REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI APP-CAL 2020/00059

In the matter between:

RANDAL REINOLDT NITSCHKE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nitschke v S* (HC-MD-CRI-APP-CAL-2020/00059) [2020] NAHCMD 440 (25 September 2020)

Coram: LIEBENBERG J *et* SHIVUTE J

Heard: 11 September 2020

Delivered: **25 September 2020**

Flynote: Criminal Procedure – Appeal – Sentence – Possession of cannabis – 85 grams valued at N$ 1720 – Sentence of 8 months' imprisonment of which 3 months are suspended for 2 years – Seriousness of offence overemphasised at expense of accused personal circumstances – Sentence shockingly inappropriate – circumstances of case merit imposing option of a fine – Sentence set aside and substituted.

Summary: The appellant was convicted on his own plea of guilty of possession of cannabis weighing 85 grams and valued at N$ 1720. He was sentenced to 8 months' imprisonment, of which 3 months are suspended for 2 years on the usual conditions.He appealed against the sentence on the grounds that it is not in line with those imposed in similar cases, that it is shockingly inappropriate and that the court overemphasised the seriousness of the offence at the expense of the appellant's personal circumstances. Held that, first offenders convicted of possessing a relatively small quantity of dagga are normally given non-custodial sentences. The appeal against sentence is upheld. The sentence is set aside and substituted with another.

ORDER

(a) The appeal against sentence is upheld.

(b) The sentence is set aside and substituted for: N$ 4000 fine or 4 months' imprisonment in default of payment.

(c) The appellant's bail is extended for 7 days on condition that he reports himself to the clerk of court Bethanie for the magistrate to issue a warrant of committal should he fail to pay a fine.

JUDGMENT

SHIVUTE J (LIEBENBERG J concurring):

Introduction

[1] The appellant was convicted in the magistrates' court for the District of Bethanie of contravening s 2*(b)*, read with s 1, 2*(i)* and/or 2(*iv)*, 7, 8, 10, 14 and Part I of the schedule of Act 41 of 1971 (as amended) - possession of a dependence producing substance, *to wit*, 85 grams of cannabis valued at N$ 1720.

[2] On 14 May 2020, he was sentenced to 8 months' imprisonment, of which a period of 3 months are suspended for 2 years on condition that the accused is not convicted of the offence of possession of dependence producing substances,

committed during the period of suspension. Dissatisfied with the outcome, he now appeals against the sentence.

Grounds of appeal

[3] The appellant was represented by Mr. McNally and the respondent by Mr. Andreas. In summary, the grounds of appeal are as follows:

1) The learned magistrate erred by over emphasizing the seriousness of the offence and paying lip service to the appellant's personal circumstances in that he is 27 years of age (youthful) , a first offender, he pleaded guilty, he was employed and therefore a useful member of society;

2) The learned magistrate erred by finding that, the fact that appellant borrowed a vehicle to fetch the dagga outside of Bethanie was a factor which increased his moral blameworthiness when there was no basis for such finding;

3) The learned magistrate erred by drawing an inference that the appellant did not play a role in the upbringing of his children;

4) The learned magistrate erred by finding that the fact that the Appellant uses a prohibited substance regularly as a stress reliever justified the imposition of sentence of direct imprisonment, there being no basis for such finding.

5) The learned magistrate erred in imposing a sentence which is shockingly inappropriate in the circumstances of the case.

Submissions by counsel for appellant

[4] Counsel for the appellant argued that the court *a quo* misdirected itself by overemphasising the seriousness of the offence at the expense of the personal circumstances of the appellant and therefore, the court erred in not considering an option of a fine and in default of payment, a shorter term of imprisonment.

[5] Counsel further argued that presiding officers should not sentence in vacuum but must acquaint themselves with the sentences imposed by other judicial officers

in similar cases. Counsel quoted various passages from the judgement in the court *a quo* where he pointed out that the learned magistrate made inferences without any basis. The inferences referred to, form part of the grounds of appeal and will thus not be repeated. In support of his argument, counsel made reference to various caselaw in which offenders received a lesser sentence for similar offences, the court takes note of those cases.

Submissions by counsel for respondent

[6] Counsel for the respondent, submitted that the offence for which appellant was convicted, is one of a serious nature and that courts have to send a clear message that crimes of that nature will attract severe sentences.

[7] Counsel referred this court to case law in support of her argument, such cases will however be discussed later on in the judgement as they are materially distinguishable from the matter before us.

[8] In dealing with the first ground of appeal, the record reflects that the appellant was a first offender, 27 years of age and therefore youthful. He is a single parent of 3 minor children and was gainfully employed at the time of sentencing. The appellant was further convicted for the offence of possession of cannabis as opposed to dealing and the amount of cannabis which he possessed is relatively small. Furthermore, he did not waste the court's time by pleading guilty.

[9] It is settled law that the court when sentencing an accused, should strive for balance between the interests of society, the interests of the accused and the seriousness of the offence. A sentence which over-emphasizes one element cannot be balanced and it is likely to be a wrong sentence. In this case, the court *a quo* clearly over emphasized the seriousness of the offence at the expense of the appellant's personal circumstances.

