



CASE NO.: CA54/09

**IN THE HIGH COURT OF NAMIBIA**

**In the matter between:**

**SAMUEL MRAJI ANDILE**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**CORAM:** Van Niekerk J *et* Botes AJ.

Heard on: October 15, 2010

Delivered on: October 26, 2010

**JUDGEMENT:**

**Botes, AJ.:** [1] The appellant was charged with the offence of dealing in dagga in contravention of section 2(a) of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 41 of 1971 ("the Act"), in the Windhoek Magistrate's Court. The charge sheet alleged that appellant unlawfully dealt in 82kg of cannabis with a value of N\$246,000.00.

[2] Appellant who was legally represented at the trial pleaded guilty to the charge and was convicted on 12 May 2009. After appellant's conviction, the matter was transferred to the Regional Court, Windhoek for sentencing where appellant was sentenced to 7 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition that appellant is not convicted of an offence of contravening section 2(a) or 2(b) of Act 41 of 1971, committed during the period of suspension. Appellant now appeals against the sentence only.

[3] Before I deal with the merits of the appeal, it is necessary to refer to the notice of appeal filed in this matter. The only grounds contained in the notice of appeal are that the magistrate erred in law and/or in fact in overemphasising the interest of society and erred in law by not placing sufficient weight on the personal circumstances of the appellant. Appellant in the notice of appeal indicated that appellant *"reserves his right to amplify or amend his grounds of appeal upon receipt of the transcribed record of the proceedings"*

[4] When the notice of appeal was drafted, appellant was still represented by the same legal practitioner who represented him in the court below. Appellant never exercised his right, as reserved, to amend the grounds of appeal.

[5] In my opinion, the grounds of appeal as contained in the notice of appeal are not proper grounds of appeal at all, but are conclusions drawn by the draftsman of the notice without setting out the reasons or grounds therefore. It has been repeatedly stated that the purpose of grounds of appeal, as required by the rules, is to appraise all interested parties as fully as possible of what is an issue and to bind the parties to those issues.<sup>1</sup>

[6] The grounds as contained in the present notice of appeal do not either inform the State, the magistrate or this Court of the grounds on which the judgment is attacked.

[7] In *S v Kakololo*,<sup>2</sup> Maritz J, as he then was, who wrote for the Court stated that:

*"Rule 67(1) of the Magistrate Court Rules, requires that convicted persons desiring to appeal under s 309(1) of the Criminal Procedure Act, 1977 "shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based.*

*The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall (S v Khoza, 1979 (4) SA 757 (N) at 758B). It serves to inform the trial magistrate in clear and specific terms which part of his or her judgment is being appealed against, what the grounds are on which the appeal is being brought and whether they relate to issues of law or fact or both. It is with reference to the grounds of appeal specifically relied on that the magistrate is required to frame his or her reasons under Magistrate's Court Rule 67(3). Once those reasons have been given, the appellant may amend the notice of appeal under sub-rule (5) and the magistrate may again respond to the amended grounds of appeal.*

*The notice also serves to inform the respondent of the case it is required to meet and regard being had to the record and the magistrate's reasons, whether it should concede or oppose the appeal. Finally it crystallises the disputes and determines the parameters within which the court of appeal will have to decide the case."*

[8] The present notice of appeal except for the conclusions drawn by the draftsman thereof does not contain any reasons or grounds for such conclusions. As such, the present notice of appeal does not comply with the provisions of rule 67 of the rules of the magistrate court read with s309 of the

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1 S v Wellington 1990 NR 20 (HC) and the cases referred therein; See also S v Gey van Pittius and Another 1990 NR 35 (HC)

2 2004 NR 7 (HC) on pg 8

Criminal Procedure Act.

[9] In order to finalize this appeal, it was however decided not to strike the present appeal from the role for want of compliance with rule 67 of the rules of the magistrate court. This present case must however again serve as a warning to all litigants, whether legally represented or not, that this court in future will require strict compliance with the provisions of rule 67 of the rules of the magistrate court, read with s 309 of the Criminal Procedure Act.

[10] Appellant on appeal appeared in person whilst the State was represented by Ms H Jacobs.

[11] No evidence was led by appellant or the state in mitigation and/or aggravation of sentence.

[12] In respect of the appellant's personal circumstances, the legal practitioner informed the court *a quo* that appellant is 46 years old, a South African citizen, married and father of 6 children between the ages of 10 and 22. Appellant attained grade 11 in school and as result of a motor vehicle accident and the injuries sustained, appellant took up employment as a truck driver. As such, appellant is gainfully employed and earns a monthly salary of N\$3,000.00. Appellant is a first offender.

[13] In his plea explanation in terms of s 112(2), which plea explanation was accepted by the State, the appellant in respect of the offence alleged that:

*"3.1 On the 5<sup>th</sup> of May 2009 I met an old friend of mine in Johannesburg.*

*3.2 He then asked me to transport three bags of cannabis to Windhoek to deliver to a certain Goodman.*

*3.3 I agreed to do it because of my financial situation of being the only breadwinner with 5 schoolgoing children.*

*3.4 I was supposed to get paid in Windhoek in the amount of N\$2,000.00, once I delivered the bags.*

*3.5 I arrived in Windhoek on the 7<sup>th</sup> of May 2009 and went to the area called Prosperita.*

*Whilst waiting to for the said Goodman, the Police from the Drug Law Enforcement arrested me with the bags in my possession.*

*3.6 I knew that when I transported the said cannabis that I was committing the offence of dealing in cannabis.*

*3.7 I further knew that my actions as aforesaid was illegal and against the law.*

*3.8 I thus had no legal right to transport the cannabis as I did, and as such my actions were wrong."*

[14] The appellant furthermore admitted that the three bags had a total weight of 82 kg with a street value of N\$246,000.00.<sup>3</sup>

[15] It is trite law that sentence is pre-eminently a matter for the discretion of the trial court and a court of appeal can and will interfere only in certain instances. In *S v Fazzie & Others*,<sup>4</sup> Van Winsen AJA said the following:

*"Where however, the dictates of justice are such as clearly to make it appear to this Court, that the trial Court ought to have had regard to certain factors and that it failed to do so, or that he*

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<sup>3</sup> Record pg 14.

