



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2023/00038

In the matter between:

ANNATJIE KOOPER

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Kooper v S* (HC-MD-CRI-APP-CAL-2023/00038) [2023]
NAHCMD 726 (10 November 2023)

Coram: SHIVUTE J and JANUARY J

Heard: 16 October 2023

Delivered: 10 November 2023

Flynote: Criminal Procedure – Appeal – Considerations and approach restated - Evidence - Onus to prove restated – Evidence of the State not refuted – Circumstantial and direct evidence – Possession – Definition – Elements corpus and animus – Inferences intention - No misdirection ad conviction.

Criminal Procedure – Sentence – Triad restated – objectives – personal circumstances considered properly – Misdirection – individualisation and uniformity.

Summary: The appellant was found in physical possession of cannabis detected by a police officer when she handed items to be given to a trial awaiting inmate in police holding cells. The evidence of the State reflects that the cannabis was found in a container containing lotion. This item was in the possession of a co-accused when they entered the police yard. The co-accused handed the item to the appellant and she in turn handed it to the police officer from the drug law enforcement unit. The State proved a prima facie case. The appellant opted to remain silent. The magistrate convicted both her and the co-accused and sentenced them to six months' imprisonment. This court found no misdirection on the conviction. It was, however, found that there was a misdirection in relation to sentence in that the magistrate did not consider the principle of individualisation and uniformity in sentencing. The sentence is set aside and substituted with a sentence of N\$2 500 or five months imprisonment.

ORDER

1. The sentence of six months' imprisonment is set aside.
2. The appellant is sentenced to N\$2 500 or five months imprisonment.
3. The bail is cancelled and is to be refunded to the depositor.
4. The appellant has to report to the magistrate court Keetmanshoop as soon as possible.

APPEAL JUDGMENT

JANUARY J (SHIVUTE J concurring)

Introduction

[1] The appellant was convicted in the magistrate's court of Bethanie on 13th April 2023 of contravening s 2(b) read with ss 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 eight grams of cannabis (four bankies) worth N\$400. She was sentenced to six months' direct imprisonment on 14 April 2023.

Background

[2] The appellant was arraigned with a co-accused. Both the accused persons pleaded not guilty and opted to remain silent and did not render any plea explanation.

[3] The State called one witness who is a police officer. He received training at the drug law enforcement unit of the Namibian police and knows cannabis from his training, from its greenish colour and smell. He knows the two accused persons as they used to visit trial awaiting inmates at the police holding cells. He testified that on 16 February 2022, he found the two accused persons entering the yard of the police station. Upon entering the police station, the appellant approached him. He assisted her, taking items from her to be handed to an inmate. He inspected a lotion container which the appellant handed to him. He used a spoon and detected something hard inside the lotion. On closer inspection, the object was in green plastic bag containing four bankies of cannabis wrapped in clear plastic. When the witness asked to whom it belonged, they looked at each other and started blaming each other not seeming to be surprised.

[4] In cross-examination, the witness testified that accused one was carrying the items when they entered the yard and then handed it to the appellant. The appellant denied that she arrived with the first accused. She put it to the witness that she was with

her aunt and was asked by the first accused to hand over the items. The witness, however, was adamant that the appellant and the co-accused arrived together and that it was not the first time they came to the police station visiting inmates. The witness confirmed that the lotion was handed to him by the appellant. Both the appellant and her co-accused did not dispute the material evidence in cross-examination.

[5] Both the accused opted to remain silent after the State closed its case.

[6] This appeal is against both conviction and sentence.

[7] The appellant is represented by Mr McNally and the respondent by Ms Shilongo.

Grounds of appeal

[8] The grounds of appeal raised in the notice of appeal are as follows:

'AD CONVICTION

1. 'That the Learned Magistrate erred in convicting Appellant, without applying his mind to whether Appellant had the requisite *mens rea*, to be in possession of cannabis.
2. That the Learned Magistrate erred in convicting Appellant despite the fact that Appellant only had corpus of a container, in which the dagga eventually was found.
3. That the Learned Magistrate erred in that he did not apply his mind to, and accordingly did not appreciate that the concept of possession comprises of two constituent elements to wit corpus and animus, and that the State did not prove that the Appellant had the required animus.
4. That the Learned Magistrate erred in finding that the Appellant and Accused 1 (in the Court a quo). Had joint possession of the dagga in question- There being no basis for such a finding which was neither alleged, nor proven.
5. That the Learned Magistrate erred in not meru motu, discharging Appellant at the end of the state's case.

