

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case No: CR 36/2017

THE STATE

versus

COSMOS WAMUNYIMA

(HIGH COURT MAIN DIVISION REVIEW REF NO. 214/2017)  
(MAGISTRATE'S SERIAL NO. 63/2016)

**Neutral citation:** *S v Wamunyima* (CR 36/2017) [2017] NAHCMD 156 (9 June 2017)

**Coram:** LIEBENBERG J et SHIVUTE J

**Delivered:** 9 June 2017

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**ORDER**

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The conviction and sentence are hereby set aside.

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**REVIEW JUDGMENT**

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SHIVUTE J (LIEBENBERG J concurring)

[1] The accused person was convicted of contravening s 2 (1) read with subsec 1, 2 (i) (iv), 7, 8, 10 14 and part 1 of the schedule of Act 1 of 1971 as amended, to wit possession of dependence-producing substance. The accused was furthermore sentenced to 3 (three) months imprisonment without the option of a fine by invoking the provisions of s 112 (1) (a) of the Criminal Procedure Act 51 of 1977.

[2] I queried the learned magistrate as to whether the sentence imposed was a competent one.

[3] The learned magistrate replied as follows:

'I did invoke the provisions of s 112 (1) (a) of the Criminal Procedure Act 51 of 1977 and sentence the accused to three (3) months imprisonment without the option of a fine.

I concede that I am not allowed to impose a direct imprisonment sentence when s 112 (1) (a) of the CPA is invoked. The sentence is therefore incompetent.

I therefore implore the court to set aside the conviction and to send the matter back to me as the trial magistrate to proceed with questioning in terms of s 112 (1) (b).'

[4] Section 112 (1) (a) primarily authorises a presiding officer to convict an accused on a bare plea of guilty in situations where the presiding officer is of the opinion that the offence in question does not merit certain kinds of punishment or fine exceeding N\$6000 as amended by the Criminal Procedure Amendment Act 13 of 2010.

[5] However, the court in this matter considered the accused to have been convicted of a very serious offence and highlighted that the accused has a previous conviction as an aggravating factor, thus this matter could not have been dealt with under the provisions of s 112 (1) (a) of the CPA. Another troubling factor surrounding this matter is that the public prosecutor indicated to the court that the accused has a previous conviction, similar to the present offence. The public prosecutor further requested that the court apply s 112 (1) (a) of the CPA in respect of the offence committed. Had the public prosecutor been alert, he would have rather requested the court to invoke the provisions of s 112 (1) (b). Ultimately it is the presiding officer who must exercise judicial discretion and according to the circumstances of the matter, apply the correct provision. See *S v Onesmus*; *S v Amukoto*; *S v Mweshipange* 2011 (2) NR 461 (HC).

[6] In light of the fact that the accused has already served the sentence, I see no need to remit the matter.

[6] In the result, the following order is made:

The conviction and sentence are hereby set aside.

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NN SHIVUTE  
Judge

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JC LIEBENBERG  
Judge