



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**APPEAL JUDGMENT**

Case no: HC-MD-CRI-APP-CALL-2017/00028

In the matter between:

**PAUL UMUB**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Umub v S* (HC-MD-CRI-APP-CALL-2017/00028) [2019]  
NAHCMD 18 (8 February 2019)

**Coram:** NDAUENDAPO J et LIEBENBERG J

**Heard:** 10 October 2018

**Delivered:** 8 February 2019

**Flynote:** Criminal procedure – Appeal – Sentence – Possession of dependence producing substance – 10 years' imprisonment – Appellant claims sentence is shockingly inappropriate – Seriousness of offence overemphasized – Amended notice of appeal filed late – Explanation not reasonable – No prospects of success on appeal - Scourge of drug abuse on the increase – Prevailing circumstances call for severe sentences – No misdirection – Appeal struck from the roll.

**Summary:** The appellant was convicted on his own plea of guilty of possession of cannabis weighing 26 9000 gram (Kg). He was sentenced to 10 years imprisonment. He appealed against the sentence on the grounds that the sentence imposed is shockingly inappropriate and that the court overemphasized the seriousness of the offence at the expense of the mitigating circumstances. The amended notice of appeal was filed out of time. Appellant explained that he was advised by his lawyer that the first notice of appeal was defective, hence the need to file an emended notice.

Held, that, the explanation for late noting of the amended notice of appeal is not reasonable nor acceptable as the appellant, despite knowing his right to legal representation, waited for 5 years to engage a lawyer.

Held, further, that there are no prospects of success on appeal.

Held, that dealing in and possession of drugs is on the increase in our society and destroying our communities.

Held, further, that the fact that appellant has a previous conviction, the seriousness of the offence and the quantity of the cannabis found on him far outweigh the personal circumstances of the appellant.

Held, further that given the prevailing circumstances where dealing in and possession of drugs is on the increase, the courts should henceforth impose severe sentences to deter the appellant and would-be offenders from committing such offences.

Held, further that, no misdirection or irregularity shown for this court to interfere with the sentence imposed. Appeal struck from the roll.

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**ORDER**

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1. In the result, the application for condonation for the late noting of the appeal is refused as the explanation is not reasonable nor acceptable and there are no prospects of success on appeal.
2. The matter is struck from the roll.

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## JUDGMENT

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NDAUENDAPO J (LIEBENBERG J concurring):

### Introduction

[1] The appellant was convicted in the regional court of Otjiwarongo of contravening section 2(b) read with sections 1, 2(i) and 2(ii), 7 8, 10, 14 and part 1 of the schedule Act 41 of 1971 (as amended) - possession of a dependence producing substance to wit 26.9000 grams of cannabis valued at N\$80 700.

[2] On 21 January 2013 he was sentenced to 10 years imprisonment. He now appeals against the sentence. The appellant filed a notice of appeal within 14 days. However on 22 June 2018, he filed an amended notice of appeal. The grounds of appeal in the amended notice are stated as follows:

- '1. The imprisonment term imposed by court in the prevailing circumstances are shockingly inappropriate.
2. The court unjustifiably overemphasized the seriousness of the offences at the expense of mitigating circumstances.'

An affidavit was filed by the appellant explaining the reasons why the amended notice of appeal was filed late. In summary, he states that after the notice of appeal was filed he made enquiries with the clerk of the court as to when his appeal will be heard and he was told that a date had still not been allocated. In April 2018 he decided to apply from legal aid directorate for a legal representative. On 28 April 2018 Mr Brockerhoff was appointed to represent him and he advised him that they needed to file an amended notice

of appeal, as the initial notice of appeal was defective. The amended notice of appeal was filed on 22 June 2018.

[3] He further states that he is a layman and not acquainted with the procedures of the court and that he has prospects of success on appeal as the sentence imposed by the trial court of 10 years' imprisonment is shockingly inappropriate and induces a sense of shock, hence this court ought to interfere therewith.

#### Point in limine

[4] Counsel for the respondent argued that the amended notice of appeal was filed out of time, 5 years after the appellant was sentenced, and that no reasonable and acceptable explanation was proffered for the inordinate delay. Counsel further argued that there are no prospect of success on appeal on the merits.

The explanation that the appellant is a lay man and did not know the court procedures is unreasonable and unacceptable. The appellant's right to legal representation including legal aid was fully explained to him. He chose to note the initial notice of appeal on his own and he must take the consequences thereof. He waited for 5 years to apply for legal aid, whereas he knew that he could apply to legal aid much earlier than to wait for 5 years.

#### Submissions by counsel for appellant

[5] Counsel relied on the matter of *S v Munyama*<sup>1</sup> where the Supreme court held that in the interests of legal certainty and respect for the judicial system, courts should generally strive for uniformity of sentences in comparable cases, while balancing this principle against individualization of sentences and submitted that the sentence imposed of 10 years in aggregate is shockingly inappropriate and induces a sense of shock.

[6] He further argued that there is a striking disparity between the sentence imposed and that which the appeal court would have imposed given

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<sup>1</sup> *S v Munyama* case no. SA 47/2011 – unreported judgment dated 9 December 2011.

the principle of uniformity in sentencing as stated in the *Munyama* matter. In this respect he argued that the sentence of 10 years' imprisonment is inconsistent with other sentences for similar offences in Namibia on more or less the same facts.

