

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 21/2017

In the matter between:

NESTOR KATANGOLO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Katangolo v S* (CA 21/2017) [2017] NAHCMD 314 (3 November 2017)

Coram: NDAUENDAPO J and USIKU J

Heard: 25 September 2017

Delivered: 3 November 2017

Flynote: **Criminal procedure** – Appeal – Conviction set aside and replaced with alternative count – Accused convicted for possession of dangerous dependence-producing drugs: Cocaine – Section 10 of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 only applies to when the quantity found equals or exceeds 115 grams

Summary: The appellant was tried and convicted for contravening section 2(c) Abuse of the Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971: Dealing in dangerous dependence-producing drugs: Cocaine. In the alternative he was charged with contravening section 2(d) of the same Act: Possession of dangerous dependency producing drugs. He was convicted on the main count and was sentenced to N\$25 000.00 or 24 months imprisonment and to 5 years imprisonment. The conviction of the appellant was solely based on the fact that the contraband was found by police officers in the home of the appellant. Appeal upheld.

ORDER

1. The application for condonation of the late noting of the appeal is granted.
2. The appeal against conviction is upheld.
3. The conviction on the main count is set aside and replaced with a conviction on the alternative count of possession.
4. The sentence imposed is set aside and replaced with one of a fine of N\$20 000.00 or 3 years direct imprisonment.
5. The sentence is antedated to 7 October 2016.

JUDGMENT

NDAUENDAPO J (USIKU J concurring):

Introduction

[1] After evidence was heard the appellant was convicted in the Magistrate's Court for the district of Walvis Bay on 5 October 2016 on a charge of dealing in dangerous dependence-producing substances and was subsequently sentenced on 7 October 2016. This is an appeal against conviction only. Although the appellant listed 10 grounds of appeal in his notice of appeal, not

all such grounds can be considered as grounds for appeal and as such relevant to these proceedings. The main grounds of appeal are that the State failed to prove its case beyond a reasonable doubt and that the state witnesses had contradicted one another in their evidence in chief.

[2] The appellant was sentenced on 7 October 2016 and the date stamp on the notice of appeal is 14 November 2016. The notice was therefore filed out of time hence the appellant filed an application for condonation. The appellant in his application for condonation for the late filing of the notice to appeal raises the fact that he brought his notice to appeal to the attention of the Correctional facility on 17 October 2016 which was within the 14 day period given to appellants post-conviction, to note their appeals. I will accept there was an oversight by the Walvis Bay Correctional Facility to forward the relevant notice in time and there are prospects of success on appeal and on that basis do grant condonation for the late filing of the appeal.

The State's Case

[3] The State in the *court a quo* called 4 witnesses to testify. The first witness was the investigating officer, who testified that he conducted a lawful search of the home of the appellant together with another police officer. He testified further that he conducted the search with the consent of the appellant and in his presence found an envelope in the kitchen tucked in between the elements of the hot plate of the oven, after which he instructed the police officer who accompanied him during the search to call the unit Commander to attend to the scene. Upon the Unit Commander's arrival he threw out the contents of the bag and discovered 27 pieces of crack cocaine. He testified that he then sealed the content of the envelope in an exhibit bag and the appellant was arrested.

[4] The evidence of the third state witness corroborated the evidence given by the first state witness save for minor differences in their testimony i.e. the envelope being found in a microwave and not wedged between the elements of an oven. The second state witness, also a police officer, testified that he received the sealed lab results from the Unit Commander, however, I shall not

dwell on this aspect of evidence as there was no dispute concerning the fact that the substance discovered was indeed a prohibited drug and that it was properly sealed and transported to the testing facility; which results were tendered into evidence by agreement between the parties by way of an affidavit in terms of Section 212 (4) (a) and (8) (a) of the Criminal Procedure Act 51 of 1977. The fourth state witness was the unit Commander, who testified that he was at the scene and found the first and third state witnesses in the home of the appellant and saw a paper packet stuffed inside a mini stove. He further testified that the contents of the packet were discovered to be 27 pieces of crack cocaine.

The Appellant's Case

[5] The defendant in the in the *court a quo* testified in his defence and called no witnesses. The evidence in chief of the appellant is that he gave consent to the police to search his premises and that the drugs found in his home were planted there by the police and that he had no knowledge thereof. The appellant further testified that the police officers who searched his home were unsupervised, especially at the time when the drugs were found.

The law and the merits

[3] I turn next to the merits. The appellant was convicted on the main count of dealing in dangerous dependence producing substances: Cocaine i.e. for contravening Section 2(c) read with Sections 1, 2 (i) and/or 2 (ii), 8, 10, 14 and Part II of the Schedule of Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971, as amended on the basis that 27 pieces of crack cocaine were found in the home of the appellant after they searched his home after the appellant had consented thereto.

[4] The term “deal in”, in relation to dependence-producing drugs or any plant from which such drugs can be manufactured, is defined in the Act to include performing any act in connection with the collection, importation, supply, transshipment, administration, exportation, cultivation, sale, manufacture,

transmission or prescription thereof. However, section 10 of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 allows for the presumption that if it is proved that an accused has more than 115grams of a dependence producing substance in his or her possession that, such accused is dealing in such dependence producing, unless the contrary is proved.

[5] Naturally, this presumption as well as the remainder of the presumptions in section 10 of the Act were designed to assist the prosecution in proving its case by legislating for a rebuttable evidentiary presumption.

[6] The learned magistrate in this case relied on the aforementioned presumptions in finding the appellant guilty on the main count, however, erred in objectively considering how large the quantity of the crack cocaine was, that was found in the possession of the appellant. What is relevant in my opinion in determining the quantity of the contraband substances is the laboratory report submitted by Mr Shomeya, the Senior Forensic Analyst in the service of the State, on an affidavit in terms of Section 212 (4) (a) and (8) (a) of the Criminal Procedure Act 51 of 1977.

[7] In terms of this report, the exhibit containing 27 cream pieces weighing in at a total of 1.9968 grams. This is far from the requisite 115 grams or more required to presume that the appellant was indeed dealing in dangerous dependence-producing substances. It follows that on that basis the presumptions enumerated in section 10 of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 do not apply.

[8] It now becomes apparent that there is nothing - at least from the evidence as adduced, assisting the State in establishing that the appellant collected, imported, supplied, transhipped, administered, exported, cultivated, sold, manufactured, transmitted or prescribed the dangerous dependence-producing substance in anyway.

[9] However, there is no dispute that the appellant was the occupant of the house when it was searched and 27 pieces containing cocaine were retrieved from the oven in the kitchen. Common sense would dictate that the appellant was indeed in possession of the cocaine and should have been convicted on the alternative charge.

[10] In view of the conclusion reached above, there is no need to deal with the remaining grounds of appeal set out in the notice.

[11] In the result, it is hereby ordered that:

6. The application for condonation of the late noting of the appeal is granted.
7. The appeal against conviction is upheld.
8. The conviction on the main count is set aside and replaced with a conviction on the alternative count of possession.
9. The sentence imposed is set aside and replaced with one of a fine of N\$20 000.00 or 3 years direct imprisonment.
10. The sentence is antedated to 7 October 2016.

N NDAUENDAPO
JUDGE

USIKU
JUDGE

APPEARANCES

APPELLANT

In Person

RESPONDENT

Mr H Muhongo
Of the Office of the Prosecutor-General,
Windhoek.