6. That the Learned Magistrate erred in convicting Appellant despite the fact, that the State did not prove that Appellant knew that the container contained dagga - as opposed to the cream that it contained.
7. That the Learned Magistrate erred in convicting Appellant despite the fact that the State never alleged, nor proved, that Appellant and Accused No.1 (in the Court a quo) acted with a common purpose.
8. Learned Magistrate erred in finding that "The act of possession does not require intention"- There being no basis for such a finding which is without substance.
9. That the Learned Magistrate erred in finding that a contravention of Section 2(b) of Act 41 of 1971 creates strict liability whereas mens rea is required.

AD SENTENCE

10. That the Learned Magistrate erred in sentencing Appellant to direct imprisonment, despite the fact that Appellant was only convicted of possession of a small quantity of dagga to wit 4 grams of dagga.
11. That the Learned Magistrate erred in sentencing Appellant to direct imprisonment, despite the fact that Appellant was only convicted of possession, which is a lessor offence, than dealing.
12. That the Learned Magistrate erred in sentencing Appellant to prison, despite the fact that she was a first offender.
13. That the Learned Magistrate erred in sending Appellant to prison despite the fact that she was a first offender, and was willing, and able to pay a fine.
14. That the Learned Magistrate erred, in that he over-emphasised, the seriousness of the offence, at the expense of Appellant.
15. That the learned Magistrate erred. In imposing a sentence which is shockingly inappropriate, under the circumstances.'

[9] The magistrate properly summarised and considered the evidence. The court was satisfied that the substance was cannabis. He concluded that he only had to consider the evidence of the State. In relation to the possession, he concluded that the accused persons had joint possession of the lotion which contained the cannabis when attempting to smuggle same into the holding cells at Bethanie. He convicted both the appellant and the co-accused since the State's version was unchallenged.

The arguments

[10] Mr McNally submitted that the evidence reflects that the appellant was merely in physical control of the container in which the cannabis was found. He further submitted that there was no evidence that the appellant handled the container before she and accused one entered the charge office. In this regard, the appellant when she addressed the court before conviction, stated that she came with the stuff, saw someone in front of a shop, handed him the things and went into the shop. Thereafter, they crossed the street and came to the charge office. Although this is not evidence, it is significant. Further, that there was no evidence from which it can be inferred that the appellant knew that there was cannabis/dagga in the container and that she intended to possess it. It was submitted that the appellant lacked *mens rea* to possess the substance in question.

[11] Mr McNally submitted that the magistrate erred that a contravention of s 2(b) of Act 41 of 1977 creates strict liability whereas *mens rea* in the form of *dolus* is an essential element of the offence. Therefore, so it was submitted, it was required to prove not only that the appellant committed the act which falls within the definition of the offence but that it was committed with the necessary guilty state of mind.

[12] Ms Shilongo submitted that the appeal is without merit and should be dismissed. She argued that, although, the appellant's rights to cross-examination and to testify in her defence were adequately explained, she did not place any evidence before court to refute the *prima facie* case against her. She submitted that counsel cannot give evidence from the bar submitting that there is no evidence of who handled the container before it came into possession of the appellant and that appellant did not know that the

lotion contained the prohibited substance, dagga. Further, that there was no evidence from the appellant that she only became aware that the substance is dagga when it was discovered by the officer to that effect. The only evidence was produced by the State from which inferences may be drawn on the circumstantial evidence.

[13] In relation to the guilty state of mind or *mens rea* counsel submitted that the intention needs to be determined from the subjective mind of a person. She argued that since that mind is not before court as the appellant elected not to testify, the court only has the evidence from the State as direct and circumstantial evidence. It was submitted that the appellant made an informed decision to remain silent despite that the consequences of it were explained to her and she had enough time to decide from 12 May 2022 to 13 April 2023 after the State closed its case.

The applicable law

[14] 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.

[15] It is trite that the onus is on the State to prove its case beyond reasonable doubt. Where the State has established a *prima facie* case, failure to testify by an accused to rebut that evidence or to cast doubt may result in the court making an adverse finding against the accused. An adverse inference could be drawn against an accused who opted to remain silent and he/she runs the material risk of being convicted.¹ It was held that once the prosecution has established a *prima facie* case, an accused who fails to produce evidence in rebuttal of that case is at risk. Such failure *ipso facto* turns to strengthen the State case because there is nothing to gainsay it and therefore less reason to doubt its credibility (*S v Mthethwa* 1972 (3) SA 766 (AD) at 769D-E).^{1,2}

¹ See: *Hifikepunye v State* (CA 102/2014) [2015] NAHCMD 39 (03 March 2015).

