REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

CR 29/2022

THE STATE

and

JAMES TSEI-TSEIB

Neutral citation: *S v Tsei-Tseib* (CR 29 /2022 [2022] NAHCMD 183 (11 April 2022)

Coram: SHIVUTE J *et* JANUARY J

Delivered: **11 April 2022**

Flynote: Criminal Procedure – Application of s220 of Criminal Procedure Act – Admissions by unrepresented accused – Requirements – Immediately it becomes apparent accused wants to give formal admissions magistrate to explain to accused the effect of making formal admissions – (a) to relieve the state of the burden of proving the admitted facts by evidence – (b) that the accused is not compelled to assist the prosecution in proving its case. Admissions to be volunteered by accused – Not to be advanced by court.

Criminal Procedure – Evidence – Original magistrate took a plea of not guilty and recorded admissions in terms of s 220 which amounts to evidence – Matter becomes partly heard. Another magistrate proceeded with the matter, took further admissions and convicted accused – Section 118 of Criminal Procedure Act sanctions another magistrate to proceed with trial where original magistrate 'is not available' and no evidence has been adduced. Irregularity for another magistrate to proceed with a partly heard matter other than the original magistrate who recorded formal admissions first.

Summary: The accused in this matter was convicted of contravening s 2 (b) of Act 41 of 1971 – Possession of dependence producing substance. He pleaded not guilty before the original magistrate and the magistrate recorded admissions in terms of s220 of the Criminal Procedure Act. It is not known what happened to the original magistrate. When the unrepresented accused appeared again, he was brought before another magistrate who again recorded further admissions and convicted the accused. Both magistrates did not give sufficient required explanation prior to taking the admissions namely: (a) That the accused is not compelled to assist the State with the burden of proving its case although it only partially informed the accused (b) that the effect of making formal admissions is to relieve the state of the burden of proving the admitted facts.

Furthermore, although the unrepresented accused made admissions that he was found in unlawful and wrongful possession of 3 grams of cannabis, further admissions were extracted from the accused through questioning. Therefore, it cannot be said accused admitted all the allegations contained in the charge as some of the admissions were advanced by the court.

Again, when the original magistrate took a plea of not guilty and recorded admissions in terms of s 220 of the Criminal Procedure Act, the matter has become partly heard. Therefore, another magistrate cannot proceed with the trial. Section 118 of the Criminal Procedure Act only sanctions another presiding officer to proceed with the trial where the original presiding officer 'is not available' and no evidence has been adduced yet. It amounts to an irregularity for the second magistrate to proceed with a partly heard matter. Proceedings were set aside on the grounds that the procedure adopted in

recording the admissions were riddled with irregularities and it was also irregular for another magistrate to proceed with a partly heard matter after the recording of the formal admissions by the original magistrate.

ORDER

(a) The conviction and sentence are set aside.

(b) If the accused had paid a fine of N$2000 in default of 6 months' imprisonment imposed by the Court *a quo* it should be returned to the accused.

REVIEW JUDGMENT

Shivute J (January J concurring):

[1] This is a review matter that came before us in terms of section 302(1) and section 303 of the Criminal Procedure Act 51 of 1977.

[2] The accused was charged with the offence of possession of dependence-producing substance-contravening Section 2 (b) read with sections1, 2 (1) and/or 2 (1) 7, 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1971, as amended.

[3] He pleaded not guilty to the charge. However, he was convicted after he purportedly made admissions in terms of s220 of the Criminal Procedure Act.

[4] I raised the following query with the magistrate:

'(a) Why did the magistrate not explain the effect of the formal admissions, to the accused and that he is not compelled to assist the state in proving its case?

(b) It is evident from the record that although the accused made some admissions those admissions were advanced by the court and not by the accused who was unrepresented. In

terms of which provisions of the Act that empowers the court to advance the admissions in order for the accused to admit them?

(c) If the accused was convicted of possession of dependence-producing substance, why is it reflected on the review sheet that the accused was convicted of dealing in dependence – producing substance?'

[5] The learned magistrate responded as follows:

'(i) If the Honourable Reviewing Court looks at page 21 of the typed record, which I have marked with a red pen, it's clear that the consequences of formal admissions was indeed explained to the Accused before he consented to the admissions. I therefore do not agree that there had been any omission from the part of the Court in explaining the consequences or effects of formal admissions to the accused.

