REPUBLIC OF NAMIBIA

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CRI-APP-CAL-2023/00042

In the matter between:

ASSUMANI KAIAKI IRANZI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Iranzi v S* (HC-MD-CRI-APP-CAL-2023/00042) [2023] NAHCMD 625 (06 October 2023)

Coram: LIEBENBERG J *et* CHRISTIAAN AJ
Heard: **15 September 2023**
Delivered: **06 October 2023**

Flynote: Criminal procedure – Appeal against conviction and sentence – Where appeal turns on the procedure (or lack thereof) adopted by the trial court as regards the main count and not against the judgment *per se* – Appeal against conviction on the main

count irrelevant and unmeritorious – Sentencing discretion of court – Principles restated – Effect of not testifying in mitigation – Admission of previous convictions not to be equated with formal admissions.

Summary: Appellant was arraigned in the Windhoek Magistrate's Court on charges of contravening s 2(c) read with s 2(i) and/or 2(ii), 8, 10, 14 and Part ll of the Schedule of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 as amended, (hereinafter referred to as 'the Act') – Dealing in cocaine; alternatively, contravening s 2(d), possession of cocaine, to wit, 14 doses to the value of N$7000. He pleaded not guilty to the main charge and guilty to the alternative charge preferred against him. Following the plea of guilty to a charge of possession of cocaine, the court proceeded to question the accused in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 as amended. The appellant did not admit to the value of the cocaine as alleged in the charge annexure and the provisions of s 113 of the CPA were invoked, subsequent to which, he was convicted on the alternative count. The appellant was sentenced to 24 (twenty four) months' imprisonment, of which 12 (twelve) months were suspended for a period of 3 (three) years on condition that the appellant is not convicted of possession of cocaine or dealing in cocaine during the period of suspension (*sic*). The appeal lies against conviction and sentence and is premised, *inter alia*, on the alleged failure by the trial court to: explain the appellant's rights to mitigation as well as his rights to be informed of the consequences of admitting to previous convictions; consider the imposition of a fine when sentencing him to imprisonment without the option of a fine and thereby overemphasising the appellant's previous conviction which consequently resulted in the imposition of a custodial sentence.

Held: That appellant's prayer for the conviction to be set aside is unmeritorious.

Held that: In deciding whether or not to impose a fine and to keep the offender out of prison, the approach is whether the offence warrants the imposition of a fine.

Held further that: The alleged overemphasising of the appellant's previous conviction is a conclusion reached by the drafter of the notice of appeal and falls short of the requisites of being clear and specific.

Held that: Despite an entry made (in long hand) that the rights to mitigation were explained without stipulating the nature and extent of the explanation given, another Namcis record reflects the full explanation of the rights in mitigation of sentence as well as the confirmation by appellant that he understood his rights. Therefore, in the absence of proof that the appellant was in actual fact a drug addict at the time, the court's failure to establish whether the appellant was on medical treatment carries little (if any) weight when such appellant failed to disclose this information in mitigation, despite his rights to mitigation being explained to him.

Held further: That there is no rule of law that an unrepresented offender has a right to be informed of the consequences of admitting to previous convictions.

Held that: This court *mero motu* amends the sentence as the construction of the sentence as it currently stands does not provide that the prohibited offence should not be committed during the period of suspension.

Appeal consequently dismissed and sentence amended to incorporate the words *committed during the period of suspension*.

ORDER

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1. The appeal against conviction and sentence is dismissed.

2. The sentence is amended to read: 24 months' imprisonment of which 12 months is suspended for a period of three years on condition that the accused is not

convicted of possession or dealing in cocaine, committed during the period of suspension.

3. The date of sentence remains unchanged – 11 April 2023.

JUDGMENT

LIEBENBERG J (CHRISTIAAN AJ concurring):

Introduction

[1] On 22 September 2022 the appellant appeared in the Windhoek Magistrate's Court on charges of contravening s 2(c) read with s 2(i) and/or 2(ii), 8, 10, 14 and Part ll of the Schedule of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 as amended, (hereinafter referred to as 'the Act') – Dealing in cocaine; alternatively, contravening s 2(d), possession of cocaine, to wit, 14 doses to the value of N$7000.