<sup>4</sup> 1964 (4) SA 673(A) at 684 B-C

*ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part, entitling this court to consider the sentence afresh."*

[16] Trollip JA, in discussing the case of *Fazzie* said the following:<sup>5</sup>

*"Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence. It must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."*

[17] Appellant, in his main heads of argument, as well as during the appeal, submitted that the learned magistrate, in the light of his personal circumstances, as well as his extended family and the minors that he has to care for, should have considered the imposition of a non custodial sentence in the form of a fine coupled with a suspended sentence of imprisonment.

[18] This Court however, is not in agreement with the submissions made by appellant as it is evident from the record of the proceedings in the court *a quo*, as well as the court *a quo*'s reasons for sentence that :

- The offence was a planned and deliberate one and as such morally more reprehensible than acting impulsively and without planning.
- Appellant, who imported the drugs into Namibia from another country, contributes to the threat Namibia is facing in relation to drugs.<sup>6</sup>
- It indeed will be an invitation to lawlessness if an appellant can rely on his financial predicament to justify the commission of the offence of dealing in drugs.
- Appellant, for a meagre amount of N\$2,000.00 decided to smuggle a large quantity of drugs into Namibia, having no concern about the consequences and the lives that he may destroy by trafficking in drugs.
- The quantity of the drugs involved is large and has a high street value.

[19] When appellant's personal circumstances are weighed against the interest of society and the seriousness of the offence, including the quantity of cannabis involved, this Court cannot fault the reasoning of the court *a quo* to impose upon the appellant, a first offender, an effective sentence in the form of a custodial sentence without the option of a fine.

[20] In *S v Mlambo* 1997 NR 221 (HC), the accused who was a first offender had been convicted of dealing in 36,102 kg of dagga, valued at NS108,570.00 and sentenced to 10 years imprisonment of which two years had been conditionally suspended. The sentence was amended on appeal to 6 years imprisonment of which 2 years were conditionally suspended.<sup>7</sup>

<sup>5</sup> *Sv Pillay* 1977 (4) SA 531 (A) at 535 D-G

<sup>6</sup> *S v Sibonyoni* 2001 NR 22 (HC) on pg 25 Hoff AJ (as he then was), said that: "*Drug dealers are unscrupulous criminals and further that the Courts have a duty to protect the members of society from exploitation by these elements.*"

<sup>7</sup> See also *S v Sehako* 2009 (1) NR 61 (HC) where accused, although not a first offender, who dealt in 18,385kg of cannabis with a street value of N\$55,155.00 was sentenced to 6 years imprisonment of which 1 year was suspended for 5 years on certain conditions. In *S v Dyomfana* 1996 (1) SACR 564 (E) the accused was sentenced to 6 years imprisonment for dealing in 61,2kg of dagga. The appeal against sentence was

[21] Even if it is taken into account that appellant is a first offender and that mercy or compassion is a quality of justice in itself, and that, no matter how serious an offence is, an accused is always entitled to receive the benefit of total justice, including the quality of mercy, one however cannot in reconciling the interest of the appellant with those of society and with due regard to the gravity of the offence and the consequences inherent therein, come to any other conclusion, but that a substantial period of imprisonment is called for in the present case.<sup>8</sup>

[22] In my view, the court *a quo*, in imposing the sentence that it did, did not commit any misdirection which is of such a nature, degree or seriousness that it shows, directly or inferentially, that the magistrate did not exercise his discretion at all, or exercised it improperly or unreasonably. There also does not exist a striking disparity between the sentence imposed by the court *a quo* and the sentence that this court would have imposed if it was the court of first instance. As such, the sentence of the trial court, is not unreasonable to such a degree that it can be described as "disturbingly inappropriate".<sup>9</sup>

[23] For the above reasons the appeal against sentence is dismissed.

**BOTES, AJ**

I concur.

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refused in light of the previous convictions of the accused.

<sup>8</sup> In *S v Tjiho* 1991 NR 361 (HC) on 365 D-F - it was stated that "*Furthermore, law and order must prevail in society and society expects the court's protection against lawlessness. The accused must be prevented from repeating his crime and, if possible, reformed and other persons must be deterred from doing what the accused did.*"

See also: *S v Lister* 1993 (2) SACR 228 (A) at 232 H-I - "*To focus on the wellbeing of the accused at the expense of the other aims of sentencing, such as the interest of the community, is to distort the process and produce, in all likelihood, a warped sentence.*"

<sup>9</sup> *S v Rabie* 1975 (4) SA 855(A) at 864; see also the judgment of Leon AJ in *S v Kramer & Others* 1990 NR 49 (HC).

**Van Niekerk, J**

**ON BEHALF OF THE APPELLANT:**

In person

**ON BEHALF OF THE RESPONDENT:**

The office of the Prosecutor-General

Adv H Jacobs