REPUBLIC OF NAMIBIA **NOT REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 126/2016

In the matter between:

BONGANI CELUMUSA DLAMINI **1ST APPELLANT**

DERICK MUSA MANZINI **2ND APPELLANT**

and

THE STATE ……..RESPONDENT

Neutral citation: *Dlamini and Another v State* (CA 126/2016) [2017] NAHCMD 75 (13 March 2017)

Coram: SIBOLEKA J and USIKU J

Heard: 17 February 2017

Delivered: 13 March 2017

Flynote: Criminal Law – Traditionally the imposition of sentence lies in the discretion of the trial court alone, and there has to be a real good cause in the

form of a misdirection on the law or fact in order for this court to interfere with the sentence so imposed.

Flynote: Drug offences – Dagga – Dealing in dagga in contravention of section 2 (a) of the Abuse of Dependence – Producing Substances and Rehabilitation Centres Act 41 of 1971 as amended – Custodial sentences the norm in cases of dealing in Drugs – No basis for Court to interfere with sentence – Appeal against sentence dismissed.

Summary: The appellants were convicted on their own guilty plea in the Regional Court sitting at Gobabis on a count of dealing in 25.808kg of cannabis with a value of N$129 040 in contravention of section 2 (a) of the Act and were each sentenced to six years imprisonment of which one year was suspended for four years on usual conditions. They transported the drugs from Swaziland into Namibia. They were each first time offenders.

ORDER

Appeal against sentence is dismissed.

APPEAL JUDGMENT

USIKU J, (SIBOLEKA J concurring)

[1] On the 22 October 2015, the appellants pleaded guilty on one count of contravening section 2 (a) of the Abuse of Dependence – Producing Substances and Rehabilitation Centres Act 41 of 1971 as amended. The allegations being that on or about the fifth day of September 2015 at or near Trans-Kalahari boarder post in the regional division of Namibia the said appellants did wrongfully, intentionally and unlawfully deal in a prohibited dependence producing drug, or a plant from which

such drug can be produced, by importing the drug form Swaziland, to wit 25.808kg of cannabis valued at N$129 040 into Namibia.

[2] The appellants were each convicted hereafter each was sentenced to six years imprisonment of which one year was suspended for four years on the usual conditions.

[3] They now appeal against sentence. Their notice of appeal dated the 12 of April 2016 listed the following grievances against sentence:

a. The learned magistrate failed to take into account or take into account adequately that:

    1. The appellants were first offenders;
    2. The appellants pleaded guilty and showed remorse; and
    3. The cannabis was confiscated by the police before any deal was done.

b. The learned magistrate erred in the law and or fact in over-emphasizing the seriousness of the offence and the interest of society.

c. The learned magistrate erred in the law and/or on the facts in failing to impose a sentence of a fine coupled with a suspended sentence.

[4] Mrs Esterhuizen appeared for the respondent and the two appellants appeared in person. She raised a point in limine which was abandoned and she proceeded to argue the matter on the merits.

[5] It is settled law that sentencing primarily lies within the discretion of the trial court and it is only in exceptional circumstances where the court on appeal will interfere with the sentence. This is a judicial discretion that must be exercised in accordance with judicial principles and only where the trial court fails to adhere thereto, would the court of appeal be entitled to interfere. *S v Pillay*[1], it was stated;

[1] *S v Pillay* 1977 (4) SA 531 (A).

'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 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] In the instant case, the appellants had argued on appeal that this is an instance where the court a quo should have considered to impose a fine. That would however not be a correct approach.

[7] The fact that a fine is provided for in the penalty clause does not mean that it must be imposed in all instances. There is no rule of thumb that a first offender should not be sentenced to direct imprisonment[2]. The appellants stand convicted of a very serious offence and as a result a message must be sent out from our courts that anyone who commits serious crimes must know that these transgressions will be met with severe punishment. To impose a fine in cases of this nature might create the wrong impression, that the offence is not at all that serious and makes it financially worth taking a chance.

[8] The penalty clause in section 2 of the Act, as amended provides that:

'…in case of a first conviction for a contravention of any provision of paragraph (a) or (c), to a fine not exceeding R30,000 or to imprisonment for a period not exceeding 15 years or to both such fine and such and such imprisonment.'

[9] From the wording of the above section I quote the following from an appeal judgment of *Nwosu v State*[3];

'it clearly appears that the Magistrate is given a discretion to choose the type of sentence that he finds to be appropriate in the circumstances of the matter. It shows that he/she is allowed to impose a sentence coupled with an option of a fine or a custodial sentence only,

[2] *S v Victor* 1970 1SA 427 (A).
[3] *Nwosu v State* (CA 105/2013) [2014] NAHCMD 105 (28 March 2014).

like he did in this matter. It is therefore my considered view that no misdirection was committed during the sentencing process in this matter.'

[10] In *S v Sibonyoni*[4], Hoff AJ had the following to say: there can be no doubt that dealing in cocaine is a serious crime and the 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.

[11] The fact that this offence was committed across the border, is indeed an aggravating factor. It involved a lot of planning on the part of the appellants.

[12] In my view it is the duty of this court to consider uniformity in sentencing in regard to similar offences.This will enable the community to comprehend the principles applied, thereby preserving the confidence of the public in the impartiality of the courts and the fairness of the trials.[5]

[13] When applying these principles to the present facts there would be no justification for this Court to interfere with the sentence imposed by the court a quo. The sentences imposed cannot be said to be startlingly inappropriate, neither do they induce a sense of shock. There is therefore no basis for this Court to interfere with the sentence imposed.

[14] The scourge of drug abuse is on the increase in our society and the devastating effects thereof 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 *Ude v State* [6]. Although the appellants pleaded guilty, were remorseful, and they are first time offenders, the seriousness of the offence, in my view, was correctly reflected and appropriately given its rightful place in the sentence imposed by the court a quo.

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[4] *S v Sibonyoni* 2001 NR 22 at 25.
[5] Du Toit Stray in Suid Afrika at p118 – 24.
[6] *Ude v State (*CA 12/2011) [2013] NAHCMD 149 (7 June 2013).

[15] In the result the appeal against sentence is dismissed.

DN USIKU

Judge

A SIBOLEKA

Judge

APPEARANCES

APPELLANTS: **In Person**

RESPONDENT: **Ms Esterhuizen**

Of the Office of the Prosecutor-General, Windhoek