[2] Appellant pleaded not guilty to the main charge and guilty to the alternative charge preferred against him. Following the plea of guilty to a charge of possession of cocaine, the court proceeded to question the accused in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 as amended (the 'CPA'). Since the appellant did not admit to the value of the cocaine as alleged in the charge annexure, but instead indicated that he bought the cocaine for N$2000, the presiding magistrate was not satisfied with the plea of guilty and seemingly[1] invoked the provisions of section 113 of the CPA. The state thereafter called one witness who testified on the value of the cocaine being N$7000, to which the appellant agreed. The appellant did not testify in his own defence or call any witness. The appellant was consequently convicted on the alternative count of possession of cocaine.

[1] This is not clearly recorded in the record.

[3] Subsequent to his conviction, the appellant was sentenced to 24 (twenty four) months' imprisonment, of which 12 (twelve) months were suspended for a period of 3 (three) years on condition that the appellant is not convicted of possession of cocaine or dealing in cocaine during the period of suspension (*sic*). Appellant was not given an option to pay a fine.

[4] Aggrieved by the outcome of the proceedings, the appellant lodged an appeal against both the conviction and sentence.

[5] Mr Muchali appears for the appellant while Ms Shilongo represents the state.

Grounds of appeal

[6] The appeal is founded on eight grounds noted in the notice of appeal, three against conviction and five against sentence. The appeal against conviction principally turns on the court *a quo's* court order of 11 April 2023, which reflects a conviction of dealing in cocaine in contravention of s 2(c) of the Act, and which is repeated on the appellant's 'prison card'. The appellant further complains that the court *a quo* failed to record a not guilty plea or invoke the provisions of section 115 on the main count, and that the finalisation of the case without leading evidence in the circumstances, amounts to unauthorised stopping of prosecution (on the main count).

[7] As regards the appeal against sentence, it is contended by the appellant that the court *a quo* erred when it failed to explain the appellant's mitigation rights, and that it failed to elicit sufficient mitigating factors from the appellant, who was unrepresented. The rest of the grounds are to the effect that a sentence of a fine, as opposed to imprisonment, was the appropriate sentence and that the trial court failed to explain to the appellant the consequence of admitting to previous conviction as evidence.

Appeal against conviction

[8] The grounds relied upon are based on entries made in the Namcis record and review cover sheet, respectively, where it is reflected that the appellant was convicted on the main count of dealing. Issue is further taken with the trial court's failure to invoke

the provisions of s 115 of the CPA after the appellant pleaded not guilty on the main count.

[9] During oral argument I raised the question with counsel for the appellant whether the appellant was disgruntled with the fact that he was not convicted on the main count, bearing in mind that none of the grounds relied on in the appeal against conviction, concern his conviction on the alternative count of possession. Counsel assured the court that it was not the case. In light thereof, there is no need to dwell on any of the alleged irregularities committed by the trial court which, even if found to be of merit, would result in vitiating the outcome of the trial in the end. Suffice it to say that the Namcis order of 11 April 2023, when the appellant was sentenced, erroneously reads that he was convicted of dealing in cocaine. This is clearly wrong.

[10] What is puzzling of the appellant's attack on the conviction, is that there is nothing on record that shows that the state pursued the main count during the ensuing trial. The appellant pleaded guilty to the alternative count of possession and when the value of the cocaine was disputed during the court's questioning, the state's sole intention was to prove that fact; not that the appellant dealt in cocaine.

[11] The trial commenced on 15 March 2023 and the state led evidence regarding the value of cocaine found with the appellant. The appellant did not challenge the evidence and elected to remain silent, where after the court delivered its *ex tempore* judgment, clearly stating that the appellant is found guilty of 'possession of Cocaine' (record at 42). During sentence and when considering the crime under consideration, specific reference was made to the 'possession of cocaine'. There can be no doubt that the court *a quo* convicted the appellant on the alternative count of possession of cocaine and proceeded to sentence on that basis, not on the main count of dealing. It is my considered view that neither the Namcis order nor an entry made on the review cover sheet negates the court's earlier judgment and sentence.

[12] Where in this instance the appeal does not lie against the judgment *per se,* but rather turns on the procedure (or lack thereof) adopted by the trial court as regards the main count, I consider this to be irrelevant to the conviction (of possession) and the

appeal under consideration. Appellant's prayer that the conviction be set aside is thus found to be unmeritorious.

The appeal against sentence

[13] As was argued on behalf of the appellant that the appeal, primarily, lies against sentence.

