



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 12/2012

In the matter between:

KEN INEM UDE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Ude v State* (CA 12/2011) [2013] NAHCMD 149 (7 June 2013)

Coram: HOFF J et NDAUENDAPO J

Heard: 23 MAY 2013

Delivered: 7 JUNE 2013

Flynote: Drug offences – Cocaine – Dealing in contravention of s 2 (c) of Act 41 of 1971 – Sentence – Accused a 41 year old first offender, born in Nigeria, married to a Namibian woman – Accused having sold on two occasions 276.7644 grams of cocaine for N\$ 139 006.07 – Sentence of 2 years imprisonment (count 1) and 8 years on count 2 of which 2 years are suspended on the usual condition and the sentence on count 1 to run concurrently with sentence on count 2, confirmed on appeal.

Summary: The appellant was convicted, on his own guilty plea, in the regional court on two counts of dealing in 276.7644 grams of cocaine in contravention of s 2(c) of Act 41 of 1971 and was sentenced to an effective 6 years imprisonment. The appellant was 41 years old and first offender. A trap was set up for him. He pleaded guilty on two counts of dealing. Sold the cocaine for N\$ 139 006.07. On appeal the sentence confirmed.

JUDGMENT

NDAUENDAPO J (HOFF J concurring):

NDAUENDAPO J [1] On 9 December 2010, the appellant pleaded guilty on two charges of contravening section 2 (c) read with sections 1, 2 (i) and or 2 (ii), 8, 10, 14 and part II of the schedule Act 41 of 1971, as amended. *‘The allegations being that on the 27 May 2010 and 28 May 2010 at Ohangwena in the district of Eenhana in the regional division of Namibia, he did wrongfully and unlawfully deal in dangerous dependence producing drugs or a plant from which such a drug can be manufactured, to wit, 0.7644 g of cocaine (count 1) and 276 g of cocaine (count 2) except admixtures containing not less than 0.1 percent of cocaine calculated as cocaine alkaloid to the value of N\$ 382.20 and N\$ 138 624.50 respectively.’*

[2] The appellant consented to the jurisdiction of the Regional Court sitting at Windhoek. On 24 June 2011 he was sentenced as follows:

Count 1: Two (2) years imprisonment.

Count 2: Eight (8) years imprisonment of which two years were suspended for five years on condition that the appellant is not convicted of an offence of contravening section 2 (c) of Act 41 of 1971 committed during the period of suspension. In terms of section 280 (2) of Act 51 of 1977 the court ordered that the sentence imposed on count 1 was to be served concurrently with the sentence imposed in count 2. He was therefore sentenced to six years effective imprisonment.

[3] He now appeals against sentence on the following grounds:

- '1. It is respectfully submitted that the Learned Magistrate misdirected himself in law and/or the facts, alternatively erred in one or more of the following aspects:
2. That the magistrate paid mere lip service when referring to the Appellant's personal circumstances:
 - 2.1 the fact that he lost his business;
 - 2.2 the effect which his arrest and sentence would have on himself, his children and family;
 - 2.3 his age and the fact that he is a first offender.
3. The magistrate attached no weight alternatively insufficient weight to:
 - 3.1 that this was a trap situation;
 - 3.2 that there is no evidence whatsoever placed before court that appellant was a drug dealer and that there was any reason whatsoever to have set a trap for him;
 - 3.3 that if it was not for the trap set for appellant, he would not have been arrested and sentenced to mandatory imprisonment;
 - 3.4 that he did not possess any cocaine whatsoever and needed time to search for the drugs;
 - 3.5 that the possessor of the drugs brought same and handed it to the police trap;
 - 3.6 that the possessor of the cocaine was arrested and charged, but the police and state in their wisdom decided to withdraw the case against them.
4. The magistrate was referred to many cases dealing with trap situations but hardly dealt with and of the authorities submitted by Appellant's Legal representative.

- 4.1 in sentencing the appellant the magistrate to such an extent referred to authorities which deals with ordinary drug cases that he imposed a sentence which is normally done in normal drug cases where not trap situation is present.
5. The sentence imposed is startlingly inappropriate and creates a sense of shock.
6. the magistrate not once in his reasons for sentence asked the rhetorical question why was it necessary to set this trap and was it not for the unjustified trap, would there have been the necessity for a conviction and sentence?’

