NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CA 45/2012

In the matter between:

NESTOR KATANGOLO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Katangolo v State* (CA 45-2012) [2014] NAHCMD 28 (30 January 2014)

Coram: UEITELE, J and UNENGU, AJ

Heard: 4 November 2013

Delivered: 30 January 2014

Flynote: Criminal Procedure – sentence – imposition of – appellant having a previous conviction of same offence – sentence – magistrate committing a misdirection – sentence – set aside and substituted with another sentence.

Summary: The appellant was convicted and sentenced for an offence of possession of cocaine in contravention of section 2(a) of Act, 1971 (Act 41 of 1971). During sentencing the magistrate indicated that the evidence produced by the state positively pointed to possession of the substance not for personal use nor to feed an addiction but rather to dealing resulting in a misdirection. As a result of the misdirection, the sentence imposed in the court below is set aside and substituted with another sentence.

ORDER

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(1) The appeal succeeds partially;

(2) The sentence imposed by the magistrate is set aside and is, in terms of section 304 (2)(c)(iv) read with section 309(3) of the Criminal Procedure Act, 1977, substituted with the following sentence:
'Three (3) years imprisonment'.

(3) In terms of section 282 of the Criminal Procedure Act, 1977 the sentence in antedated to 11 June 2012.

JUDGMENT

UNENGU AJ (UEITELE J) concurring:

[1] The appellant was charged with and convicted of possession of 1,315 grams of cocaine with a value of N$1920.00; i.e. contravening the provisions of section 2(d) read with sections 1, 2(i) and 2(ii), 7, 8, 10, 14 and Part 11 of the Schedule[1]. Thereafter, the appellant was sentenced as follows: 'Fine of fifteen thousand dollars (N$15 000.00) or in default to three (3) years imprisonment'. In addition, the appellant was sentenced to three (3) years imprisonment of which one (1) year thereof was suspended for five (5) years on the condition that the appellant is not

[1] Of Act 41 of 1971 as amended

convicted of an offence under section 2 of the Abuse of Dependence producing Substances and Rehabilitation Centres of Act 41 of 1971 committed during the period of suspension.

[2] The appellant was represented by Ms Fouche of Fouche-Van Vuuren Legal Practitioners during the trial who also noted an appeal on behalf of him against both the conviction and the sentence imposed on him immediately after sentencing.

[3] Meanwhile, Mr Jacobs who argued the appeal for the appellant *amicus curaie* has abandoned the appeal against the conviction and conceded that the appellant was correctly convicted by the court below. The concession by Mr Jacobs, in our view, is correctly made if regard is had to the overwhelming evidence against the appellant.

[4] Before dealing with the merits of the appeal, we wish to express our gratitude and thanks to Mr Jacobs for his willingness and preparedness to argue the appeal on behalf of the appellant as *amicus curiae* and for the complete and well researched heads of argument which we found very useful. Similarly, we also thank Ms Husselmann, counsel for the respondent for her immense and valuable contribution in the matter.

[5] The appellant is attacking the sentence on the following grounds:

> ‘**2.** **AD SENTENCE**
>
> 2.1 The learned Magistrate erred in law and/or on the facts in that he failed to adequately take into account, that:
>
> 2.1.1 the Appellant only has one previous conviction dating back to 2009 for possession of a dangerous prohibited producing substance;
>
> 2.1.2 the Appellant has dependants;
>
> 2.1.3 The Appellant is a sole breadwinner.
>
> And as such failed to take into consideration or adequately take into consideration the person circumstances of the Appellant.

2.2 The learned Magistrate erred in law and/or on the facts in over emphasizing the nature and seriousness of the offence as well as the interest of the community against the personal circumstances of the Appellant.

2.3 The learned Magistrate erred in law and/or on the facts by not giving sufficient consideration to the circumstances under which the alleged offence took place:

2.3.1 Incorrectly applied his mind in drawing an inference that the substance was possessed for the purpose of dealing therein;

2.3.2 Incorrectly applied his mind in accepting that the efforts of the 3rd witness were done in an attempt to combat drug abuse.

