

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

Case no: HC-NLD-CRI-APP-CAL-2020/00057

In the matter between:

MANZEYE BENJAMIN

APPELLANT

V

THE STATE

RESPONDENT

Neutral citation: *Benjamin v S* (HC-NLD-CRI-APP-CAL-2020/00057) [2021]
NAHCNLD 12 (8 February 2021)

Coram: SALIONGA J and SMALL AJ

Heard: 8 December 2020

Delivered: 9 December 2020

Date Released: 8 February 2021

Flynote: Criminal - Appeal - Sentence - The Abuse of Dependence-producing Substances and Rehabilitation Centres Amendment Act 25 of 1987 (OG 5462), being an Act promulgated by the pre-independent South West African/Namibian Legislature, and deemed to have come into force on 1 January 1986, amended the penal provisions and repealed other provisions of the principal Act. The amending Act did away with the compulsory imposition of imprisonment for all offences.

Criminal - Appeal - Sentence - Imprisonment is not the only appropriate punishment for corrective and deterrent purposes for contraventions under the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971.

Criminal - Appeal - Sentence - Imprisonment usually is only justified if the accused needs to be removed from society to protect the public. An alternative punishment to imprisonment can also serve the nature of the offence and the public's interests. In the interest of the convicted offender, preference must sometimes be given to alternative punishments when imposing a sentence.

Criminal- Appeal - Sentence - A Court misdirects itself if the dictates of justice require that it should have regarded certain factors and failed to do so, or that it ought to have assessed the value of these factors differently from what it did. Such a misdirection then entitles an appeal court to consider the sentence afresh.

Criminal - Appeal - Sentence - Not every misdirection entitles a Court of Appeal to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or by inference that the trial court either did not exercise its discretion at all or exercised it improperly or unreasonably.

Criminal - Appeal - Sentence - In this context, misdirection means an error committed by the trial Court to determine or apply the facts for assessing the appropriate sentence. It is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion correctly and judicially.

Criminal - Appeal - Sentence - When it comes to sentencing, courts properly exercising their discretion should be striving to impose an appropriate sentence. In this case, the law provided for an option of a fine. The Appellant has spent almost 17 months in pre-trial custody. A custodial sentence was not a reasonable and appropriate sentence. Although competent, custodial sentences should always be justified, not only by the commission of the offence but by such other factors that would render it the most appropriate sentence in a particular case.

Summary: Appeal against sentence. The Appellant was arraigned before the Magistrate's Court on a charge under the Abuse of Dependence-producing Substances

and Rehabilitation Centres Act 41 of 1971- Possession of 385 grams of cannabis valued at N\$3 850.00.

The Appellant was arrested on 17 August 2019 and remained in custody until he pleaded guilty to possession on 14 August 2020. Appellant spent almost 17 months in custody awaiting trial. The magistrate mentioned the period but miscalculated the period the Appellant spent in custody and only took part of it into account.

The Court a quo sentenced the Appellant to 12 months imprisonment of which 6 months imprisonment is suspended for a period of 3 years on condition that the accused is not convicted of contravening section 2(a) or (b)-dealing or possession of prohibited dependence producing substance-committed during the period of suspension.

The Court held that the Court a quo did not consider alternative sentences and did not carefully consider that the Appellant spent 17 months in custody prior to sentence being imposed. The appeal against sentence is accordingly upheld the Court a quo's sentence is substituted by a fully suspended sentence.

The appeal against sentence is accordingly upheld.

ORDER

1. The appeal succeeds;
2. The sentence is set aside and substituted by the following sentence: 12 months imprisonment fully suspended for a period of 5 years on condition that the accused is not convicted of a contravention of section 2(b) of Act 41 of 1971 committed during the period of suspension;
3. The sentence is antedated to 14 August 2020;
4. It is ordered that the Appellant be released from custody immediately.

REASONS

SMALL AJ (SALIONGA J concurring);

Introduction

[1] This is an appeal against sentence. Appellant was arraigned before the Outapi Magistrate's Court on a charge of Contravening section 2 (b) of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 - Possession of a Prohibited Dependence - Producing Drug to wit 385 grams of cannabis valued at N\$3 850.00. He tendered a guilty plea and was thereafter questioned in terms of section 112 (b) of Act 51 of 1977. He was convicted on his plea and on 14 August 2020 was sentenced to 12 months imprisonment of which 6 months was suspended for a period of 3 years on condition that the accused is not convicted of contravening sections 2(a) or (b) - Dealing or possession of prohibited dependence producing substance committed during the period of suspension.

[2] The Appellant is represented by Ms. M. Amupolo while the Respondent is represented by Mr. R.S. Sibungo.

