

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

| | |
|---|---|
| Case Title: <i>The State v Isabel Moises</i> | Case No: High Court Ref No. CR 65/2020 |
| High Court MD Review No: (CR 65/2020) | Division of Court: High court Main Division |
| Heard before: Honourable Justice Unengu <i>et</i> Honourable Justice Sibeya Acting | Delivered on: 14 September 2020 |
| (HIGH COURT MAIN DIVISION REVIEW REF NO. 65/2020) | |
| Neutral citation: <i>S v Moises</i> (CR 65/2020) [2020] NAHCMD 413 (14 September 2020) | |
| The order: <ol style="list-style-type: none">1. The conviction is set aside.2. The matter is remitted to the same court in terms of s 312(1) of the CPA with the direction to further question the accused in terms of s 112(1)(b). If not satisfied, then the court should invoke the provisions of s 113 for the trial to proceed. | |
| SIBEYA, AJ and UNENGU, AJ (concurring) | |
| [1] This is a matter submitted to this court for special review purportedly in terms of s 304 | |

of the CPA. S 304 applies to court proceedings sent on review after being terminated. It is apparent from reading the record that proceedings in this matter were not terminated but were still ongoing. S 20(1)(c) of the High Court Act¹ empowers this court to review the proceedings of the lower court brought before it where gross irregularity occurred. It is at the backdrop of the said authority that this matter is reviewed.

[2] The accused appeared in the magistrate's court for the district of Outjo charged, in the main count, with the offence of dealing in dependence-producing substance in contravention of s 2(a) read with s 1, 2, 8, 10, 14 and Part I of the Schedule of the Act 41 of 1971, as amended.

'In that upon or about the 11th day of October 2019 at or near Kamandjab location, in the district of Outjo the said accused did wrongfully and unlawfully deal in a prohibited dependence-producing drug, or a plant from which such drug can be manufactured, to wit 50 x ballies of pure cannabis weighing 65 grams and valued at N\$650.'

Alternative count: Possession of dependence-producing substance in contravention of s 2(b) read with s 1, 2, 7, 8, 10, 14 and Part I of the Schedule of Act 41 of 1971, as amended.

'In that upon or about the 11th day of October 2019 at or near Kamandjab location, in the district of Outjo the said accused did wrongfully and unlawfully have in his (sic) possession or use a prohibited dependence-producing drug, or a plant from which such drug can be manufactured, to wit 50 x ballies of pure cannabis weighing 65 grams and valued at N\$650.'

[3] The accused pleaded not guilty to the main count of dealing in dependence producing substance and guilty to the alternative charge of possession of dependence-producing substance. Upon being questioned in terms of s 112(1)(b) of the CPA on the alternative

¹ 16 of 1990.

charge the following exchange appear on record:

'... Crt: To whom did the cannabis belong to?

Accused: It's my own cannabis.

Crt: What was your intention with the cannabis?

Accused: I wanted to sell.

Crt: And if you wanted to sell to who do you sell to?

Accused: I sell to any person who wants it.

Crt: For how much do you sell it for the cannabis(sic)?

Accused: I sell it for N\$5.00 a ballie.

Crt: Who are your regular customers?

Accused: It's male adults.

Crt: Do you ask for identification from your customers when they purchase the cannabis to ascertain their age?

Accused: I don't ask them.

Crt: For how long have been selling the cannabis?

Accused: That was the very first time I tried then I was arrested.

Crt: Where do you get the cannabis from?

Accused: I bought it at night from one man who stopped his vehicle at my house.

Crt: Do you know the reason why this maybe this one man selected your house from all the house (sic) in Kamandjab just to sell the cannabis to you?

Accused: It's just a person that came to stop and claiming that he was selling the cannabis.

Crt: What was the value of the cannabis when you bought them (sic)?

Accused: I bought it from (sic) N\$400.00.

Crt: How much profit were you going to make?

Accused: I did not get any profit from it I was trying to sell...

Crt: Did you have a permit or prescription from a medical practitioner and/or any authorization for you to be in possession and also to sell cannabis?

Accused: No your worship.

Crt: Did you know that cannabis is a prohibited dependence-producing substance?

Accused: Yes, I had (sic) about that...

Crt: Accused person from the answer (sic) that you have provided to court in questioning, you have admitted to the main count which is dealing in cannabis.

PP: State accepts plea on the main count of dealing and will withdraw the alternative count.'

[4] Subsequently, the trial court proceeded to hear mitigation factors and submissions in aggravation of sentence. The court then postponed the matter for sentence to be passed. Prior to imposing punishment on the accused, the trial magistrate realised that the accused was convicted on a wrong charge of dealing in dependence-producing substance on which she pleaded not guilty.

[5] The magistrate sent the record of proceedings to this court for special review with a letter providing, inter alia, that:

'Accused in this matter pleaded not guilty to the main count of dealing in dependence-producing substance and guilty to the alternative of possession... During section 112(1)(b) questioning on the alternative, a question was put to the accused, being what her intend (sic) was

with this cannabis to which accused respondent that she intended to sell such cannabis. Based on the answer given by the accused, the court convicted her on the main count of dealing.

Upon review of the proceedings in preparation of sentence it came to the court's attention that the court misdirected itself in convicting the accused on the main count based on answers given under the alternative count given the fact that she pleaded not guilty on the main count.'

[6] It is elementary that an accused person can only be convicted based plea of guilty on a charge where he or she tendered such plea. It is not permitted to wrongly convict an accused person, but to convict an accused person based on a guilty plea to a charge on which he has not pleaded guilty to, offends the administration of justice to the core.

[7] In the foregoing, it is concluded that the magistrate correctly conceded that the accused was wrongly convicted.

[8] As I draw curtains to close this matter, I wish to record my further observation made on the record of proceedings. The questions posed by the magistrate in pursuance of the provisions of s 112(1)(b) appear to extend beyond the parameters of questioning in order to whether indeed the accused admits the elements of the offence charged and pleaded guilty to. Notwithstanding the fact that, courts are encouraged to elicit as much facts as possible to determine if the accused bears any defence to the offence, courts should be mindful of the charge and the elements thereof at times to avoid drifting away.

[9] In the premises, the conviction of the accused cannot be allowed to stand and falls to be set aside. The accused is to be further questioned. In the event that the accused is subsequently convicted, the magistrate is reminded to take into account during sentencing, the period of imprisonment that the accused already served.

[10] In the result, it is ordered:

1. The conviction is set aside.
2. The matter is remitted to the same court in terms of s 312(1) of the CPA with the direction to further question the accused in terms of s 112(1)(b). If not satisfied, then the court should invoke the provisions of s 113 for the trial to proceed.

O S SIBEYA
ACTING JUDGE

E P UNENGU
ACTING JUDGE