² See: *Langenhoven v The State* (CA 31/2016) [2016] NAHCMD 294 (30 September 2016).

[16] Possess is defined in the Act as: “possess” includes keeping, storing or having in custody or under control or supervision, and “possession” has a corresponding meaning’. Possession consists of two elements, namely a physical (*corpus*) and mental element (*animus*). *Corpus* means physical control by a person over a thing and this control may exist either in the direct physical control of the article by the person concerned or, the mediate control through another having control on behalf of the former.³ Whilst *animus* is fundamentally the intention to have *corpus*, i.e. control.⁴ Therefore, if either of the elements are lacking, a person cannot be said to have been in possession of an article under his control.

[17] The evidence proves beyond reasonable doubt that the appellant had control of the substance which was proven to be cannabis hidden in a container with lotion. Shortly before that, the co-accused had the control of the prohibited substance. Both the appellant and her co-accused seem to have had control. The intention to have *corpus* i.e. *animus* may be inferred from the circumstantial evidence. The evidence reflects that both accused persons’ reaction at the time was to blame each other. Further, the appellant did not dispute that the substance was cannabis/dagga and did not react to be surprised. It was not disputed that she received it from her co-accused to be handed to an inmate who was in the holding cells. In addition, the appellant did not testify for the court to determine from her testimony what her state of mind was at the time. Counsel cannot testify from the bar and speculate that the appellant did not have the requisite *animus* to possess the prohibited substance. In the circumstances, the only reasonable inference is that the appellant possessed the cannabis with the necessary *animus*.

[18] Consequently, we agree with the conviction and do not find that the magistrate committed a misdirection. Therefore, the appeal against conviction stands to be dismissed.

Ad Sentence

[19] It is trite that the powers of a court of appeal to interfere with a sentence is limited and to only do so where the sentence is vitiated by an irregularity, misdirection or failure

³ *R v Binns and Another* 1961 (2) SA 104 (T) at 107C-D.

⁴ *Ibid.*

to take into account material facts, where the sentence 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 court of appeal.⁵

[20] It is a settled rule of practice that punishment falls within the discretion of the trial court. As long as the discretion is judicially, properly and reasonably exercised, an Appellate Court ought not to interfere with the sentence imposed.⁶

[21] The personal circumstances of the appellant is that she is a first offender at the age of 27 years old. She was staying with two elderly persons, the one blind and the other disabled. They were her only source of income. She has three children. She assisted the elderly persons on the farm and therefore left the youngest child in the care of her neighbors. She was able to pay a fine of N\$500.

[22] The magistrate properly considered the triad of factors applicable in sentencing i.e. the crime, the personal circumstances of the appellant and the interest of society. In addition, he considered the objectives of punishment i.e. deterrence, prevention, retribution and rehabilitation. He considered the prevalence of the crime and the fact that the appellant attempted to smuggle the cannabis to a trial awaiting inmate at the police station as aggravating. There is no indication that the magistrate considered the principles of individualisation and uniformity of sentences.

[23] Mr McNally referred this court to a number of cases where small and bigger quantities of dagga/cannabis were involved. We do not want to refer to specific citations, however it suffices to state that the quantities range between two grams and two kilograms where fines between N\$600 and N\$5000 with an alternative of imprisonment were imposed. We find that the learned magistrate did not apply his mind to consider sentences in similar previous cases and wanted to make an example of the appellant. He overemphasised the seriousness of the offence. In these circumstances we ought to interfere with the sentence.

⁵ See: *S v Tjiho* 1991 NR 361 (HC).

⁶ See: *S v Van Wyk* 1992(1) SACR 147 (NmS).

[24] We were informed that the appellant already served one month imprisonment of her sentence. A sentence of a fine with the alternative of a period of imprisonment will be appropriate in the circumstances.

[25] In the result:

1. The sentence of six months' imprisonment is set aside.
2. The appellant is sentenced to N\$2 500 or five months imprisonment.
3. The bail is cancelled and is to be refunded to the depositor.
4. The appellant has to report to the magistrate court Keetmanshoop as soon as possible.

H C January
Judge

I agree

N N Shivute
Judge

APPEARANCES

APPELLANT:

P Mc Nally

C/o Delport Legal Practitioners, Windhoek

RESPONDENT:

M Shilongo

Of Government – Office of the Prosecutor-General,
Windhoek