The appellant appeared in person and Mr Nyambe for the respondent.

[4] **FACTS AD SENTENCE:** They are succinctly summarised in the heads of counsel for respondent and they are as follows:

1. ‘The accused testified in mitigation that he was 41 years old, married to a Namibian woman with 2 (two) children – 2 (two) years and 4 (four) years respectively.
2. He was in custody, trial waiting for about a year.
3. He was born in Nigeria and obtained Namibian citizenship through his marriage.
4. He was running shops in Windhoek and Oshikango respectively as his businesses.
5. He realized between N\$ 13 000 and N\$ 14 000 of income from the shops after bills were paid.
6. His wife was not employed and is dependent on him.
7. He maintained the children with income from the shops.
8. He had three employees working at his shops in Oshikango and Windhoek respectively.
9. He alleges that the businesses broke down apparently because of his arrest.
10. The wife and children now only survive with support from families.
11. He alleges that he was lured into this transaction by a lady who owed him money for clothes, wrist watches and a necklace.

12. The lady allegedly failed to pay him for four to five months despite various demands for the money.
13. She eventually informed him that she had a customer looking for cocaine on the understanding that the accused would recover the debt from the proceeds of the crime. The accused agreed to search for cocaine. After he left the lady, she repeatedly phoned him to find cocaine.
14. He eventually found cocaine which was sold and handed to a police trap.
15. He testified to how the dealing took place but inconsistent with what the police officer who testified to the facts testified.'

THE LAW

[5] In *S v Tjiho* 1991 NR 361 at 366 A-B Levy J (as he then was) set out the grounds upon which the court of appeal will interfere with sentence as follows:

'The appeal court is entitled to interfere with a sentence if:

- (i) *the trial court misdirected itself on the facts or on the law;*
- (ii) *an irregularity which was material occurred during the sentencing proceedings;*
- (iii) *the trial court failed to take into account material facts or overemphasized the importance of other facts;*
- (iv) *the sentence imposed 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 a court of appeal.'*

In *S v Ndikwetepo and others* NR 319 (SC) Chomba AJA (as he then was) said the following:

'...the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection.'

In *S v Pillay*, it was stated that:

'the essential inquiry in an appeal against sentence, however is not whether the sentence was wrong or right, but whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to

entitle the appeal court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.

[6] The penalty for dealing in cocaine is stipulated in the Abuse of Dependence Producing Substances and Rehabilitations Act 41 of 1971, section 2 (d) (i), provides: *“in the case of a first conviction for a contravention of any provision of paragraph (a) or (c), to a fine not exceeding thirty thousand rand or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.”*

[7] Dealing in cocaine is a serious crime. In *S v Sibonyoni 2001 NR 22 at 25 Hoff AJ* (as he then was) said the following: *“there can be no doubt that dealing in cocaine is a serious crime and that drug dealers are unscrupulous criminals and further that the courts have a duty to protect members of society from exploitation by these elements but a court in considering an appropriate sentence must be mindful also of the personal circumstances of the accused and the maximum penalties prescribed by the legislature”*

[8] From the record, it is very clear that the presiding officer considered the personal circumstances of the appellant and other relevant factors.

The appellant in his grounds of appeal further stated *that ‘this was a trap situation’ and that ‘there is no evidence whatsoever placed before court that appellant was a drug dealer and that there was no reason whatsoever to have set a trap for him’* Unfortunately for the appellant, he pleaded guilty and his appeal is against sentence and not against conviction and the court is bound by his notice of appeal against sentence only.

[9] The scourge of drug abuse is on the increase in our society and the devastating effect of drug abuse on members of our society is there for everyone to see. The courts must join forces with law enforcement agencies in combating that evil by imposing harsh sentences on drug dealers and by so doing send a strong message to drug dealers that they will be dealt with severely.

[10] In my view the magistrate exercised his discretion judicially in sentencing the appellant and the sentence imposed is not startlingly inappropriate nor does it

induces a sense of shock considering the seriousness of the crime. In fact the appellant was lucky to have been sentenced as he was considering that he committed the offence twice and also considering the sentences imposed in similar cases by this Court.

ORDER

In the result, the appeal is dismissed.

GN Ndauendapo
Judge

E Hoff
Judge

APPEARANCES

APPELLANT: IN PERSON

RESPONDENT: MR NYAMBE
of the Office of the Prosecutor General