2.4 The learned Magistrate erred in law and/or on the facts by imposing a sentence which is so out of context with the offence that no reasonable court would have imposed such sentence.

2.5 The learned Magistrate erred in law and/or on the facts by failing to draw a balance between the interest of the Appellant and the interest of Society in relation to the crime itself.

2.6 The learned Magistrate erred in law and/or on the facts by over emphasizing the seriousness of the offence, the interest of society and prevalence of the offence.

2.7 The learned Magistrate erred in law and/or on the facts by incorrectly failing to consider the arguments advances by the Defence.

2.8 The learned Magistrate erred in law and/or the facts in concluding that the only appropriate sentence is a custodial sentence despite the Appellant's ability to pay a fine.

2.9 The learned Magistrate erred in law and/or on the facts in not taking into consideration and or rejecting previous sentences handed down for similar offences.

2.10 The learned Magistrate erred in law and/or on the facts in failing to take into consideration the weight of the substance in handing sentence.

2.11 The learned Magistrate displayed a pertinent bias towards the Appellant in that he *mero moto* cancelled the bail of the Appellant on conviction.

2.12 The learned Magistrate erred in law and/or on the facts in that he upon conviction, before hearing argument in mitigation decided to incarcerate the Appellant.

2.13 The learned Magistrate erred in law and/or on the facts in drawing an incorrect inference the Appellant possessed the drugs for the purpose of dealing therein.

2.14 The learned Magistrate erred in law and/or on the facts in holding as an aggregating factor that the Appellant insisted on smudging the integrity of the State witnesses.'

[6] This is a long list of grounds against the sentence. Why the legal practitioners for the appellant chose to draft such a long list, is only known to them. Some grounds have been duplicated, while others are not grounds at all.

[7] Be that as it may, we are mindful that it is trite law that a Court of Appeal can only interfere with the sentence if it finds that the sentencing court misdirected itself materially or to such a degree that it shows directly or inferentially that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably[2].

[8] In *S v Rabie*[3] Holmes, JA said: 'In every appeal against sentence, whether imposed by a magistrate or a judge, the Court hearing the appeal:-

(a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court.

(b) should be careful not to erode such discretion, hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised.'

[9] Holmes, JA concluded and said: 'punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances; one should guard against allowing the heinousness of the crime to exclude all other relevant considerations. What is needed is a balanced and judicial assessment of all factors'[4].

[10] The principles laid down in *S v Rabie* and other cases cited above have been followed in the past and are still being followed in our jurisdiction[5].

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[2] S v Pieters 1987 (3) SA 717 (A) 727 F-H;
S v Pillay 1977 (4) SA 531 (A) 535 E-F;
S v Holder 1979 (2) SA 70 (A) 78 B

[3] 1975(4) SA 855 at 857 D-E

[4] S v Rabie *supra* at 862D – 863 A-B

[5] S v Van Wyk 1992 (1) SACR 147 (NAM)

[11] In this appeal, it is not in dispute that the appellant was convicted of the possession of cocaine with a value of N$1 920.00; and his second conviction for being in possession of cocaine. On 30 November 2009 with his first conviction and as a first offender, the appellant was sentenced to pay a fine of N$1 000.00 or 6 months imprisonment. He paid the fine.

[12] In less than three years, from the day he was punished, on 8 May 2012, the appellant was again found guilty of the same transgression, namely being in possession of cocaine for which he was punished with the sentence he is now appealing against.

[13] As indicated above, the appellant is attacking the sentence on various grounds. One such ground being that the magistrate failed to adequately take into account his personal circumstances like that he only has one previous conviction for possession of a dangerous prohibited producing substance dating back 2009; that he has dependants and a bread winner for his family.

[14] In that regard, we must mention that the magistrate took his personal circumstances into account. He said that he will consider the mitigating factors of the appellant, in particular the fact that the appellant was living with a girlfriend and a child and that he has another child in the North, a bread winner who also supported his elderly parents. It is thus not correct for the appellant to allege that the magistrate failed to adequately take into account his personal circumstances and erred in overemphasizing the nature and seriousness of the offence and the interest of the community against his personal circumstances.

