



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 53/2015

In the matter between:

NYAMBE NYAMBE

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: Nyambe v State (CA 53/2015) [2016] NAHCMD 23 (12 February 2016)

Coram: USIKU J and SIBOLEKA J

Delivered: 12 February 2016

Flynote: Criminal procedure- Sentence appeal against- The role of the court of appeal- Such interference only justified where sentence vitiated by irregularity or failure to take certain factors into account or over-emphasis of others sentence startlingly inappropriate under the circumstances.

Summary: The appellant pleaded guilty and was convicted as charged. He was sentenced to five years direct imprisonment without an option of a fine.

ORDER

The appeal against sentence is upheld. The sentence of the trial court is substituted with the following: Three years imprisonment of which one year is suspended for (5) five years on condition that accused is not convicted of dealing in prohibited dependence producing drugs in contravening section 2(A) or 2(B) of Act 51 of 1971, committed during the period of suspension. The sentence is antedated to 26 January 2015.

JUDGMENT

USIKU J, (SIBOLEKA J CONCURRING)

[1] The appellant was arraigned in the Katima Mulilo district court on a charge of contravening sections 2(a) read with section 1,2(ii) 8,10,14 and Part 1 of the Schedule of Act 41 of 1971, as amended- Dealing in Prohibited dependence-Producing Drugs- Alternatively Contravening Section 2 (B) read with sections 1,2 (i) and/or 2(iv) 7,8,10 14 and Part 1 of the Schedule of Act 41 of 1971 as amended- Possession or use of Prohibited dependence-Producing drugs.

[2] He was jointly charged with others who tendered pleas of not guilty whilst he pleaded guilty to the charges where after the trials were separated. The appellant was convicted and sentenced to five years imprisonment without an option of a fine. He now appeals against the sentence only.

[3] In his notice of appeal, he argued that the magistrate has erred in law and or facts by over-emphasizing the seriousness of the offence, ignoring the appellant's

mitigating factors, such as, that the appellant was a first offender, and a sickly person with three minor children to support.

[4] Further that all the cannabis where recovered and were declared forfeited to the state after the appellant was convicted and sentenced.

[5] The appellant also took issue with the sentence imposed, in that the sentence is not in uniform with sentences imposed by other courts for similar cases.

[6] It was further the appellant's contention that the trial court had misdirected itself by failing to follow the norms set by this court when sentencing in cases of this nature. Counsel for the respondent also made reference to cases of similar nature where the court upheld the appeal and set aside the sentence or substituted these sentences with lesser sentences which were partly suspended for a period of time on specific conditions.

[7] Mr Kuutondokwa appearing for the respondent, made reference to the sentences imposed, in *S v Reddy* 1975 (3) SA 757 (AD) at 759 and *S v Tjiho* 1991 NR 361 (HC) at 366-A-B and also in *S v Shikunga and Another* 1997 NR 156, he submitted that the court hearing the appeal- should be guided by the principles that punishment is "pre-eminently a matter for the discretion of the trial court" Furthermore that the sentence should only be altered if the discretion has not been "judiciary and properly exercised"

[8] Though confirming that the offence in questions was carefully planned when one has regard to the fact that the appellant had imported the cannabis outside Namibia, counsel for the respondent also conceded that the magistrate did over emphasize the seriousness of the offence and imposed a sentence which did not take proper cognisance of the personal circumstances of the appellant and the fact that he was a first offender, a sick person and a father of three minor children.

[9] That trial court misdirected itself by, imposing an excessive and inappropriate sentence when regard is had to the sentences already imposed by this court in other similar cases.

[10] After giving due consideration to the appellant's personal circumstances. I am satisfied that the sentence of five years direct imprisonment is inappropriate in that it is too severe and ought to be tampered with. The circumstances of this case dictate that part of the sentence be suspended.

[11] In the result the court makes the following order:

The appeal against sentence is upheld. The sentence of the trial court is substituted with the following: Three years imprisonment of which one year is suspended for (5) five years on conditions that accused is not convicted of dealing in prohibited dependence producing drugs in contravening section 2(A) or 2(B) of Act 51 of 1971, committed during the period of suspension. The sentence is antedated to 26 January 2015.

DN USIKU
Judge

A SIBOLEKA
Judge