NOT REPORTBALE

CASE NO: CA 62/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GEORGE KLAZEN **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: HOFF, J

Heard on: 323 September 2005

Delivered on: 23 September 2005 (*Ex tempore)*

Reasons on: 14 March 2012

APPEAL JUDGMENT

HOFF, J: [1] The appellant was convicted in the magistrate's court Karasburg for dealing in a prohibited dependence – producing drug (1,772 kg of cannabis) and sentenced to 10 years imprisonment.

[2] The appellant subsequently appealed against sentence only. Mr P McNally of the firm Lentin, Botma & van den Heever appeared on behalf of the appellant and Ms de Villiers appeared on behalf of the respondent. The appeal was upheld on 23 September 2005. The sentence was set aside and substituted with the following sentence:

> "A fine of N$5 000.00 or 18 months imprisonment plus a further 18 months imprisonment suspended *in toto* for a period of 3 years on condition appellant is not convicted of contravening section 2(a) of Act 41 of 1971 committed during the period of suspension."

[3] Ms de Villiers in her heads of argument as well as her submissions in Court referred to a number of similar cases comparing the sentences imposed in those cases with the sentence imposed in this matter. She conceded that the sentence imposed by the magistrate is shockingly inappropriate and that the appeal should succeed. A period of 5 years imprisonment of which 2 years imprisonment are suspended on certain conditions was suggested as an appropriate sentence.

[4] Mr McNally also referred this Court to a number of similar cases and the sentences imposed in these cases and suggested that an appropriate sentence would be a fine with an alternative sentence of imprisonment.

[5] The appellant pleaded guilty in the Court *a quo*. It appears from the questioning by the magistrate that the appellant was found in possession of dagga. No sale of dagga occurred but the dagga was possessed with the intention to sell it. The appellant was a first offender, aged 27 years, was self-employed and married with no dependants.

[6] It is apparent from the reasons for sentencing that the magistrate was influenced by the following factors:

(a) the quantity of dagga;

(b) the abhorrence of society in this type of offence; and

(c) the prevalence of the offence in the district.

[7] If one compares the sentence imposed in this instance with the sentences imposed in cases involving much larger quantities of dagga the conclusion is inevitable that an inappropriate long term of imprisonment had been imposed.

[8] In *S v August* 2005 (2) NCLP 16 at p. 20 – 21 Damaseb J (as he then was) stated the following:

> "It is trite law that sentencing is pre-eminently a matter for the trier of fact and that a Court on appeal will interfere only where a misdirection had taken place on the facts or the law; if a material irregularity occurred during the proceedings; if material facts had not been taken into account or one factor or other relevant to sentencing had been improperly over-emphasized at the expense of others equally relevant to sentencing; or if the sentence imposed is startlingly inappropriate or a striking disparity between that which would have been imposed by the Court of appeal. *S v Tjiho* 1991 NR 361 HC at 366 A – C. This approach has been endorsed by the Namibian Supreme Court in, amongst others *S v Ndikwetepo and Othe*rs 1993 NR 319 (SC) at 322 – 323, and in *S v Shapumba* 1999 NR 342 (SC) at 344 I – J and 345 A – B."

[9] In *S v Mlambo* 1997 NR 221 the appellant dealt in 36,102 kg of dagga. Strydom JP (as he then was) stated the following on 223 G – H:

> "Bearing in mind the aforegoing, the personal circumstances of the accused and the fact that she is a first offender, the sentence of 10 years imprisonment of which two years are suspended, seems to me unreasonable and as set out previously it seems to me from the magistrate's reasons that the quantity involved was over-emphasised to the detriment of the personal circumstances and other mitigating factors of the appellant."

[10] In this matter the appellant was found in possession of 34 kg of dagga less than in *Mlambo*, nevertheless a heavier sentence was imposed.

In *Mlambo* on appeal the sentence of 10 years imprisonment of which 2 years imprisonment were suspended was reduced to 6 years imprisonment of which 2 years imprisonment were suspended on certain conditions.

[11] In *S v Khararoses* 2005 (2) NCLP 81 Mainga J quoted with approval from the unreported judgment of this Court in *Jerro Tsamaseb v The State* and stated at p. 83 that presiding officers should not sentence in a vacuum, but must acquaint themselves with the sentences imposed by other officers in similar and related cases.

[12] In *S v Kramer and Others* 1991 (1) SACR 25 Nm at 36 F O'Linn J (as he then was) pointed out that a sentence out of line with comparable sentences in recent years would only be justified if special aggravating factors are established.

[13] In respect of the issue of abhorrence referred to by the magistrate the remarks of White J in S v Nkombini 1990 (2) SACR (Tk) at 469 are instructive, where he remarked as follows:

> "I come now to the first offender who is convicted of dealing in a very substantial quantity of dagga. Magistrates must be careful not to let their natural indignation override their better judgment in such cases. The abhorrence we have for the drug dealer must not induce us to impose inhuman sentences."

[13] I am of the view that the magistrate over-emphasised the quantity of the dagga and the prevalence of the offence at the expense of the personal circumstances of the accused.

The emphasis on abhorrence of society was likewise over-emphasised resulting in a harsh sentence. The sentence imposed is furthermore out of line with comparable sentences imposed in recent years.

[14] I am of the view that as a result of these irregularities (referred to *supra*) the magistrate imposed a startlingly inappropriate sentence under the circumstances of this case.

[15] These then are the reasons why the sentence imposed by the magistrate was set aside and substituted with an appropriate sentence.

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HOFF, J:

ON BEHALF OF THE APPELLANT: MR McNALLY

Instructed by: LENTIN, BOTMA & VAN DEN HEEVER

ON BEHALF OF THE RESPONDENT: ADV. DE VILLIERS

Instructed by: OFFICE OF THE PROSECUTOR GENERAL