CASE NO.: CR 64/07

IN THE HIGH COURT OF NAMIBIA
In the matter between:

THE STATE

versus

BARTHOLOMEUS ROOI

(HIGH COURT REVIEW CASE NO.: 296/07)

CORAM: **MAINGA, *et* VAN NIEKERK, JJ**

Delivered on: 2007-04-13

REVIEW

JUDGMENT:

VAN NIEKERK, J:

[1] The accused in this matter was charged with a main count of contravening section 2(a) of the Abuse of Dependence-Producing Drugs and Rehabilitation Centres Act, 1971 (Act 41 of 1971), in that he dealt in 559 grams of cannabis valued at N$1 677. He was charged in the alternative with a contravention of section 2(b) of Act 41 of 1971 in that he had the cannabis in his possession or used it.

[2] The accused pleaded guilty to both counts. The questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) went as follows:

"Crt: Did any one force you do plead guilty to the charges?

Accd: No one.

Crt: What did you do wrong?

Accd: I was found in possession of cannabis.

Crt: What were you doing with the cannabis?

Accd: I use it. I smoke it as I do with Tobacco.

Crt: Did you want to smoke all the 559 grams of cannabis?

Accd: Yes."

"Crt: How was the cannabis found on you?

Accd: I was having the cannabis with me when I asked for a lift from a certain farmer. He gave me lift on his vehicle and we drove to his farm. While on farm he requested to search my bags. I agreed. After searching he found the cannabis and then took me to the police.

Crt: Why were you carrying the cannabis to the farm.

Accd: I wanted to smoke the cannabis while at the farm.

Crt: Is it not true that you wanted to sell it there?

Accd: No.

Crt: How was the cannabis packed?

Accd: It was rapped in 4 newspapers bundles.

Crt: The law provides that if you are found with cannabis weighing more that 115 grams then you are presumed to have been dealing in that substance. Do you understand that?

Accd: Yes.

Crt: Do you have any explanation to convince the court that you did not want to sell the cannabis as the law presumes?

Accd: I have always been smoking cannabis since I was a child. I am so used to it that I cannot do without it. So I wanted to smoke this one.

Crt: Do you reside at that farm where you were arrested?

Accd: No I was visiting relatives.

Crt: For how long?

Accd: For 2 days.

Crt: Did you want to smoke all the 559 grams of cannabis in two days?

Accd: Yes.

Crt: Why had you packed the cannabis in 4 bundles.

Accd: For easy carrying.

Crt: Is it not correct that those were measurements for selling purposes.

Accd: No.

Crt: Do you have any lawful excuse why you were possessing 559 grams of cannabis for example are you a holder of a licence authorising you to possess or deal in that drug.

Accd: No. I do not have any such licence.

> The court is satisfied that you are admitting to all the elements of the ALTERNATIVE count that is Possession or use of a Prohibited Dependence Producing Drug in Contravention of Section 2(b) of Act 41 of 1971, however the court placed a presumption upon you due to the quantity in excess of 115 grams that you were in possession to the effect that you were dealing in the drug. The court is convinced that you failed to rebut that presumption from your explanation. The court accordingly arrives at the following verdict.

VERDICT:- GUILTY AS CHARGED ON THE MAIN COUNT."

[3] Having convicted the accused, the trial magistrate then sentenced him.

[4] On review I directed the following query:

> "Is it permissible to apply the presumption contained in Section 10(1)(a) of Act 41 of 1971 during the questioning of the accused in terms of Section 112(1)(b)?"

[5] The magistrate replied without relying on any authority, that he thought that it was permissible. However, he seeks guidance on the matter.

[6] Section 10(1)(a) of Act 41 of 1971 provides as follows:

> "If in any prosecution for an offence under section 2 it is proved that the accused was found in possession of -

(i) dagga exceeding 115 grams in mass;

(ii) ..... ., it shall be presumed that the accused dealt in such dagga, unless the contrary is proved." (my underlining)

[7] It is clear that the purpose of this provision (and the remainder of section 10) is to assist the prosecution in proving its case by legislating for a rebuttable evidentiary presumption. The legislature has set a threshold requirement for the presumption to apply namely, that it must be proved beyond reasonable doubt that the accused was in possession of dagga exceeding 115 grams in weight [*S v Noble* 2002 NR 67 (HC) 69C-D). Where the accused pleads guilty of possession of dagga and in the course of the questioning in terms of Section 112(1)(b) of Act 51 of 1977 admits that he was in possession of dagga exceeding 115 grams in weight, it is obviously not necessary for the prosecution to prove this fact. However, before the prosecution or the court can rely on a presumption like this, it must remember that the presumption is rebuttable by proof to the contrary. The only way that the accused can present proof is by presenting evidence, which means that he/she must be afforded the opportunity to do so under oath, either by giving evidence in person, or by calling witnesses. The prosecution must also be given the opportunity to cross-examine on the evidence presented by the accused. The accused cannot attempt to rebut the presumption by means of answers during the section 112(1)(b) questioning process.

[8] What the learned magistrate should have done in this case was to question the accused separately on the main count and then on the alternative count. When it became clear that the accused was in fact denying the element that he was dealing in the dagga, but was

admitting that he was in possession of the dagga, the magistrate should have asked the prosecutor whether he/she accepts the plea on the alternative count. If the prosecutor had declined to accept the latter plea, the magistrate should have entered a plea of not guilty on the main count and have let the trial proceed, during which the prosecution and the accused would have had, in the normal course, the opportunity to present evidence under oath. If the prosecutor relied on the presumption, the effect thereof should have been explained to the accused so that he could make an informed decision whether to present evidence in rebuttal.

[9] In the circumstances of this case, it is clear that the proceedings must be set aside for the magistrate to properly apply section 112(1)(b) without applying the presumption.

[10] In dealing with the issue of the presumption as I have, I must point out that the constitutionality of the presumption is an issue on which this Court may still have to pronounce itself. In the *Noble* case this Court declined to do so because on appeal it was held that the prosecution had failed to prove beyond reasonable doubt that the appellant had been in possession of dagga. My judgment should, however, not be seen as an indication that reliance must necessarily be placed on the presumption.

[11] In conclusion the following order is made:

1. The conviction and sentence are set aside.

2. The proceedings in terms of section 112(1)(b) of the Criminal Procedure Act are set aside and the matter is remitted to the magistrate in terms of section 312(1) of this Act to question the accused afresh.

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VAN NIEKERK, J

I agree

MAINGA, J