REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

APPEAL JUDGEMENT

Case No: HC-NLD-CRI-APP-CAL-2019/00047

In the matter between:

NDJAMBA IMMANUEL **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Immanuel v S* (HC-NLD-CRI-APP-CAL-2019/00047) [2021] NAHCNLD 43 (29 April 2021)

Coram: SMALL AJ and MUNSU AJ
Heard: **22 April 2021**
Delivered: **29 April 2021**

Flynote:
Criminal Procedure - Appeal – Conviction-Presumption in section 10(1)(a) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 does not apply to dangerous dependence-producing drugs like cocaine listed in Part II of the Schedule to the Act. The Court a quo misdirected itself by finding that this presumption finds application in respect of dangerous dependence-producing drugs.

Criminal Procedure - Appeal – Conviction- The failure to inform an undefended accused correctly of a presumption which he must refute, if it applies in any event, could lead to the quashing of his conviction if the accused were prejudiced by that failure.

Criminal Procedure - Appeal – Conviction- Importation in dealing definition includes 'to bring something from one country into another' for whatever reason.

Criminal Procedure - Appeal - Sentence – Direct and unsuspended Imprisonment is not the only appropriate punishment for corrective and deterrent purposes.

Criminal Procedure - Appeal - Sentence - Appropriate sentence. The Appellant spent almost two years in pre-trial custody. Any substantial time spent in custody awaiting trial should be taken into account-A partially suspended sentence firstly prevents the offender from going to jail for an extended period, and secondly, he or she has part of the sentence hanging over him or her.

Summary:

Appeal against conviction and sentence. The Appellant was arraigned before the Regional Court on a charge of contravening section 2(c) alternatively 2(d) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971- Dealing in, and alternatively possessing, 185.3 grams of cocaine valued at N$107 500.00.

Appellant made his first appearance in the Regional Court Eenhana on 28 July 2017. The appellant was in custody. On 26 October 2017, the plea was eventually taken the accused pleaded guilty to both the main as well as the alternative charge before a plea of not guilty was entered. He was convicted on 27 February 2018 of dealing and sentenced to six years imprisonment. On the date of his conviction and sentence the unrepresented appellant, who was arrested on 7 March 2016, was in custody for almost two full years.

The Court *held* that the appellant was correctly convicted of dealing in cocaine albeit for different reason than those forwarded by the court a quo.

The Court further *held* that the Court a quo did not consider alternative sentences and did not carefully consider that the Appellant spent almost two years in custody prior to sentence being imposed. The appeal against sentence was accordingly upheld and the Court a quo's sentence was substituted Six (6) years imprisonment of which 2 years imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of a contravention of section 2(c) of Act 41 of 1971 committed during the period of suspension.

The appeal against sentence is accordingly upheld, substituted, and antedated to 27 February 2018.

ORDER

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1. The appeal against the conviction is dismissed.

2. The appeal against the sentence succeeds. The sentence is set aside and substituted by the following sentence: Six (6) years imprisonment of which 2 years imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of a contravention of section 2(c) of Act 41 of 1971 committed during the period of suspension.

3. The sentence is antedated to 27 February 2018.

APPEAL JUDGMENT

SMALL AJ (MUNSU AJ concurring);

Introduction

[1] The State, being the Respondent is this appeal formulated the charges against the Appellant in the Regional Court Eenhana as follows:

> 'That the accused is/are guilty of contravening section 2(c) read with sections 1, 2(i) and/or 2(ii), 8, 10. 14 and Part II of the Schedule of the act 41 of 1971, as amended.
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> In that upon or about the 7th day of March 2016 at or near Oshikango border in the district of Eenhana the said accused did wrongfully and unlawfully deal in a dangerous dependence-producing drug, or a plant from which such drug can be manufactured, to wit: two parcel[s] of powder containing 27 percent of Cocaine weighing 185.3 grams and valued at N$107 500.00.[1]
>
> Alternatively
>
> That the accused is/are guilty of contravening section 2(d) read with sections 1, 2(iii) and/or 2(iv), 8, 10. 14 and Part II of the Schedule of the act 41 of 1971, as amended.
>
> In that upon or about the 7th day of March 2016 at or near Oshikango border in the district of Eenhana the said accused did wrongfully and unlawfully possess a dangerous dependence-producing drug, or a plant from which such drug can be manufactured, to wit: two parcel[s] of powder containing 27 percent of Cocaine weighing 185.3 grams and valued at N$107 500.00.'

