REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: Vincent Goliath v The State	**Case No:** HC-MD-CRI-APP-CAL-2022/00057
Coram: Liebenberg J *et* Christiaan AJ	**Division of Court:** High Court, Main Division
Heard: 8 September 2023	**Delivered:** 15 September 2023
Neutral citation: *Goliath v S* (HC-MD-CRI-APP-CAL-2022/00057) [2023] NAHCMD 570 (15 September 2023)	
ORDER: 1. The condonation application is granted. 2. The appeal against conviction is upheld. 3. The appellant is to be released forthwith.	

REASONS:

LIEBENBERG J (CHRISTIAAN AJ concurring):

Introduction

[1] The appellant and his co-accused (accused 1) were charged in the Magistrate's Court at Bethanie for contravening s 2*(a)* read with s 1, 2 (i) and/or 2 (iv), 7, 8, 10, 14 Part I of the Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 (the Act), as amended – Dealing in dependence producing substances; alternatively, contravening s 2*(b)* read with s 1, 2 (i) and/or 2 (iv), 7, 8, 10, 14 Part I of the Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 – Possession of dependence producing substances. While accused 1 was convicted on the main count for dealing, appellant was acquitted on the said count but convicted on the alternative count of possession. The appellant was sentenced to 18 months' imprisonment. The allegations by the State were that on 3 July 2019, at Bethanie, the appellant wrongfully and unlawfully had in his possession or use a prohibited drug or plant from which such drug can be manufactured, to wit, 190 grams of pure cannabis, valued at N$1900.

[2] Disenchanted with the conviction, the appellant noted an appeal against the conviction.

[3] The grounds of appeal enumerated in the amended notice of appeal, can be summarised as follows:

'1. The magistrate erred in law and/or fact by not taking into consideration that accused 1 admitted through section 220 admissions that the cannabis that was found in his possession, was his alone.

2. That the magistrate misdirected herself in law and/or fact by not taking into consideration that accused 1 indicated that appellant was a visitor at his house who just came to buy corrugated iron sheets and thus he had nothing to do with the cannabis that was found.

3. That the magistrate erred in law and/or fact by not believing the version of appellant when he stated that he only came to the house of accused 1 because he was looking for accused 1's cousin who sold him corrugated iron sheets. This version was also confirmed by accused 1 himself under oath.

4. That the magistrate erred in law and/or fact by not properly considering that there was no direct evidence linking the appellant to possession of the cannabis and by rejecting the version of events from the appellant.

5. That the learned magistrate erred in law and/or in fact by concluding that the state had proven its case beyond a reasonable doubt.'

[4] The appellant applies for condonation for the late noting of his amended notice of appeal. What is clear from the papers is that the initial notice of appeal was filed on 16 June 2022, well within the 14 day period. In his affidavit in support of the condonation application, appellant sets out a clear account of the circumstances that transpired and leading up to the time that the amended notice of appeal was eventually filed. It is common cause that appellant was convicted on 14 June 2023 and sentenced on 15 June 2022. On 16 June 2022, pending the outcome of his legal aid application, he filed his notice of appeal and the matter was eventually set down on the Criminal Appeals Mentions Roll of 11 August 2022.

[6] Subsequent to this, Mr Siyomunji was appointed by Legal Aid to represent the appellant and it was on his advice that he filed an amended notice of appeal on account of his initial notice being defective as far as the purported grounds of appeal therein not amounting to proper and valid grounds. The amended notice of appeal was filed on 21 November 2022, but with no condonation application as Mr Siyomunji had since withdrawn as his legal practitioner. Appellant submitted another application for legal aid

and Mr Kanyemba was appointed on 30 March 2023. Owing to him being incarcerated at the Hardap Correctional Facility, appellant submits that it proved rather difficult for him to consult with his legal practitioner. He submits further that the delay was not due to a blatant disregard of the rules of court.

[7] The authorities on condonation need no rehashing. A party applying for condonation must satisfy two requirements namely a reasonable explanation for the delay as well as the prospects of success on appeal.[1] I am satisfied that the appellant has proffered a reasonable and acceptable explanation for the delay. It must be noted that a reasonable explanation does not necessarily presuppose a successful appeal, the prospects thereof must still be considered. This discussion follows below.

