REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case Title: *Martin Witness Amadhila v The State*	**Case No:** HC-NLD-CRI-APP-CAL-2022/00028
	Division of Court: Northern Local Division
Heard before: Honourable Mr Justice Munsu, J *et* Honourable Mr Justice Kesslau J	Heard on: **17 March 2023** Delivered on: **07 July 2023**
Neutral citation: *Amadhila v S* (HC-NLD-CRI-APP-CAL-2022/00028) [2023] NAHCNLD 62 (07 July 2023)	

The order:

1. The appeal succeeds in part.

2. The sentence in respect of the appellant is amended to read: '24 months imprisonment of which 12 months are suspended for a period of five years on the condition that the accused is not convicted of the contravention of section 2(a) of The Abuse of Dependence-producing Substances and Rehabilitation Act 41 of 1971 as amended: Dealing in a prohibited dependence-producing substance, committed during the period of suspension'.

Reasons for decision:

KESSLAU J (MUNSU J concurring)

Introduction

[1] The appellant, with a co-accused, who is not part of this appeal, were charged in the Magistrates Court of Outapi with the contravention of section 2(a) of The Abuse of Dependence-producing Substances and Rehabilitation Act 41 of 1971 as amended (the Act): Dealing in a prohibited dependence-producing drug *to wit* cannabis. Both pleaded guilty to the offence with the appellant admitting all the elements of the offence apart from the quantity of cannabis. He indicated that, when it was weighed by the police on the day of his arrest, it was 102 grams and not 120 grams as alleged in the charge sheet.

[2] A plea of not guilty was entered by the Magistrate in terms of section 113 on behalf of both appellant and co-accused and the State proceeded to present evidence. The evidence revealed that the appellant provided cannabis to his co-accused for selling. The scale operator's certificate handed in as Exhibit "A" indicated that 102 grams of cannabis were found. A docket was opened under CR11/12/2020 which forms the basis of the case at hand. The police however also searched the house of the appellant and when more cannabis was found, opened another docket under CR 12/12/2020. The latter case was finalized about a year prior to this matter.

[3] The appellant and co-accused were convicted as charged. The co-accused was sentenced to 12 months imprisonment of which 6 months were suspended on conditions. The State however produced the previous conviction under CR 12/12/2020 above for the appellant and he was sentenced to 24 months imprisonment. This appeal lies against sentence only.

[4] It is trite law that sentencing is primarily at the discretion of the trial court[1]. In *S v*

[1] *S v Ndikwetepo and Others* 1993 NR 319 (SC).

Tjiho 1991 NR 361 HC at 366 A-B, Levy J stated that:

'The appeal court is entitled to interfere with a sentence if:

(i) the trial court misdirected itself on the facts or on the law;

(ii) an irregularity which was material occurred during the sentencing proceedings;

(iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;

(iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by any court of appeal.'[2]

It is against this background that the grounds of appeal will be considered.

1st Ground of appeal

[5] The first ground of appeal is that the magistrate erred when failing to explain the right to disclosure and failing to 'ensure and observe' that disclosure is provided to the appellant to enable him to properly prepare for trial.

[6] It is clear from the record that the appellant was alerted to his right to disclosure even though not in the form of a detailed explanation.[3] Considering that the only aspect disputed by appellant was the weight of the cannabis, and the fact that it was not a complex trial, I cannot find that the appellant was prejudiced by not being in possession of disclosure.[4] The magistrate cannot be expected to force disclosure on an accused person who, after being made aware of such, elects not to request for it. Accordingly this ground is dismissed.

2nd Ground of appeal

[7] The second ground of appeal states that the Court made an error in fact and in law when finding the Appellant guilty of dealing in cannabis weighing 120 grams when

[2] *S v Tjiho* 1991 361 (HC) at 366 A-B.
[3] Page 63 of record of appeal; *S v Wasserfall* 1992 NR 18.
[4] *S v Nassar* 1994 NR 233.

according to the state witness and evidence led the weight was 102 grams.

