence.

[10] According to counsel for the appellant there were numerous factors in mitigation, namely diminished blameworthiness of the appellant as the drugs were not his, that the appellant was a first offender and breadwinner for his minor children, that the appellant had served 2 months imprisonment after his sentence was imposed and that the value of the contraband was relatively small.

[11] Counsel urged the court to have regard to uniformity of sentences and referred to a number of review judgments wherein fines coupled with imprisonment was given for drug related offences. I will return to these matters later in this judgment.

Submissions by Counsel for the Respondent

[12] Counsel for the respondent argued that the magistrate sufficiently considered all the relevant factors and that the sentence was not shockingly inappropriate or disproportionate.

The law

[13] It is settled that sentencing is primarily a matter that falls squarely in the discretion of the trial court. An appeal court can only interfere with a sentence if there

¹ CA 12/2012 [2013] NAHCMD 149 (7 June 2013).

was a misdirection which was so serious that it can be said the sentencing court did not exercise its discretion judiciously.²

Disposal

[14] At the outset, I want to make it clear that this court has no qualm with the tenet that first offenders are not easily or lightly send to prison without the option of a fine. This is but one of the sentencing principles amidst other equally relevant considerations, which factors were apparent in the *court a quo*'s reasons for sentence.

[15] In looking at the facts, the case charge involved two different type of drugs with a combined value of almost N\$ 20 000, which by no means can be called a small quantity or value, as contended by the counsel for the appellant.

[16] I differ with counsel for the appellant's contention that the appellant's blameworthiness is reduced as the appellant was an unwilling participant that the appellant did not carry the drugs for his own purposes, and collaborated fully with the police at the time of arrest.

[17] The plea statement by the appellant reveals that he did not initially know of the drugs when he was sent by his employer, one Emilia Hepote to collect stock in Windhoek, but that he definitely discovered the illicit nature thereof after it was handed to him at Woermann & Brock in Katutura. Though he protested to his employer, he nevertheless travelled with the package for handover to his employer, Ms Hepote. The facts do not suggest that the appellant volunteered information to the Police Officers regarding the packet prior him being found in possession of the drugs. Only once found with the drugs did he convey that he carried it for his employer, who was a shopkeeper at Aranos.

[18] In *Platt v S*³ it was held that possessors and users of drugs are the main culprits that makes the business of dealing in drugs a lucrative business. In the matter before us, the appellant was used as a 'courier' of the prohibited substances, which would

² S v Tjiho 1991 NR 361 at 366.

³ [2018] NAHCMD 38 (26 February 2018).

have reached the drug merchant and subsequently the community of Aranos if the Police Force did not intercept it.

[19] I briefly refer to the review matters cited by counsel for the appellant in an effort to plead their case to impose a fine combined with imprisonment as an alternative. It is unfortunate that the matters do not advance their case as they are not comparable.

[20] *S v Isaacks*⁴ is a review matter where the proceedings were finalised in terms of section 112(1)(a) of the Act and combined value of drugs involved was N\$ 446.00. The matter encapsulated the principle that section 112(1)(a) of the Criminal Procedure Act is intended for minor offenses and that a severe sentence is not feasible for a matter disposed of in terms of that provision.

[21] The matters of *S v Witbooi*,⁵ and *S v Kambundji*⁶ were criminal reviews wherein the quantity and value of the substances involved were not mentioned in the judgments, as so it cannot be used for comparative purposes. The *Witbooi* case dealt with the issue of a condition of suspension that was too widely phrased, whereas the *Kambundji*, matter dealt with charge stipulated the wrong section and on review it was corrected.

[22] In *S v Pamela*⁷ the accused was given a fine of N\$ 6000 or 15 months' imprisonment which was partially suspended for being in possession of 85 grams of cannabis, which is hardly comparable to the matter at hand.

[23] I return to the issue on appeal namely whether there was a material misdirection in the sentence that was imposed. In *Dlamini and another v S*,⁸ a case that dealt with a guilty plea in a matter of dealing in cannabis, the appeal court also faced the question of whether the trial court acted off course by imposing a sentence of imprisonment without the option of a fine. The appeal against sentence did not succeed and the court observed that the number of drug related cases are increasing

⁴ (CR 2/2018) [2018] NAHCMD 8 (29 January 2018).

⁵ (CR 59/2017) [2017]NAHCMD 290 (10 October 2017).

⁶ (CR 62/2018)[2018] NAHCMD 243 (14 August 2018).

⁷ (CR 103/2019) [2019] NAHCMD 545 (12 December 2019).

⁸ CA 126/2016 [2017] NAHCMD 75 (13 March 2017).

and that courts have to work together with law enforcement agencies by imposing harsher sentences on drug dealers.

[24] The matter of *S v Swatz*⁹ indicates a paradigm shift in sentencing when it comes to drug related matters as the reviewing court stated in para 11 '... 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 offense and its prevalence in society.'

[25] The same approach was evident in the appeal matter of *Umub v S*,¹⁰ a matter that involved a guilty plea on a charge of possession of a large consignment of cannabis to the value of N\$ 80 700 and 40 mandrax tablets to the value of N\$ 2800. The appellant had a previous conviction and a sentence of 10 years direct imprisonment was imposed. The appeal court came to the conclusion that there was no prospects of success on the appeal against the sentence.

[26] In the *Umub* matter Ndaunendapo J went on to state at para 12 that:

'The fight against dealing and possession of dependence and dangerous dependence producing substance must be intensified at all levels by the law enforcement agencies and the courts. It is on the increase and busy destroying our communities particularly the youth despite the heavy sentences imposed. The courts must step in and impose severe sentences, never heard of before, as we are losing the battle against drug abuse. The sentences to be imposed must be so severe to deter the appellant and would be offenders from committing such offences.'

[27] I endorse the sentiments expressed in the *Swatz* and *Umub* matters. Though possession of drugs is regarded as less serious than the offense of dealing in drugs, it cannot be overlooked that a transporter of the substance is an instrumental cog in the wheel of the drug supply chain and cannot get away with a mere slap on the wrist.

[28] Although I may have imposed a slightly different sentence, that in itself does not justify interference.

⁹ CR 86/2018) [2018] NAHCMD 343 (30 October 2018).

¹⁰ HC-MD-CRI-APP-CALL-2017/00028 [2019] NAHCMD 18 (8 February 2019).

[29] In the premises, there was no material misdirection or irregularity that was committed by the *court a quo*, nor was the sentence shockingly disproportionate. Therefore the appeal against the sentence must fail.

[30] In the result the following order is made:

- a) The appeal against sentence is dismissed.
- b) The appellant's bail is extended until 29 June 2020 on condition that the appellant reports himself to the Clerk of Court at the Aranos Magistrates Court for the Magistrate to issue a warrant of committal.

C M CLAASEN
JUDGE

N N SHIVUTE
JUDGE

APPEARANCES:

1ST APPELLANT: Mr N Kauari
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