[2] The Appellant was unrepresented in the Court a quo and pleaded guilty on both the main and alternative charge. The Court only questioned him in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 regarding the main count. From the questioning of the accused, it is apparent that he admitted that he, on 7 March 2016, carried the alleged dangerous dependence-producing drug from Angola into Namibia through the Oshikango border post on behalf of a foreigner. Police officials inside Namibia stopped him. He, however, denied knowing that what he was carrying was the dangerous dependence-producing drug cocaine and stated that the person on whose behalf he had the bag said it was medication for his livestock. The Court then entered a plea of not guilty in terms of section 113 of the Criminal Procedure Act, 1977.

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[1] This sets out the main charge as formulated in the original part of the record. They transcribed version, although alleging a contravention of section 2(c) mistakenly avers that the accused possessed the aforesaid cocaine.

[3] After the state presented its evidence, the accused gave evidence. The Court a quo convicted the accused on the main charge and sentenced him to six years imprisonment.

[4] The Appellant in the appeal is represented by Mr Aingura while the Respondent is represented by Ms Nghiyoonanye. The appeal is against conviction and sentence.

The evidence prior to conviction

[5] The evidence of the two police officers who gave evidence for the State indicates that they, on 7 March 2016, stopped the accused after he entered Namibia through the Oshikango border post. Upon searching the accused, two bags suspected to be cocaine were found sellotaped to his thighs beneath his clothes. The accused accepted responsibility for the two bags and their contents taped to his thighs and did not allege that they belonged to someone else. If he did, they would have attempted to detain such a person as well. The contents of the bags were weighed in the accused presence and found to have a mass of 215 grams. On this weight, it was valued at N$107 500.00. These two bags containing the suspected cocaine were sealed in exhibit bag NFB33294 and the accused cell phone in exhibit bag NFB 33295. These exhibit bags were packed in Exhibit bag NFE19410 and later forwarded to the National Forensic Science Institute for evaluation.

[6] While admitting that the bags suspected to contain cocaine were found in his possession on 7 March 2016 after crossing into Namibia, the accused gave evidence and denied that it was sellotaped to his thighs. He averred that it was in the bag he was carrying for a foreigner. He further stated that he was unaware that the bags contained cocaine. If he were, he would have refused to take the foreigner’s bag over the border.

[7] The affidavit in terms of sections 212(4)(a) and 212(8)(a) of the Criminal Procedure Act 51 of 1977 of Christine Simbara Kamukwanyama, a duly qualified forensic scientist, was handed up and received in evidence by the Court a quo during the State's case. This statement can be handed in in terms of the aforesaid section and provides prima facie proof that the two bags of powder suspected to be cocaine submitted to the National Forensic Science Institute, had a mass of 185.3 grams and contained 27 per cent cocaine. The appellant had no objection to this statement being

received in evidence and this in essence proves that the powder brought into Namibia by him far exceeds the percentage of 0,1 percent required to place the said of content cocaine within the definition of the dangerous dependence-producing drug cocaine as defined and listed under Part II of the Schedule to the Act.

Approach on Appeal

[8] The general principles of the appeal court's approach are well known. The departure point thereof is that an appellant is entitled to a re-hearing as of right. This right is a matter of law and must not be made illusory. In the absence of an apparent and material misdirection by the trial court, its findings are presumed correct. The appeal court can only disregard them if the recorded evidence shows them as wrong. However, this approach does not relieve an appeal court from its obligation to carefully consider the evidence because it has other advantages that the trial court does not have. Sometimes a Court of Appeal is in a better position to evaluate the secondary facts from the evidence as the case is, as it were, laid out thoroughly before them.[2]

[9] If a trial court commits a serious misdirection, this Court is at large to disregard the findings of fact, even those based on credibility, and must then come to its own conclusion based on all the evidence. [3]

Misdirection by the Court a quo

[10] Although Mr Aingura made several submissions regarding possible misdirections by the Court a quo in respect of the conviction, some of which were abandoned, this Court can determine this appeal on a glaringly apparent misdirection.

[11] The Court a quo, after the submission was made by the prosecutor concluded that the accused possessed 185 grams of cocaine. Due to the presumption contained in section 10 it deemed appellant to have dealt in the cocaine because, so the court concluded, any substance weighing above 150 grams by law is dealing. It thus convicted the accused of the main charge.

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[2] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) as further developed in *Ostriches Namibia (Pty) Ltd v African Black Ostriches (Pty)* Ltd 1996 NR 139 (HC) at 151G – 152A and approved and applied in *S v Hangue* 2016 (1) NR 258 (SC) paragraph 61.

