REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 25/2016

In the matter between:

NTINDA TANGENI PAULUS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation*: Paulus v S* (CA 25/2016) [2017] NAHCNLD 8 (17 February 2017)

Coram: TOMMASI, J and JANUARY, J

Heard: 25 November 2016

Delivered: 17 February 2017

Flynote: Criminal Procedure – Appeal – Sentence – Dealing in cannabis – Considering the fact that an accused pleaded not guilty when evidence against him is overwhelming – Irrelevant, irregular and a misdirection – On aggravating factors sentence lenient – Also considering personal circumstances – Sentence appropriate

Summary: The appellant pleaded not guilty in the magistrate's court, amongst others, a charge of dealing in cannabis. He was sentenced to 30 months' imprisonment. This appeal is against the sentence. The magistrate in her reasons stated *inter alia* that the

appellant wasted the courts time by pleading not guilty. This is found to be irrelevant, irregular and a misdirection. On the aggravating factors alone the sentence appears to be lenient but in conjunction with the personal circumstances of the appellant the sentence is appropriate. The sentence is not shocking or startlingly inappropriate. The misdirection is not of such a nature that it vitiates the proceedings. Despite the misdirection the sentence is confirmed.

ORDER

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1. The appeal is dismissed.
2. The sentence is confirmed.

APPEAL JUDGMENT

JANUARY, J; TOMMASI, J (CONCURRING)

[1] In this matter the appellant was arraigned in the magistrate's court on charges of; **1.** Contravention of section 2(a) read with sections 1, 2(i) and 2(ii), 8, 10,14 and part 1 of the Schedule of Act 41 of 1971, as amended - dealing in a potentially dangerous dependence-producing drug to wit: 18 balies and parcels of cannabis weighing 1040 grams valued N$3120. **2.** Contravention of section 2 read with sections 1, 38(2) of Act 7 of 1996, as amended - possession of an arm to wit: a 7.65 millimetre pistol without a license. **3.** Contravention of section 33 read with sections 1, 38(2) and 39 of Act 7 of 1996, as amended - possession of ammunition to wit: one magazine, 6 live round of ammunition without being in lawful possession of an arm capable of firing that ammunition.

[2] The appellant pleaded not guilty on all charges. A trial was held and the appellant was convicted on count 1, dealing in a dangerous dependence producing drug and count 2, possession of an arm. He was acquitted on count 3, possession of ammunition.

[3] The appeal is only against the sentence on count 1, dealing in a dangerous dependence-producing drug. The State proved a previous conviction of possession of cannabis against the appellant. Mr. Tjiteere appeared *amicus curiae* for the appellant and Mr. Gaweseb for the respondent.

[4] Sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo.* A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or
- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;
- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.[1]

[5] The learned magistrate considered the crimes committed, the personal circumstances of the accused and the interest of society. She considered that the prescribed sentence for dealing in cannabis is N$30 000 or 15 years imprisonment for a first offender. The appellant was a first offender for dealing in cannabis. The magistrate further considered the previous conviction for possession of cannabis and that the appellant knew that the possession of cannabis was unlawful. The cannabis was packaged into parcels and balies and her inference that the appellant was a dealer is correct.

[1] *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G

[6] The personal circumstances of the appellant are; that he was 24 years old; that he was single with 3 children aged 5, 3 and 2 years old with one child residing with the accused; The accused was self-employed and earned a salary of up to N$1500 at times; His assets are only a bed and television set; Grade 10 is his highest level of education; He has a younger brother who suffers from HIV; He requested for a sentence of 2 years or a fine of N$2000 to enable him to care for his kids and the younger brother. The appellant volunteered to the court to become an informer.

[7] The learned magistrate in her reasons *inter alia* states; '*Accused is unremorseful and has wasted the court's time in taking the matter on trial when evidence clearly pointed to himself.'* It is evident from many reviews and appeals that this court is dealing with, that some magistrates are in the habit of using the phrase that; 'an accused wasted the court's time' in pleading not guilty where the evidence is overwhelming against them. Any accused has the constitutional right to plead not guilty and the right to remain silent.[2] Considering whether or not he pleaded guilty is only relevant, in my view, to the factor of remorse but irrelevant to aggravation of sentence.

[8] The fact that a magistrate mentions the wasting of the court's time, in my view, is an indication that that factor is considered in meting out the sentence. It is not a factor that is to be considered in aggravation of sentence, is irrelevant, irregular and a misdirection.[3] Even if it is only mentioned in passing or to emphasize that an accused has no remorse, it is in my view wrong. It creates a perception that an accused will be sentenced heavier when he/she pleads not guilty and more lenient when pleading guilty.

[9] Despite the misdirection and the fact that the magistrate considered an irrelevant fact, the sentence is not startlingly inappropriate or shocking. The misdirection is not of such a nature that it vitiates the proceedings.

[10] I do not find any other irregularity or misdirection in the sentencing. Considering the seriousness of the crime, the heavy prescribed sentences and the fact that the appellant is not a first offender in relation to cannabis, I am of the view that it is on the

[2] Article 12 especially articles 12(1)(a) and 12(1)(d) of the Namibian Constitution.
[3] *S v Martin* 2009 (1) 306 at 307 C-D, *S v Zemburuka* 2008 (2) NR 737 at 741 E-H

lenient side. However taking into consideration the personal circumstances of the appellant also, I find the sentence to be appropriate.

[11] In the result:

1. The appeal is dismissed.
2. The sentence is confirmed.

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HC JANUARY, J

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MA TOMMASI, J

APPEARANCES:

For the Appellant:	Mr Tjiteere (*Amicus Curiae*)
	Dr Weder, Kauta & Hoveka Inc.
For the Respondent:	Adv. Gaweseb
	Office of the Prosecutor-General