[15] The appellant, however, does not say in which respect the magistrate has wrongly or unreasonably exercised his sentence discretion when he imposed the sentence on him. Similarly, the appellant also does not indicate reasons why he thinks the magistrate was wrong in overemphasizing the nature and seriousness of the offence and the interest of the community. It is not wrong *per se* to overemphasize one or other principles of sentencing at the expense of the other. In

many cases, it is difficult to harmonise and balance these principles, giving rise to situations whereby one element is emphasised at the expense of the other[6].

[16] In this appeal, the appellant is not a first offender. He has a relevant previous conviction for which he was given a fine to pay in order to stay out of jail. But, the appellant was not deterred by the punishment so it seems, because within a period of three years, he again has been convicted of a similar offence. In my view, the magistrate did not err in imposing a custodial sentence in this matter.

[17] In his written heads of argument as amplified by oral submissions, Mr Jacobs complained and attacked the sentence on the ground that the magistrate misdirected himself when he pointed out in his sentencing judgment that there was no mitigatory evidence to suggest that the possession was for personal use or to feed an addiction, that the State's evidence pointed positively to possession for purposes of dealing in the substance – which the magistrate indicated that it was aggravating.

[18] Mr Jacobs complained that, in his view, the magistrate punished the appellant as if he was convicted of dealing in cocaine. Therefore, according to him, this is a misdirection on the part of the magistrate and requested us to interfere with the sentence.

[19] Mr Jacobs might be correct. It is unfortunate that the magistrate said what he said. The appellant was convicted of possession – the purpose why he possessed the substance was not interrogated during trial. It is an offence under Part 11 of the Schedule of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971, as amended to possess cocaine, for whatever purposes. Possession in terms of the Act, includes keeping, storing or having in custody or under control or supervision[7]. The law prohibits possession of cocaine finish.

[20] Therefore for the magistrate to say that the evidence led by the State in the matter pointed positively that appellant possessed the substance not to feed and

[6] S v Van Wyk *supra* at 165 i-j
[7] Section 2(d) of Act 41 of 1971

addiction or for personal use but for the purposes of sale is a mistake in law. It could be for other purposes, not necessarily for dealing. The magistrate has misdirected himself in that regard and we shall interfere with the sentence as a result.

[21] Even though the magistrate committed an error by saying that cocaine was not possessed by the appellant for personal use or to feed and addiction, it will not change the situation with regard the sentence by this Court. By repeating the same offence so quickly after the first punishment, the appellant shows that he was not deterred by the first punishment – therefore, another form of punishment has to be imposed to deter him from repeating the offence.

[22] We agree with Ms Husselmann, counsel for the respondent that an effective imprisonment is the appropriate sentence for the appellant in view of the fact that he was not deterred by the first punishment. In fact, Mr Jacobs for the appellant also conceded and supported the view of Ms Husselmann that the appellant indeed was supposed to go to prison, with part of the sentence be suspended for a certain period conditionally.

[23] That being the case, we do not think that it is necessary to deal with all grounds against the sentence. Counsel for both the appellant and the State agree that the appellant was not deterred by the first sentence and expressed the views that an appropriate sentence in this instance, is one of imprisonment without an option of a fine.

[24] Consequently, the following order is made:

(1) The appeal succeeds partially;

(2) The sentence imposed by the magistrate is set aside and is, in terms of section 304 (2)(c)(iv) read with section 309(3) of the Criminal Procedure Act, 1977, substituted with the following sentence:

‘Three (3) years imprisonment’.

(3) In terms of section 282 of the Criminal Procedure Act, 1977 the sentence in antedated to 11 June 2012.

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E P Unengu

Acting

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S F I Ueitele

Judge

APPEARANCES

APPELLANT: J Jacobs
Amicus Curiae

RESPONDENT: I Husselmann
Of the Office of the Prosecutor-General