Factual background of the case

[8] The State called two witnesses (police officers) who testified that on the day of the incident, and, acting on a tip-off, they found the appellant and his co-accused (accused 1) in a house belonging to accused 1 at around 04h40 in the morning. Further, that a search of the house led them to a discovery of 76 bales of pure cannabis placed on a TV table. Without more, accused 1 claimed ownership of the cannabis. According to the witnesses, notwithstanding accused 1's admission immediately when the cannabis was discovered, appellant was also arrested and charged for dealing in and possession of a dependence producing substance. The witnesses further testified that, appellant was arrested as accused 1's admissions could not, at the time, be taken seriously unless given under oath. It was their further testimony that they feared accused 1 might deny ownership if the appellant was not arrested. A search conducted on their persons also revealed no cannabis.

[1] *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC).

[9] Appellant and his co-accused's versions corroborated each other in so far as they both confirmed that: the cannabis found belonged to accused 1; appellant's presence at accused 1's house was because he was waiting for accused number 1's cousin in relation to a sale of corrugated iron sheets; and, appellant never knew that he was busy with cannabis. It must be noted here that the evidence alluded to above is only in respect of the circumstances surrounding the charge on possession of dependence producing substances.

[10] In light of the aforementioned evidence, the court *a quo* convicted appellant for possession of a dependence producing substance. In convicting appellant, the learned magistrate premised such conviction on the definition of the word 'possess' as follows:

> 'Possess' includes keeping, storing or having in custody or under control or supervision, and 'possession' has a corresponding meaning. The court is not convinced that accused 2 did not have knowledge of what was accused 1 was doing. The time that accused 2 went to accused 1 residence was at an odd hour, which baffles me.'[2]

Arguments by Appellant

[11] Appellant's counsel argues that it was a serious misdirection on the part of the court to hold that appellant was in possession of the cannabis, considering the fact that accused 1 had claimed ownership of the cannabis (at the scene as well as in court) and on account of the corroboration of the state's witnesses. According to appellant, the magistrate misdirected himself when he failed to employ the test of proof beyond reasonable doubt when convicting him in that no evidence was led to prove his guilt beyond reasonable doubt. His contention is that the trial court convicted him merely because he was found at accused 1's house during the wee hours of the morning and thereby rejected his version.

[12] On the other hand, the respondent's counsel argues that appellant was found on accused 1's premises (on which the cannabis was found) in the early morning hours.

[2] Record p 50.

Counsel relies on English cases and submits that ‘possession’ in a statutory context comprises of a physical component as well as a mental element. Furthermore, counsel’s interpretation of the term ‘possession’ as defined in s 1 of the Act is that it simply requires an awareness of the possession of the thing in question. However, counsel submits, this excludes cases where the thing is planted without the possessor’s knowledge. Counsel drives his argument home by submitting that the odd time of the day of appellant’s presence on the premises was enough for the learned magistrate to draw an inference that appellant had both physical control, as well as the necessary awareness of the cannabis.

The applicable law

[13] In considering an appeal against conviction, the court must be satisfied that there was a misdirection on the facts or the law on the part of the court *a quo* in arriving at its decision.

[14] The facts led at the trial comprised of a corroborated version that appellant was looking for corrugated iron sheets as well as accused 1’s testimony that he admitted at the scene as well as in court that the cannabis belonged to him. Considering the meaning of the word ‘possession’ in the Act where it is defined as: keeping, storing or having in custody or under control or supervision, I am not convinced that the magistrate was presented with sufficient facts to prove beyond a reasonable doubt that the appellant was in possession of the cannabis, as contemplated under section 1 of the Act. Though not stated in so many words, it would appear from a reading of the judgment that appellant was convicted solely on the strength of his presence at accused 1’s house. The magistrate seems to have relied on the rebuttable presumption under s 10(3) of the Act to the effect that possession is imputed on an accused merely for having been found in the vicinity of the article concerned, *unless the contrary is proved*.

[15] The magistrate's conviction of the appellant on the strength of s 10(3) in these circumstances, would be a misdirection on the law for two reasons. Firstly, the court did not draw the presumption to the appellant's attention[3] so as to afford him a fair trial, and secondly, any reliance on the presumption would be contrary to the proven facts.

[16] This court is accordingly not satisfied that the magistrate exercised her discretion judiciously in convicting the appellant on the alternative count of possession. The conviction therefor stands to be set aside and consequently, the sentence falls away.

[17] In the result, the following order is made:

1. The condonation application is granted.
2. The appeal against conviction is upheld.
3. The appellant is to be released forthwith.

J C LIEBENBERG **JUDGE**	**P CHRISTIAAN** **ACTING JUDGE**

[3] See *S v Kau and Others* (SA 1 of 1993) [1993] NASC 2 (15 October 1993) para 17.