



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-CAL-2018-00038

In the matter between:

JEROME WLAD DAUSAB

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Dausab v S* (HC-MD-CRI-CAL-2018-00038) [2019] NAHCMD 42
(6 March 2019)

Coram: NDAUENDAPO J et USIKU J

Heard: 25 January 2019

Delivered: 6 March 2019

Flynote: Criminal Law – Sentence appeal against – Interference by Court of Appeal – Court justified to interfere with sentence imposed by the trial Court as it was found to be excessive – Sentence imposed found to be startlingly inappropriate and induces a sense of shock – The sentence imposed set aside and replaced with another sentence – Appeal against sentence upheld.

Summary: The appellant, being a first time offender, was convicted in the Magistrate’s Court of the district of Karibib on a charge of dealing in dependence – Producing drugs, namely 170 grams of cannabis valued at N\$540. In contravention of section 2 (a) of Abuse of Dependence Producing Substances and Rehabilitation Centre Act 41 of 1971 as amended. Though custodial sentences are the norm in cases of dealing in drugs, the sentence imposed is found to be excessive for the quantity of cannabis the appellant was convicted of. The sentence imposed must be set aside and be substituted with another one.

ORDER

1. The appeal is upheld. The sentence of three years imprisonment is set aside and substituted with the following sentence.
2. Accused is sentenced to three years imprisonment of which 18 months imprisonment is suspended for three years on condition that the appellant is not convicted with the crime of dealing in dependence-producing drugs, committed during the period of suspension.
3. The sentence is antedated to 29 May 2018.

JUDGMENT

USIKU J, (NDAUENDAPO J concurring)

Background

[1] The appellant, being a first time offender, was convicted in the Magistrate's Court for the District of Karibib on a charge of Dealing in Dependence-Producing Drugs, namely 170 grams of cannabis valued at N\$ 540.00, in contravention of section 2 (a) read with section 1, 2 (i) and/or 2 (iv), 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1977 as amended. The appellant was then sentenced to 3 years direct imprisonment on 29 May 2018.

[2] The appellant subsequently lodged an appeal against both conviction and sentence. However when the appeal was argued, it was submitted that on record for the appellant the appeal was only against the sentence imposed by the trial Court: The grounds of appeal may be summarised as hereunder:

1. The sentence of 3 years imprisonment, is inappropriate and induces a sense of shock, as it is inconsistent with other sentences for similar offences in Namibia about more or less the same facts.
2. That the court *a quo* misdirected itself by overemphasizing the seriousness of the offence at the expense of the personal circumstances of the appellant.

[3] At the hearing, Mr Brockerhof appeared for the appellant and Mrs Shikerete for the respondent (the State).

Applicable Law

[4] It is trite law that the Court of Appeal will not lightly interfere with the sentence imposed by the trial court unless the court *a quo* did not properly exercise its sentencing discretion judiciously. It further follows that such discretion would not be judicially exercised if the court misdirected itself on facts and/or law; if a material irregularity occurred during sentencing; if the trial court failed to take into account

material facts or overemphasized the importance of others and/or if the sentence imposed is startlingly inappropriate or induces shock.¹

[5] The appellant's legal practitioner argued that the Appeal court is under an obligation to strive for uniformity of sentences when dealing with similar cases and this was not done in the instant case. In the case of *S v Munyama*,² at paragraph 12 of the judgment, it was held:

'Although it is trite that sentences should be individualised, our Courts generally strive for uniformity of sentences in cases where there has been a more or less equal degree of participation in the same offence or offences by participants with roughly comparable personal circumstances.'

[6] Having considered the above statement uniformity of sentences in similar cases is important as it not only displays the fairness of the courts, but encourages the public's confidence in the impartiality of the courts. In the case before court, appellant was a first time offender. He was found with 170 grams of cannabis valued at N\$549 and was sentenced to direct imprisonment of three (3) years.

[7] Drug offences are indeed serious. Offenders should be severely punished as drugs have become a serious threat to the communities. The offenders, however, must still be treated fairly when sentencing them for such offences. In my view, the trial court misdirected itself by overemphasizing the seriousness of the offence at the expense of the personal circumstances of the appellant. As much as the scourge of drug abuse was on the increase in society and that courts are required to join forces with the law enforcement to combat those crimes, this court is of the view that the sentence imposed is out of line with other sentences for similar crimes. The value of cannabis was minimal and as such this is a basis for this Court to interfere with the sentence. The imposition of a sentence of 3 years imprisonment in the circumstances of this case was a serious misdirection by the court *a quo* warranting interference by this Court.

[8] In the result the following order is made:

¹ *S v Tjiho* 1991 NR 361 (HC).

² *S v Munyama* (SA 47/2011) [2011] NASC 13 (09 December 2011) at para 12 of the judgment.

1. The sentence of three years direct imprisonment is set aside and substituted with the following sentence.
2. Appellant is sentence to three years imprisonment of which 18 months imprisonment are suspended for three years on condition that the appellant is not convicted with the crime of dealing in dependence – producing drugs, committed during the period of suspension.
3. The sentence is antedated to 29 May 2018.

D N USIKU
Judge

G N NDAUENDAPO
Judge

APPEARANCES:

For the Appellant:

Mr Brockerhof

Instructed by Directorate of Legal Aid, Windhoek

For the Respondent:

Mrs Shikerete

Office of the Prosecutor-General, Windhoek