[3] *S v Shikongo and Others* 1999 NR 375 (SC) (2000 (1) SACR 190) at 387F – G (SACR at 201d – e).

[12] The presumption as to weight contained in section 10 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 is contained in section 10 (1)(a)[4] of the Act.

[13] This presumption refers dagga exceeding 115 grams in mass, and for that matter not 150 grams. It also refers to any prohibited dependence-producing drugs without requiring a specific mass. Prohibited dependence-producing drug is defined in section 1 as any drug referred to in Part 1 of the Schedule to this Act. Cannabis (dagga) and the whole plant or any portion or product thereof is also contained in the same schedule as a prohibited dependence-producing drug.

[14] The presumption above only applies to prohibited dependence-producing drugs as listed in Part 1 of the Schedule to the Act and not to dangerous dependence-producing drugs like cocaine[5] listed in Part II of the Schedule to the Act. The Court a quo thus clearly misdirected itself by finding that this presumption finds application regarding dangerous dependence-producing drugs like cocaine and applying the presumption described above in convicting the appellant on the main count.

[15] In addition to the aforesaid, the Court a quo never explained the presumption relied on to the undefended accused at the time of his plea. The failure to inform an undefended accused correctly of a presumption which he must refute, if it applied in any event, could lead to the quashing of his conviction if the accused were prejudiced by that failure. Our common law has a very long-established practice that, for excellent reasons based on considerations of fairness, require that presumptions that appear in statutory provisions should be explained to an undefended accused.[6] The same

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[4] If in any prosecution for an offence under section 2 it is proved that the accused was found in possession of- (i) dagga exceeding 115 grams in mass;

(ii) any prohibited dependence-producing drugs,

it shall be presumed that the accused dealt in such dagga or drugs, unless the contrary is proved

[5] 'Cocaine, excluding admixtures containing not more than 0,1 percent of cocaine, calculated as cocaine alkaloid.'

[6] *S v Andrews* 1982 (2) SA 269 (NC) at 269J-270A and 272B-E; *S v Shangase and Others* 1972 (2) SA 410 (N) at 432D - 433A and the authorities collected there. See also *R v Ruben* (CR 48/2020) [2020} NAHCNLD 118 (27 August 2020) by January J and Diergaardt AJ in paragraphs 7 to 10. See also *S v Kuvare* 1992 NR 7 (HC) and *S v Rooi* 2007 (1) NR 282 (HC)

principles regulate competent verdicts. In *S v Kakoma*[7] Shivute J and Masuku AJ stated the following in respect of competent verdicts:

'The need to inform an accused with sufficient particularity of the case he has to meet, including any competent verdicts applicable, preferably at plea stage, is in my view consistent with the element of fairness of criminal proceedings enshrined in the above article.'

[16] Due to the misdirections above, this Court is now at large to disregard the Court a quo's findings of fact, even those based on credibility, and re-evaluate the facts and reach its conclusion regarding the evidence presented.

[17] The definition of 'deal in', in relation to dependence-producing drugs[8] or any plant from which such drugs can be manufactured:

'includes performing any act in connection with the collection, importation, supply, transhipment, administration, exportation, cultivation, sale, manufacture, transmission or prescription thereof'. This was thus the definition that applied to the main count preferred against the accused.

[18] In *S v Crawford and Another*[9] the court concluded:

'The offence of dealing in drugs as created by s 2 (a) of Act 41 of 1971 is not limited to acts or transactions of a commercia l nature and this applies to all the acts listed in the definition of "deal in" in s 1 (xxxi) of the Act, including importation (invoer). As regards the meaning of the word "import" or "invoer" in Afrikaans, there is no reason why this word should not be given its ordinary and primary meaning, i.e. "to bring something from one country into another"' [my underlining] [10]

[19] It is common cause in this case that the accused brought the cocaine into Namibia from Angola. He thus clearly performed the actus reus of the crime alleged in the main count. Whether he brought it in for himself or for anyone else makes no difference. The only two real areas of dispute are in what manner he brought it into Namibia and whether he knew the substance was cocaine.

