



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no.: CR 49/2017

THE STATE

And

SISWANISO REVERTZ MUMPAYI

(HIGH COURT MAIN DIVISION REVIEW REF NO. 257/2016)

Neutral citation: *S v Mumpayi* (CR 49/2017) [2017] NAHCMD 220 (11 August 2017)

Coram: NDAUENDAPO J and SHIVUTE J

Delivered: 11 August 2017

Flynote: Accused was charged with unlawful dealing in cannabis – contravening s 2 (a) of Act 41 of 1971 – Alternatively possession of cannabis contravening s 2(b) of the same Act – Failing to record a plea – Magistrate failed to keep a proper record – Very important for Court to keep proper record of proceedings – In absence of any mechanical recording complete written record must be kept by presiding officer – Both questions and answers must be recorded.

Court convicting the accused on alternative charge without affording State the opportunity. Whether accepting plea on alternative or rejecting – Misdirection by magistrate – Plea of guilty on alternative charge which magistrate convicted accused left issues of the main charge unresolved between State and accused – Wrong for magistrate to assume that main charge was disposed of – Conviction on alternative charge cannot be allowed to stand

ORDER

The appeal and conviction are set aside.

REVIEW JUDGMENT

SHIVUTE J, (NDAUENDAPO J CONCURRING)

[1] The accused was charged with the offence of contravening s 2(a) read ss1,2(1) and 2(1) 8,10,14 and part 1 of the Schedule of Act 41 of 1971 as amended – Unlawful dealing in a prohibited dependence producing drug or a plant from which such drug can be manufactured, (cannabis) as the main count.

Alternative count:

Contravening s 2(b) read with ss1, 2(1) and 2 (iv), 7,8,10,14 and Part 1 of the Schedule of Act 41 of 1971 as amended-Unlawful possession or use of a prohibited dependence producing drug or a plant from which such drug can be manufactured. (cannabis)

[2] The accused was convicted on the alternative charge and sentenced to a N\$5000 fine or 18 months' imprisonment in default thereof. It is not clear from the record whether the accused has pleaded on both counts or only on the alternative count.

[3] I raised a query with the magistrate as to whether the accused had pleaded to both counts and if so, what happened to the main count?

[4] The learned magistrate responded as follows:

'I accept the error that I made as I did not enter the main count or the alternative for the plea, the court was of the view that the accused admitted that he was found in possession of the cannabis and pleaded guilty. I then proceeded with the alternative count which is possession of cannabis, this is an oversight that I will not repeat! The accused did not admit the main count.'

[5] The record does not reflect that the accused pleaded not guilty to the main count. It also does not reflect that the main count was withdrawn which implies the withdrawal of the alternative charge because it is an accessory to the main charge.

[6] It is very important for the court to keep a proper record of proceedings. A complete written record of the proceedings in the absence of any mechanical recording must be kept by the presiding officer. It is very essential to record both questions and answers in order to ensure that there is no doubt as to what facts have been formally admitted by the accused and what facts still remain to be proved by evidence. A verbatim recording is essential. *S v Maedwa* 1978 (1) SA 509 (E) 511 F.

[7] Furthermore, where an accused pleads not guilty to the main charge and guilty to the alternative charge or lesser offence of which he can be convicted of, the main charge is only impliedly disposed of if the prosecutor accepts the plea of guilty on the alternative charge or lesser offence of which the accused may be convicted of. However, if the prosecutor does not accept the plea of guilty in respect of an alternative or lesser offence the court must note a plea of not guilty in respect of the main charge and act in terms of s115 of the Criminal Procedure Act 51 of 1977.

[8] In the present matter the accused was charged with dealing in cannabis as the main charge alternatively possession of cannabis. The plea of guilty on the alternative charge of which the magistrate convicted the accused left the issue of the main charge between the State and the accused unresolved, more specifically because the prosecutor did not accept the plea of guilty on the alternative charge and it is wrong for the magistrate to assume that the main charge was disposed of.

The learned magistrate was supposed to enter a plea of not guilty on the main count and invoke the provisions of s115 of Act 51 of 1977 and the trial should have proceeded. The learned magistrate's conviction of the accused on the alternative charge without the acceptance from the prosecutor, was impermissible and the court had denied the State the opportunity to prosecute the accused on the main charge preferred against him. For the above reasons the conviction on the alternative charge cannot be allowed to stand as well as the sentence.

[9] The accused was sentenced to a fine of N\$5000 (five thousand) or in default of payment 18 months' imprisonment. The accused had already served a substantial part of his sentence and it will not be in the interest of justice to remit the matter to the magistrate in terms of s 312 of the Act in order to enter a plea of not guilty and proceed with the trial.

[10] In the result the following order is made:

The appeal and conviction are set aside.

NN SHIVUTE
Judge

G N NDAUENDAPO