[10] The 2nd, 3rd and 4th grounds of appeal will be dealt with together because they relate to the same issue. The record of proceedings reflect that during sentencing, the learned magistrate made countless remarks which she considered as aggravating factors. The remarks were as follows:

a) that although the appellant is a first offender, the well-being of his children was not considered by him when he committed the criminal activities;
b) that because appellant testified that he uses cannabis as a stress reliever, the court drew an inference that this is a habit which appellant has been developing for a while;
c) that because no submissions were made in respect of the role which appellant played in his children's life, the court has drawn a reasonable inference that the role he played was of little significance, otherwise he would have thought twice about his actions.

The learned magistrate, in her reasons for sentence, explained that she finds it particularly extreme that the appellant mislead his uncle to transport the drugs into the Bethanie community and that the circumstances of the case required the court to send out a harsh punishment to send a clear message, particularly to the educated appellant that such behaviour is frowned upon.

[11] The learned magistrate relied on the case of *Dlamini v S*[1] where it was held that:

'There is no rule of thumb that a first offender should not be sentenced to direct imprisonment[2]. The appellants stand convicted of a very serious offence and as a result, a message must be sent out from our courts that anyone who commits serious crimes must know that these transgressions will be met with severe punishment. To impose a fine in cases of this nature might create the wrong impression, that the offence is not at all that serious and makes it financially worth taking a chance.'

[12] This court however finds that the remarks and inference made by the learned magistrate during sentencing were not only made without basis but are unnecessary and regrettable, as they spectacle the magistrate's incomprehensibility towards the considerations to be made by a court when sentencing and/or what should qualify as an aggravating factor.

[13] What remains to be determined is whether the sentence was shockingly inappropriate. This question is best determined by way of looking at comparable case law.

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[1] *Dlamini and Another v State* (CA 126/2016) [2017] NAHCMD 75 (13 March 2017).
[2] *S v Victor* 1970 1SA 427 (A).

[14] In support of the argument that the sentence is in line with similar sentences, counsel for the state relied on the case of *Platt v The State* [3] where the court held that, courts will fail in their duties to punish the offence of possession of drugs if those convicted with the offence are given a mere slap on their wrist. Furthermore, counsel referred to the case of *Tjihambuma v The State* [4] where the appellant was sentenced to 14 months' direct imprisonment following a conviction on possession of 755 grams of cannabis valued at N$ 7 550.

[15] This court however notes that the two cases cited by counsel for the state are distinguishable from the one before us in that, the appellant in the *Platt* [5] case, was convicted of possession of 4 doses of crack cocaine which is a dangerous dependence producing drug, valued at N$ 14 000. The case before us is for possession of a different type of drug, *to wit*, cannabis. Similarly, the *Tjihambuma*[6] case does not find applicability as the quantity of dagga which appellant was convicted of is much higher than that which appellant faces in the present case.

[16] The passage from the judgment which the learned magistrate relied on is also of no relevance whatsoever because it relates to the offence of dealing in cannabis whereas the accused in the case before us is convicted of possession thereof. The appellants in the *Dlamini*[7] case were sentenced to 6 years' imprisonment following a conviction of dealing in 25.808 kg of cannabis valued at N$ 129 040. In fact, the penalty clause applicable for dealing is much more severe than that of possession of cannabis.

[17] In the case of *S v Issacks*[8] however, the facts are similar to those in the present matter in that the accused who was 22 years of age and a first offender, was found in possession of a 100 grams of dagga which he possessed for personal use, he was sentenced to 9 months' imprisonment suspended in *toto* for 3 years on similar conditions. In handing down the judgement, Frank J stated the following:

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[3] *Platt v S* (HC-MD-CRI-APP-CAL-2017/00012) [2018] NAHCMD 38 (26 February 2018).
[4] *Tjihambuma v S* (HC-MD-CRI-APP-CAL-2018/00040) [2019] NAHCMD 95 (12 April 2019).
[5] Ibid.:
[6] *Tjihambuma v S* (HC-MD-CRI-APP-CAL-2018/00040) [2019] NAHCMD 95 (12 April 2019).
[7] *Dlamini and Another v State* (CA 126/2016) [2017] NAHCMD 75 (13 March 2017) .
[8] *S v Isaacks*, CR 21/96.

'First offenders convicted of the possession of dagga of a relatively small quantity are normally given non-custodial sentences. This is so because of the relative easy availability of dagga, its limited adverse effects compared to other drugs and the fact that otherwise law-abiding people, young giving people, tend to experiment with it. A suspended sentence normally has the effect of ensuring that the offence is not repeated.'

He further went on to state that:

'The usual sentence is a fine coupled with the alternative of imprisonment. As the accused in the present case has already served a month in prison I do not intend imposing a fine and will only impose a suspended sentence.'

[18] In applying the above principles to the present facts, we are of the view that the circumstances of this case warrant imposing a custodial sentence coupled with the option of a fine and although the principle of individualisation is recognised, a sentence must not be decided in isolation but must be balanced against uniformity with previous cases. We thus find the sentence imposed by the learned magistrate to be shockingly inappropriate and cannot be allowed to stand.

In the result, we make the following order:

(a) The appeal against sentence is upheld.
(b) The sentence is set aside and substituted for: N$ 4000 fine or 4 months' imprisonment in default of payment.
(c) The appellant's bail is extended for 7 days on condition that he reports himself to the clerk of court Bethanie for the magistrate to issue a warrant of committal should he fail to pay a fine.

NN SHIVUTE
Judge

JC LIEBENBERG
Judge

APPEARANCES

APPELLANT:	Mr. P McNally Of C/O Delport Attorneys Windhoek
RESPONDENT:	Mr. J Andreas Of Office of the Prosecutor-General Windhoek