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[7] *S v Kakoma* (CR 11/2015) [2015] NAHCMD 58 (13 March 2015) in paragraph 31

[8] "dependence-producing drug" means any substance referred to in the Schedule to this Act;

[9] *S v Crawford and Another* 1979 (2) SA 48 (A)

[10] See also *Lazarus v S* (HC-NLD-CRI-APP-CAL-2020/00043) [2020] NAHCNLD 172 (3 December 2020) paragraph 4

[20] As was indicated hereinbefore the two state witnesses averred that the accused had the two parcels sellotaped to his thighs underneath his clothes. The accused however alleges that the parcels were inside a bag that he carried on behalf of a foreigner. This is clearly a lie. If you carry a bag on behalf of someone there is simply no reason whatsoever why such person will explain that two small bags inside the bag contained medication for his livestock. Nor would the accused have enquired about these two bags. He sellotaped it to his thighs under his clothes because he knew what the substance was and for that reason attempted to hide it. I accept the evidence of the two state witnesses as to where the drugs were carried and reject that of the appellant.

[21] Insofar as the appellant averred that he was unaware as to what the content of the bags were, I find that his evidence is false beyond reasonable doubt. He was thus correctly convicted on the main count albeit for the wrong reasons.

Appeal against sentence

[22] A Court misdirects itself if the dictates of justice require that it should have regarded certain factors and failed to do so, or that it ought to have assessed the value of these factors differently from what it did. Such a misdirection then entitles an appeal court to consider the sentence afresh.[11]

[23] Not every misdirection entitles a Court of appeal to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or by inference that the trial court either did not exercise its discretion at all or exercised it improperly or unreasonably. In this context, misdirection means an error committed by the trial Court in determining or applying the facts for assessing the appropriate sentence. It is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion correctly and judicially.[12]

[24] First offenders for contravening section 2(a) and 2(c), conveniently called the dealing offences, are liable to a fine not exceeding R30 000 or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.

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[11] in *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684B-C and *S v Redondo* 1992 NR 133 (SC) at 153A-E.

[12] *S v Pillay* 1977 (4) SA 531 (A) per Trollip JA at 535D-G and *S v Redondo* 1992 NR 133 (SC) at 153A-E.

[25] Drug offences are serious and have become a severe threat in our communities. The Courts should not overlook the seriousness of a crime.[13] However, the crime itself is only one of the factors to be considered in an appropriate sentence. Offenders of serious crimes should still be treated fairly. Therefore, unusual mitigating facts, like long periods spent in custody awaiting trial, should be appropriately considered when sentencing them for such offences. Although competent, custodial sentences should always be justified, not only by the commission of the offence but by such other factors that would render it the most appropriate sentence in a particular case. [14]

[26] In this matter the learned magistrate found that the only appropriate sentence was one of imprisonment. What is absent from the reasoning are the reasons why alternative sentences were not considered.[15] Direct imprisonment is not the only appropriate punishment for the corrective and deterrent purposes in this case. Imprisonment usually is only justified if the accused needs to be removed from society to protect the public or the offence is so serious that no other sentence is appropriate.[16] An alternative punishment to imprisonment can also serve the nature of the offence and the public's interests. In the interest of the convicted offender, preference must sometimes be given to alternative punishments when imposing a sentence.[17]

[27] An alternative, in this case, is a partially suspended sentence. A partially suspended sentence has two beneficial effects. It firstly prevents the offender from going to jail for an extended period, and secondly, he or she has part of the sentence hanging over him or her. If he behaves himself, he will not serve the suspended portion

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[13] *Dausab v S* (HC-MD-CRI-CAL-2018-00038) [2019] NAHCMD 42 (6 March 2019) paragraph 7.

[14] *Benjamin v S* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 12 (8 February 2021) paragraph 22.

[15] *S v Lang* 2014 (4) NR 1211 (HC) paragraph 25; *Benjamin v S* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 12 (8 February 2021) paragraphs 16 and 17.

[16] *S v Scheepers* 1977 (2) SA 154 (A) at 159A-C applied in *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10; *Benjamin v S (supra)* paragraphs 16 and 17.

[17] *R v Persadh 1944* NPD 357 at 358; *S v Goroseb* 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10.

of the sentence. On the other hand, if he subsequently commits a similar offence, the Court can put the suspended sentence into operation.[18]

[28] Appellant made his first appearance in the Regional Court Eenhana on 28 July 2017. The appellant was in custody. On 26 October 2017, the plea was eventually taken the accused pleaded guilty to both the main as alternative charge before a plea of not guilty was entered. Be as it may he was convicted on 27 February 2018 and sentenced to six years imprisonment. On the date of his conviction and sentence the unrepresented appellant, who was arrested on 7 March 2016, was in custody for almost two full years. The Court a quo did not elicit this fact from the undefended accused, nor did it take it into account. In my judgement he should have taken it into account and suspended a part of the sentence.

