

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Toivo Kapalingo Pamela</i>	<b>High Court Ref</b> <b>Case No:</b> CR 103/2019
	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Honourable Mrs. Justice Shivute <i>et</i> Honourable Mr. Justice Sibeya Acting	<b>Delivered on:</b> 12 December 2019
<b>Neutral citation:</b> <i>S v Pamela</i> (CR 103/2019) [2019] NAHCMD 545 (12 December 2019)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The conviction of contravening section 2(b) of Act 41 of 1971 for possession or use of dependence-producing drugs, namely cannabis is confirmed.</li><li>2. The sentence is confirmed, however, the condition of suspension of sentence is amended to read as follows:  A fine of N\$6000 in default of payment 15 months imprisonment of which N\$2,000.00 (Two Thousand Namibia Dollars) or 5 (five) months imprisonment are</li></ol>	

suspended for a period of 4 (Four) years on condition that the accused is not convicted of contravening section 2(b) of Act 41 of 1971 committed during the period of suspension.

**Reasons for order:**

[1] The accused appeared in the Magistrate's Court sitting at Katima Mulilo on the charge of contravening section 2(a) of the Abuse of Dependence-Producing Substances and Rehabilitation (the Drugs Act)<sup>1</sup> alternatively, contravening section 2(b) of the Drugs Act for possession or use of dependence-producing substances, namely 85 grams of cannabis.

[2] He pleaded guilty to the alternative charge of possession of cannabis as dependence-producing substances. The Court invoked the provisions of section 112(1(b) of the Criminal Procedure Act 51 of 1977 and upon being satisfied that accused admitted all the elements of the offence, he was convicted accordingly. The conviction is in order and will be confirmed.

[3] The accused was sentenced to a fine of N\$6000 or 15 months imprisonment of which N\$2000 or 5 months imprisonment were suspended for a period of 4 years on condition that accused is not convicted of contravening section 2(a) or 2(b) of Act 41 of 1971 committed during the period of suspension.

[4] A query was sent to the magistrate whether the suspension of sentence on condition that the accused is not convicted of contravening section 2(a) of Act 41 of 1971 which provides for the offence of dealing in dependence-producing substances was competent law, in view of the fact that the accused was only convicted of possession of dependence-producing substances in contravening 2(b)<sup>2</sup>.

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<sup>1</sup> Act 41 of 1971.

<sup>2</sup> The Drugs Act.

[5] The magistrate in his response stated that the accused was convicted of a lesser offence of possession and prayed that the condition relating to section 2(a) be removed.

[6] The sentence will be confirmed but the problem lies with the way in which the condition of suspension of sentence was formulated.

[7] The inclusion of the condition of not contravening section 2(a) in the suspension of sentence when it is apparent that the accused was not convicted of section 2(a) but section 2(b), amounts to a misdirection and therefore such condition cannot be allowed to stand. The magistrate rightly conceded the said misdirection. Courts should carefully consider the terms of the suspension of sentence as this informs the accused that he should not in future be convicted of the prohibited offence committed during the period of suspension.

[8] In the result, it is ordered that:

1. The conviction is confirmed.
2. The sentence is confirmed. However, the condition of suspension of sentence is amended to read as follows:

A fine of N\$6000 in default of payment 15 months imprisonment of which N\$2,000.00 (Two Thousand Namibia Dollars) or 5 (five) months imprisonment are suspended for a period of 4 (Four) years on condition that the accused is not convicted of contravening section 2(b) of Act 41 of 1971 committed during the period of suspension.

O S SIBEYA ACTING JUDGE	N N SHIVUTE JUDGE