[3] On 8 December 2020, after hearing the parties this Court allowed the appeal, set aside the sentence of the Court a quo, and ordered the immediate release of the Appellant after this Court substituted the sentence with the following sentence: 12 months imprisonment fully suspended for a period of 5 years on condition that the accused is not convicted of a contravention of section 2 (b) of Act 41 of 1971 committed during the period of suspension. The sentence was antedated to 14 August 2020. This Court further indicated that the reasons for the ruling will be provided on 4 February 2021. What follows are the reasons alluded to hereinbefore.

[4] The point *in limine* originally raised by the Respondent was abandoned when it was pointed out by the Court that the present Notice of Appeal was filled well within the 14-day period prescribed by Magistrates' Court Rule 67(1).

[5] The present appeal lies against the sentence only. The Respondent opposed the appeal and submitted that the sentence is appropriate and should therefore be confirmed.

[6] It is at this stage important to consider the penal provisions of the Act under which the Appellant was charged. The Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 (RSA) (RSA GG 3118) was brought into force in South Africa and South West Africa on 6 December 1971 by RSA Proc. R.265/1971 (RSA GG 3321). After the administration of the Act was transferred to South West Africa/Namibia in 1977 several South African Acts amending the penal provisions in South Africa, did not apply in the pre-independent Namibia as these Acts were not made applicable to the then South West Africa/Namibia.

[7] The Abuse of Dependence-producing Substances and Rehabilitation Centres Amendment Act 25 of 1987 (OG 5462), being and an Act promulgated by the pre-independent South West African/Namibian Legislature, and deemed to have come into force on 1 January 1986, amended the penal provisions and repealed other provisions of the main Act. Importantly the amending Act did away with the compulsory imposition of imprisonment for all offences.

[8] First offenders for contravening section 2(a) and 2(c), conveniently called the dealing offences, were after the amendment liable to a fine not exceeding R30 000 or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment. The compulsory sentence of not less than five years, but not exceeding 15 years, was repealed. This is still the position today.

[9] First offenders for contravening section 2(b) and (d), conveniently called the possession offences, were liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment. The sentence of not less than two years, but not exceeding ten years was repealed. This is also still the position today.

[10] The long title¹ of the amending Act clearly indicate that the Legislature at the time moved away from compulsory imprisonment for offences under the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971 and placed the appropriate sentence within the discretion of the sentencing presiding officer. This permitted a Court to consider mitigating circumstances and the imposition of other sentences in lieu of the previously prescribed compulsory imprisonment sentences. This however does not mean that direct imprisonment should not be imposed in appropriate cases.

[11] The appellant is a first offender. He pleaded guilty to the charge on 14 August 2020 and was sentenced the same day.

[12] It is however vital for a just decision of this appeal to point out that Appellant in this same matter approached the High Court after he was arrested on 17 March 2019. The Appellant then appealed against his conviction and sentence of 24 months direct imprisonment after he was convicted of contravening section 2 (a) of the Dependence Producing substances and Rehabilitation Centre's Act 41 of 1971, dealing in a prohibited dependence-producing drug.

[13] On 5 September 2019, the High Court held that:

'The magistrate should have recorded a plea of not guilty in terms of section 113 in view of the fact that the accused did not admit dealing. In the alternative the magistrate could have asked more questions to clarify if accused possessed cannabis at that material time or was dealing with it by virtue of the definition of 'dealing'. In convicting the appellant of dealing because he had a person who was to bring cannabis to him, the magistrate misdirected himself

¹ To amend the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971, so as to do away with the obligation to impose imprisonment in respect of convictions of certain offences and, in the place thereof, to provide for a discretion to impose a fine or imprisonment or both; to repeal the provisions which prohibit the suspension or postponement of a sentence or a discharge with a caution or a reprimand; to repeal those provisions which permit in the case of mitigating circumstances the imposition of other sentences in lieu of the prescribed compulsory sentences; and, in view of the withdrawal of the obligation to impose imprisonment, to repeal those provisions which permit, in certain circumstances, the imposition of shorter periods of imprisonment; and to provide for incidental matters.

and the conviction cannot be allowed to stand. Since the conviction has to be set aside, the appeal against the sentence will not be considered at this stage.^{1 2}

[14] The matter was remitted to the magistrate court Outapi in terms of section 312(1) of the Criminal Procedure Act, 1977 to either clarify the issue of possession or enter a plea of not guilty in terms of section 113 of the Act and to finalize the case in accordance with the directives given.

[15] The Appellant remained in custody until he pleaded guilty to possession of the cannabis on 14 August 2020 as was set out hereinbefore. He in other words was in custody from 17 March 2019 till 14 August 2020 before he was convicted and sentenced. That is almost 17 months awaiting trial. The magistrate mentioned this but miscalculated the period the Appellant spent in custody.

[16] In *casu*, the learned magistrate found that the only appropriate sentence was one of imprisonment. What is absent from the reasoning are the reasons why alternative sentences were not considered.³ The Court a quo indicated in its reply to the Notice of Appeal that a fine was not considered because the legal representative did not request a fine. This clearly disregards the fact that it is the trial court's duty to impose an appropriate sentence. If a fine for example is the appropriate sentence it should be imposed notwithstanding the fact that none of the parties requested such sentence. If it deems it necessary, a Court should prompt counsel to address them on alternative sentences.