[29] I recently dealt with this aspect as follows in *S v Nanyemba*[19]:

'Before sentencing, a court must consider any substantial time spent in custody awaiting trial. I do not believe that it is a mitigating factor per se that lessens the severity of the criminal act or the accused's culpability. However, a court tasked with imposing an appropriate sentence cannot ignore the time the accused spent in custody pending his conviction and sentence if such period is substantial. A court must accord sufficient weight to such time spent in custody and should consider it together with other relevant factors to arrive at an appropriate sentence. Taking it into account does not mean simply deducting the time spent in custody from the intended sentence. [20]

"[11] As January J and I said in *Hamana v S*[21] : 'It is a given that a criminal trial takes time to finalize. A lapse in time between the commission of a crime and the resultant trial's finalization is inevitable.' If an unsentenced accused must be kept in custody while the judicial system processes his or her case, even the most fundamental principle of fairness requires that any substantial time spent in custody should be considered in arriving at an appropriate

[18] *R v Persadh* 1944 NPD 357 at 358; *S v Goroseb* 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 11; *Benjamin v S* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 12 (8 February 2021) paragraph 18.

[19] *?* (CC 12/2018) [2021] NAHCNLD 42 (27 April 2021) paragraphs 10 and 11.

[20] *S v Kauzuu* 2006 (1) NR 225 (HC) at 232E-G quoting numerous South African cases that set this principle. See also *S v Seas* 2018 (4) NR 1050 (HC) paragraph 27 and *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 262 (30 June 2020) paragraph 11

[21] *Hamana v S* (HC-NLD-CRI-APP-CAL-2020/00012) [2020] NAHCNLD 156 (12 November 2020) in paragraph 100

sentence. To disregard it, results in an unbalanced approach to sentencing. It should not be seen as trivializing the offence itself. If the criminal justice system takes a significant time to process the case against an accused and he is kept in custody for that time basic fairness requires that such period should be to his credit. The accused in this case played no role in delaying his trial. He therefore cannot be held responsible for the length of his incarceration prior to his conviction and sentence." '

[30] If the fact that the appellant is still a young man, a first offender and spent almost two years in custody awaiting trial is carefully considered I believe that a partially suspended sentence would have been appropriate in this matter.

In addition

[31] Two additional aspects must be addressed. They are not only relevant to this case but also finds general application.

[32] Firstly, a lot of time was spent and wasted in the prosecution, defending, perusal and consideration of this appeal. This was due to the confusion created by how the appeal record in this matter was compiled. The record contained a typed part, a transcribed part, and a handwritten part that not only did not complement one another but in some instances lacked vital parts. It also differed in parts. One of these differences was pointed out in footnote 1. In the end this Court had to rely on the handwritten part of the record that was not contained in typed parts that were purported to be certified as true copies of the original. An appeal court is bound to the record placed before it, and its work is increased exponentially with records like this one. It is a shame that more care was not taken when compiling this record as it would have expedited this appeal tremendously.

[33] Secondly, the main count alleged that the accused 'did wrongfully and unlawfully deal in' the cocaine mentioned above being a dangerous dependence-producing drug under the Act. The extended meaning of deal in means:

'…performing any act in connection with the collection, importation, supply, transhipment, administration, exportation, cultivation, sale, manufacture, transmission or prescription thereof'. I believe the State should, when prosecuting this offence, consider using a charge sheet listing the different manners in which someone can 'deal in' the drugs as mentioned earlier and then mark those relevant to the facts of the specific case. Such a drafted charge sheet will more specifically inform an accused about what

is alleged against him or her. It will furthermore also greatly assist the presiding officer if he or she must question and accused either in terms of section 112(1)(*b*) or section 115(2) of the Criminal Procedure Act 51 of 1977.

[34] In the result it is ordered that:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentence succeeds. The sentence is set aside and substituted by the following sentence: Six (6) years imprisonment of which 2 years imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of a contravention of section 2(c) of Act 41 of 1971 committed during the period of suspension.
3. The sentence is antedated to 27 February 2018.

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D. F. SMALL

ACTING JUDGE

I agree,

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D. C. MUNSU

ACTING JUDGE

APPEARANCES

APPELLANT:	Mr S.Aingura Aingura Attorneys, Oshakati
RESPONDENT:	Ms M. Nghinoonanye Of Office of the Prosecutor General, Oshakati