[7] He further argued that the court *a quo* misdirected itself by overemphasizing the seriousness of the offence at the expense of the personal circumstances of the appellant and therefore the court *a quo* erred in not considering a shorter term of imprisonment.

#### Submissions by counsel for respondent

[8] He argued that the first ground of appeal is that 'the imprisonment term imposed by the court in the prevailing circumstances are shockingly inappropriate. With regard to this supposedly ground of appeal, it is the Respondent's humble submission that, this is not a proper ground of appeal, but a conclusion by the draftsman of the notice of appeal.' The above ground does not indicate in what way the alleged imprisonment term is being alleged to be shockingly inappropriate. One is left guessing as to whether the argument to be advanced borders on the leniency or excessiveness of the alleged imprisonment.

[9] The appellant in his second ground of appeal, intimates that 'the court unjustifiably overemphasized the seriousness of the offences at the expense of mitigating circumstances.' 'It is however clear from the court *a quo*'s judgment in sentencing the appellant that the court *a quo* did try to strike a balance between the seriousness of the offence committed, the appellant's personal circumstance as well as the legitimate interest of society.'

[10] Counsel further argued that after weighing the appellant's personal circumstances against the nature of the offence, their gravity as well as the interests of society, the presiding Regional Magistrate found that a custodial term was inescapable under the circumstances. Considering the fact that appellant was convicted of possession of large quantities of dependence producing drugs i.e 40 tablets of mandrax and 26.9000 grams of dagga, the

learned Regional Magistrate's decision to incarcerate the appellant, presents no irregularity at all. More so consideration being had of the fact that the appellant was not a first offender in this instance. The appellant's previous brushes with the law relating to drug offences were correctly considered in arriving at the imposition of a custodial term since the previous sentence imposed on the appellant had not deterred him.

In *S v Tjiho*<sup>2</sup> the court held 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 the a court of appeal.'

[11] The appellant in this case was not only convicted of possession of cannabis of large quantity (26.9000 grams), but was also convicted of possession of 40 tablets of mandrax containing methaqualone valued at N\$2 800.00. The appellant also has a previous conviction of dealing in cannabis – he was convicted on 20 August 2001 and sentenced to a fine of N\$3 000.00 or 18 months' imprisonment. The court *a quo* considered the personal circumstances of the appellant and also took into account that he pleaded guilty.

[12] The fight against dealing in and possession of dependence and dangerous dependence producing substance must be intensified at all levels

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<sup>2</sup> *S v Tjiho* 1991 NR 361 (HC) at 366 A-B.

by the law enforcement agencies and the courts. It is on the increase and busy destroying our communities particularly the youth despite the heavy sentences imposed. The courts must step in and impose severe sentences, never heard of before, as we are losing the battle against drug abuse. The sentences to be imposed must be so severe to deter the appellant and would-be offenders from committing such offences. The sentence imposed in the prevailing circumstances is in my view not shockingly inappropriate but fit the prevailing circumstances.

[13] In this regard, I wholeheartedly associate myself with the sentiments expressed by Liebenberg J with Damaseb JP concurring, in the matter of *S v Swatz*<sup>3</sup> wherein it was held that:

'There is a dire need for change in the court's stance on drug related matters and to accord the necessary weight to the seriousness of the particular offence and its prevalence in society. To this end all possible evidence should be submitted in order to place the presiding officer in the best position to fully appreciate the offence before court and to impose an appropriate sentence. Though the personal circumstances of the accused should be accorded the necessary weight and taken into account, the nature and extent of the crime, as well as the need of society to root out the evil of drugs in its midst, should equally be given proper consideration. In doing so, sentences should reflect the determination of our courts to play their part in curbing this evil that is only aimed at destroying human lives and the more vulnerable members of society like the youth. A clear and unequivocal message should emerge from the courts that crimes of this nature will not be tolerated any longer and sentences will henceforth be appropriately severe.'

[14] Although the Supreme Court opined that courts should generally strive for uniformity of sentences in comparable cases, the court must take into account the prevailing circumstances when imposing sentences. The situation of drug abuse in our society has become dire. It is destroying our communities and particularly our youth who are the future of our society. If the courts cannot act now (by imposing severe sentences) to arrest the situation, we may regret it one day.

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<sup>3</sup> *S v Swatz* (CR 86/2018) [2018] NAHCMD 343 (30 October 2018).

[15] In any event, there are no prospect of success on appeal. In my view the sentence imposed by the learned magistrate is not shockingly inappropriate nor did the magistrate overemphasize the seriousness of the offence at the expense of mitigating factors. The scourge of drug abuse is on the increase and courts are henceforth expected to impose severe sentences to deter the appellant and would-be offenders from committing similar offences.

[16] In the result, the court finds no misdirection on the part of the learned magistrate nor any reason for this court to interfere with the sentence.

1. In the result, the application for condonation for the late noting of the appeal is refused as the explanation is not reasonable nor acceptable and there are no prospects of success on appeal.
2. The matter is struck from the roll.

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N. G. NDAUENDAPO  
JUDGE

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J.C. LIEBENBERG  
JUDGE



**APPEARANCES:**

APPELLANT

Mr T Brockerhoff  
Of Brockerhoff & Mbunje Legal  
Practitioners, Windhoek.

RESPONDENT

Ms C Moyo  
Of the Office of the Prosecutor-General  
Windhoek.