[14] Counsel for the appellant in para 7 of his heads of argument referred this court to page 22 of the appeal record, reflecting the Namcis recording of court proceedings on 11 April 2023 between 15h28 – 15h45 and points out that, besides an entry made (in long hand) that rights to mitigation were explained, it does not stipulate the nature and extent of the explanation given. To this end, counsel is correct. However, at page 24 of the same record and regarding the same (duplicated) proceedings, the Namcis recording at 15h50 reflects the full explanation of the rights in mitigation of sentence. In response thereto, the appellant confirmed that he understood. The appellant was specifically informed that he has to place his personal circumstances before court and all other factors which the court may take into consideration in order to arrive at an appropriate sentence. The court further informed him as to how he could go about in presenting the information i.e. to give evidence, call witnesses or address the court from the dock. He opted for the latter and placed his personal circumstances before the court, to which I will return shortly.

[15] As borne out by the duplicated Namcis record, the appellant was duly informed of his rights in mitigation of sentence. Notwithstanding, the appellant asserts that the explanation of rights were not properly recorded, constituting an irregularity. In coming to this conclusion, reliance was placed on the difference between the 'initial' recording and the recording of five minutes later (15h50). Whilst maintaining that the rights to mitigation were not fully explained to the appellant, it was not suggested that the record of proceedings had been tampered with afterwards. No argument was advanced why counsel chose to rely on the first recording when pointing out the difference in the recordings. The latter recording forms part of the appeal record and, in the absence of

any evidence or reason showing otherwise, there is no basis in law to simply disregard it for purposes of this appeal.

[16] In reaching this conclusion, I am satisfied that the appellant was duly informed of his rights when invited to place his personal circumstances before the court. To this end, he is 28 years old with two children, aged three years and six months respectively, self-employed and owns a company.

[17] A further ground of appeal turns on the presiding magistrate's failure 'to invoke her inquisitorial authority and elicit sufficient mitigating factors from the unrepresented accused person before imposing a custodial sentence'. This is amplified by the magistrate's failure to inquire whether (a) the appellant had the ability to pay a fine and (b) if he received medical treatment for his cocaine addiction. Counsel for the appellant argued that the magistrate had a legal duty to solicit this information before imposing the 'severe sentence' as she did, particularly where the Act provides for the option of a fine on a second conviction. The matter of *S v Muhepa*[2] is cited as authority for counsel's contention.

[18] It is a well-established principle of our law that a judicial officer, when sentencing an unrepresented accused, is entitled to ask the accused such questions which may assist at arriving at an appropriate fine.[3] The approach of the court at sentencing should be to gather as much relevant information as possible that could assist in deciding what sentence, in the particular circumstances of the case, would be appropriate and just. That would obviously not only require information pertaining to the convicted person, but also with regards to the circumstances under which the offence was committed or, as in this instance, the proof of a similar previous conviction.

[19] The court *a quo* in its judgment on sentence took into account the triad of factors being: the personal circumstances of the appellant, the crime and the interests of society. Regard was particularly had to the appellant's previous conviction on 9 March 2022 of a similar offence, for which he was sentenced to a fine of N$3000 or 12 months'

[2] *S v Muhepa* (CR 87/2020) [2020] NAHCMD 497 (30 October 2020).
[3] *S v Vekueminina and Others* 1993 (1) SACR 561 (Nm).

imprisonment. Also that cocaine is listed as a dangerous dependence-producing substance, with devastating consequences to users and society in general. Courts, as reasoned by the magistrate, should therefore condemn the possession of drugs.

[20] Counsel for the appellant's outright condemnation of the court *a quo's* failure to consider the imposition of a fine, appears to me unjustified, given the circumstances of this case. The appellant, as correctly pointed out by the trial court in its judgment on sentence, elected not to give evidence in mitigation of sentence. There was no show of remorse by the appellant; an important factor at sentencing. Moreover, when he was convicted of the same offence barely six months earlier and afforded the opportunity of paying a fine, in order to keep him out of prison. Though not captured in the judgment on sentence, the court *a quo* was clearly of the view that on this second occasion, a deterrent sentence was called for and that the imposition of (another) fine, would not be appropriate. Furthermore, the appellant was found with 14 doses of cocaine valued at N$7000, which I do not consider by any margin to be of small quantity, as submitted by appellant's counsel.

[21] In deciding whether or not to impose a fine and to keep the offender out of prison, the approach of the court in the *Muhepa* matter was correctly summarised at para 8, where it was stated that the first consideration is whether the offence warrants the imposition of a fine. Here the objective blameworthiness of the offender and the seriousness of the offence come into consideration.