[8] The appellant admitted to dealing in cannabis without the State having to rely on the presumption of dealing provided for in section 10 of the Act. The operator's certificate and oral evidence confirmed his version indicating that 102 grams of cannabis was confiscated.[5] The charge sheet erroneously indicated 120 grams and thus when the Magistrate convicted the appellant as charged erred in this regard. She went further during sentencing to forfeit 120 grams of cannabis to the State and thus did not apply her mind to the facts presented. The incorrect weight was considered by the magistrate when imposing sentence which was a misdirection on facts.

3rd Ground of appeal

[9] The third ground of appeal states that the Court erred in fact and law by drawing an inference based on the appellant's silence that he did not show any remorse.

[10] The magistrate in sentencing remarked that the appellant: 'did not show any remorse to this court, he just want his day in court and be done with it'.[6] The appellant's initial plea of guilt was not regarded as a sign of remorse even though he was correct on the weight of cannabis found.[7] The fact that a full trial followed was caused, not by the appellant, but by an error on the charge sheet. The above remark by the Magistrate was misplaced and an indication that she did not properly apply her mind during sentencing.

4th Ground of appeal

[11] The fourth ground of appeal relates to a failure of the Magistrate to emphasise the importance of cross-examination during trial both at the beginning and end of evidence of state witnesses and the right to address the Court in mitigation.

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[5] *S v Mlambo* 1997 NR 221 (HC).
[6] Page 82 of the appeal record.
[7] *S v Katjivi* (CC 01-2016) [2016] NAHCMD 258 (09 September 2016).

[12] The record reflects that the above rights were sufficiently explained to the appellant at various stages. The magistrate could not have been expected to do more and cannot be faulted in this regard considering that only the weight of cannabis was disputed by the appellant. Therefore I find no misdirection.

5th Ground of appeal

[13] The fifth ground of appeal is aimed at conviction in that the appellant was convicted a second time for events that occurred on the same day.

[14] The notice of appeal indicates that the appeal only lies against sentence and thus the above ground will not be entertained. Suffice to say that when applying the single intent or same evidence rule it is clear that there were two separate crimes committed. Therefor this ground is dismissed.

6th and 7th Grounds of appeal

[15] The last two grounds of appeal are interlinked. They state that the magistrate erred during sentencing by failing to consider that the previous conviction was for an incident that occurred on the same day as the case before court and thus the appellant was not arrested and charged on separate occasions for these offences.

[16] Strictly speaking the conviction on CR 12/12/2020 was a previous conviction as per definition,[8] however from the record it is clear that these cases were emanating from the same date. Whilst the magistrate was entitled to consider it as a reflection on the character of the appellant, the weight attached to it seems to be excessive. In sentencing the magistrate remarked that: 'it is evident from the previous conviction that the appellant did not taken advantage of the leniency which the sentencing court previously showed him'. In reality the appellant, who was arrested and charged for both matters

[8] Du Toit et all, Commentary on the Criminal Procedure Act, Service 9, 1992, 27-2A.

simultaneously, had no opportunity to alter his ways. By the date of his sentence on the first conviction, the offence *in casu* had already been committed. In considering it as a previous conviction and, without having regard to the surrounding circumstances, it resulted in the appellant receiving a much heavier sentence than his co-accused. I find that the weight attached to the said previous conviction was overemphasised.

[17] In conclusion, and upon considering the above discussions and the highlighted misdirection present, the court is entitled to interfere with the sentence imposed.

[18] In the result it is ordered:

1. The appeal succeeds in part.

2. The sentence in respect of the appellant is amended to read: 24 months imprisonment of which 12 months are suspended for a period of five years on the condition that the accused is not convicted of the contravention of section 2(a) of The Abuse of Dependence-producing Substances and Rehabilitation Act 41 of 1971 as amended: Dealing in a prohibited dependence-producing substance, committed during the period of suspension.

Judge(s) signature:	**Comments:**
Kesslau, J	None
Munsu, J	None
Counsel:	
APPELLANT	**RESPONDENT**
Mr M. Nyambe	Ms M. Hasheela

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