[17] Imprisonment is not the only appropriate punishment for corrective and deterrent purposes in this case. Imprisonment usually is only justified if the accused needs to be removed from society to protect the public.⁴ An alternative punishment to imprisonment can also serve the nature of the offence and the public's interests. In the interest of the

² *Benjamin v S* (HC-NLD-CRI-APP-CAL-2019/00046) [2019] NAHCNLD 85 (5 September 2019) paragraph 11

³ *S v Lang* 2014 (4) NR 1211 (HC) paragraph 25

⁴ *S v Scheepers* 1977 (2) SA 154 (A) at 159A-C applied in *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10

convicted offender, preference must sometimes be given to alternative punishments when imposing a sentence.⁵

[18] The alternative is either a fine or a suspended sentence. A suspended sentence has two beneficial effects. It firstly prevents the offender from going to jail, and secondly, he or she has the sentence hanging over him or her. If he behaves himself, he will not serve the suspended sentence. On the other hand, if he subsequently commits a similar offence, the Court can put the suspended sentence into operation.⁶

[19] A Court misdirects itself if the dictates of justice require that it should have regarded certain factors and failed to do so, or that it ought to have assessed the value of these factors differently from what it did. Such a misdirection then entitles an appeal court to consider the sentence afresh.⁷

[20] Not every misdirection entitles a Court of appeal to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or by inference that the trial court either did not exercise its discretion at all or exercised it improperly or unreasonably. In this context, misdirection means an error committed by the trial Court in determining or applying the facts for assessing the appropriate sentence. It is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion correctly and judicially.⁸

[21] When it comes to sentencing, courts properly exercising their discretion should be striving to impose an appropriate sentence. In this case, the law provided for an option of a fine. I am not convinced that if all factors were considered in this specific case, especially the fact that the Appellant has spent almost 17 months in pre-trial custody, a custodial sentence was a reasonable and appropriate sentence. If one adds

⁵ *R v Persadh* 1944 NPD 357 at 358; *S v Goroseb* 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10

⁶ *R v Persadh* 1944 NPD 357 at 358; *S v Goroseb* 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 11

⁷ in *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684B-C and *S v Redondo* 1992 NR 133 (SC) at 153A-E

⁸ *S v Pillay* 1977 (4) SA 531 (A) per Trollip JA at 535D-G and *S v Redondo* 1992 NR 133 (SC) at 153A-E

the unsuspended part of the present sentence to the period spent in custody awaiting trial, the Court a quo, in essence, sentenced the Appellant to 23 months imprisonment. Such a sentence for possession of cannabis is one month less than the sentence the Court a quo previously imposed in the same matter on the Appellant for dealing in cannabis. The trial court thus either did not exercise its discretion at all or exercised it improperly or unreasonably.⁹ This Court is thus at large to consider sentence afresh.

[22] Drug offences are serious and have become a severe threat in our communities. The Courts should not overlook the seriousness of a crime.¹⁰ However, the crime itself is only one of the factors to be considered in an appropriate sentence. Offenders of serious crimes should still be treated fairly. Therefore, unusual mitigating facts, like long periods spent in custody awaiting trial, should be appropriately considered when sentencing them for such offences. Although competent, custodial sentences should always be justified, not only by the commission of the offence but by such other factors that would render it the most appropriate sentence in a particular case. I do not think it would be appropriate in the specific circumstances of this case.

[23] The Appellant has once again served part of the sentence before this appeal come before us. Inadequate information is on record to consider if a fine or what fine would be appropriate in the circumstances of this case. I have considered referring the matter back to the Court a quo for sentence but in view of the time it took to comply with this Court's order dated 5 September 2019 have decided that a fully suspended sentence of imprisonment will serve the same purpose and be in the interest of justice in the circumstances of this case.

[24] In the result it is ordered that:

1. The appeal succeeds;
2. The sentence is set aside and substituted by the following sentence: 12 months imprisonment fully suspended for a period of 5 years on condition that the accused is not convicted of a contravention of section 2(b) of Act 41 of 1971 committed during the period of suspension;
3. The sentence is antedated to 14 August 2020;

⁹ *S v Shikunga and Another* 1997 NR 156 (SC) at 173B-C

¹⁰ *Dausab v S* (HC-MD-CRI-CAL-2018-00038) [2019] NAHCMD 42 (6 March 2019) paragraph 7.

4. It is ordered that the Appellant be released from custody immediately.

D. F. SMALL
ACTING JUDGE

I Agree

J. T. SALIONGA
JUDGE

APPEARANCES

APPELLANT: Ms. M. Amupolo
Jacobs Amupolo Lawyers & Conveyancers, Oshakati

RESPONDENT: Mr. R.S. Sibungo
Prosecutor General Office, Oshakati