[22] Although the court *a quo* had a discretion to impose a fine on the appellant as provided for in s 2(d)*(iv)* of the Act, albeit him being a second offender, it decided against such option in light of the seriousness of the offence and the appellant's history with drugs. The court was clearly of the view that deterrence, as the objective of punishment, was justified and that a custodial sentence, half of which suspended, would be appropriate. Mindful that punishment being pre-eminently a matter for the discretion of the trial court and, the powers of a court on appeal to interfere with sentence being limited as interference would only be permissible where the trial court failed to exercise its discretion judiciously, I am not in agreement with the view taken that the court *a quo*

misdirected itself by not considering the possibility of a fine. This seems to be an instance where the trial court held the view that the imposition of a fine was not warranted. Given the circumstances of the case, I am unable to find that the trial court, in coming to this conclusion, did not exercise its discretion judiciously – a term of direct imprisonment was justified and an appropriate punishment.

[23] The assertion that the trial court misdirected itself by not inquiring whether the appellant was receiving medical treatment for his cocaine addiction, is based on the presumption that the appellant is a drug addict, whilst there is no basis for coming to this conclusion. If he was indeed a drug addict, as suggested by counsel, this information would have been material to sentencing and one would have expected of the appellant to disclose such important fact. As stated, the appellant was informed of his rights in mitigation of sentence and had the opportunity to bring this to the court's attention when invited to do so. Complaining only on appeal that such information should have been elicited by the court, appears to be a mere afterthought. Sight should not be lost of the fact that this was not the appellant's first encounter with court and sentencing proceedings. In the absence of proof that the appellant was in actual fact a drug addict at the time, the court's failure to establish whether the appellant was on medical treatment carries little (if any) weight. This ground is accordingly found to be without merit.

[24] Further grounds of appeal turn on the trial court's failure to explain to the appellant 'the consequences of admitting a previous conviction as *evidence* into the record' and by overemphasising the previous conviction when imposing a custodial sentence. I pause to observe that an admission of a previous conviction made by an offender before sentence, should not be equated with formal admissions made during the trial; the purpose of admitting a previous conviction is not a formal admission as envisaged in s 220 of the CPA.

[25] Besides the bold assertion that the court misdirected itself with regards to its omission to explain the consequences of a previous conviction to the accused, no legal basis was provided for coming to this conclusion. In this instance the appellant admitted

his previous conviction. What more had to be explained to him, one may ask? In any event, what difference would an explanation of the consequences of an admission to a previous conviction have made? I am not aware of any rule of law, neither have we been referred to any such law in the heads of argument or during oral argument, that an unrepresented offender has a right to be informed of the consequences of admitting to previous convictions. The assertion is accordingly baseless and without merit.

[26] The alleged overemphasising of the appellant's previous conviction which resulted in the imposition of a custodial sentence, is a conclusion reached by the drafter of the notice of appeal and falls short of the requisites of being clear and specific.[4] Notwithstanding, the court *a quo* was entitled to take into consideration that the appellant had a similar and relevant previous conviction, an aggravating factor at sentencing. As this court already found that the imposition of a custodial sentence was warranted, no further consideration of the sentence imposed is required, as the sentence itself, was not attacked on appeal.

[27] There remains one issue this court needs to raise *mero motu* which concerns the construction of the suspended sentence. As the sentence currently stands, half of the sentence of imprisonment (12 months) is suspended for three years on condition that the accused/appellant is not convicted of possession or dealing in cocaine. What has been omitted from the sentence are words to the effect that the prohibited offence should not be *committed during the period of suspension*. Hence, the sentence needs to be amended to incorporate the omitted phrase.

Conclusion

[28] In the result, it is ordered:

1. The appeal against conviction and sentence is dismissed.

2. The sentence is amended to read: 24 months' imprisonment of which 12 months is suspended for a period of three years on condition that the accused is not

[4] See *Nghipunya v S* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020).

convicted of possession or dealing in cocaine, committed during the period of suspension.

3. The date of sentence remains unchanged – 11 April 2023.

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J C LIEBENBERG

Judge

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P CHRISTIAAN

Acting Judge

APPEARANCES:

APPELLANT:	J Muchali Of Jermain Muchali Attorneys, Windhoek.
RESPONDENT:	M Shilongo Office of the Prosecutor-General, Windhoek.