(ii) If Honourable Reviewing Judge looks at page 20 of the typed record, when the Court asks the accused what admissions he wants to make if he already pleaded not guilty he said he wanted to plead guilty for unlawfully and wrongfully having cannabis in his possession. To me, words such as possession, unlawfulness and wrongfulness are legal terms which have to be proven and thus for me to properly assess, if indeed accused is truly admitting to such allegations it was needed for me to ask him questions in clarification thereof. My questions only related to the issues of possession, the unlawfulness and the wrongfulness; the allegations pointed out by the accused in the start of the proceedings and therefore I do not agree that the admissions were advanced by the court. In fact, the admissions were advanced by the accused as the court never exceeded its mandate. To this, as stated on page 21 of the typed record, the admissions were entered in terms of section 220 of Act 51 of 1977.

(iii) Having sight of the query and the review cover sheet, I admit that it was a typing error on my part and thus I have corrected the review cover sheet and have attached it hereto.'

[6] From the record of proceedings, it is evident that the accused pleaded not guilty on 23 July 2019 before the learned magistrate Van der Colf. The accused did not disclose the basis of his defence and the matter was postponed to 20 February 2020 for trial. When it came on 20 February 2020, the trial could not proceed and it was again

postponed to 26 May 2020 for trial. When the accused appeared on 26 May 2020 the following transpired:

‘Accused: Your worship I want to plead guilty in this matter.

Court: You have already pleaded not guilty but you may make admissions and the court can determine if satisfied not to proceed with trial in terms of section 220.

Accused: I understand.

Court: Proceed.

Accused: I am admitting that the cannabis was found wrongfully and unlawfully in my possession.

Court: Why are you saying so?

Accused: The cannabis of 3 grams was found in my possession, wrongfully and unlawfully which I am aware of and I know that it is illegal, because people are getting locked up for it.

Court: Is there anything in the allegations against you that you dispute?

Accused: No your worship.

Public Prosecutor: State will accept the admission in terms of s220.

Court: Remand date 27 May 2020

Bail extended and warned to 8.30 am.’

[7] On 27 May 2020, the accused again appeared before the same magistrate. However, the case did not proceed and it was postponed to 15 June 2020 for ruling on section 220 admissions. When the accused appeared on 15 June 2020 the following transpired:

‘Court: Accused you made admissions on 26 May 2020 indicating that cannabis was found in your possession wrongfully and unlawfully, 3 grams as such did you admit to those facts wilfully and without any undue influence?

Accused: Yes your worship.

Court: Can you indicate to the court how the cannabis was found on you?

Accused: It was found in one jean pants pocket which was only worn by me in the afternoon.

Court: So what are you trying to say?

Accused: I probably forgot about this cannabis which was in my pocket but I plead guilty not to wasting this court's time.

Court: Did you know about this cannabis?

Accused: No your worship, I only saw it the time it was taken out your worship.

Court: Would you then dispute that it is you who put it in there?

Accused: I dispute that it was me who put it in there.

Court: You said you knew it was unlawful and wrongful to have it in your possession, is that correct.

Accused: Yes your worship because I was having it.

Court: Did you have a right to possess it.

Accused: No your worship.

Court: On which date did this incident happen and where?

Accused: I can't remember the date but it happened in Westdene in Keetmanshoop district your worship.

Court: The court may admit all these facts into record as formal admissions and as such exonerate the state from proving these allegations which means that the state does not have to prove these facts and you can be convicted based on these allegations you have admitted to do you understand?

Accused: I give my consent that these facts are admitted as formal admissions.

Public Prosecutor: State accepts these allegations being admitted as formal.

Court: The court admits the following facts into record as admissions by the accused in terms of section 220 of the Criminal Procedure Act 51 of 1977, that the accused

was found with cannabis to wit 3 grams and that he was wrongfully and unlawfully in possession of such in the district of Keetmanshoop, however the accused still disputes that he was the one who placed it in his pockets and cannot tell the court how it got into his pocket, he further cannot admit to the date the incident took place and as such the matter will still proceed to trial.'

[8] From the reading of the record, the accused had pleaded not guilty and later on indicated that he wanted to make formal admissions. The court recorded formal admissions, that:

'the accused was found with cannabis to wit 3 grams, and that he was wrongfully and unlawfully in possession of such in the district of Keetmanshoop.'

However, he made a qualification to his admissions that he did not know about the cannabis and he only came to know about it when it was taken out of his pocket. He disputed that it was him who put it in the pocket.

[9] This court is unable to comprehend how it could be interpreted that accused was making admissions in light of the qualification given by the accused in his response. Furthermore, the accused never initiated on his own that he was found in possession of cannabis in Westdene in the district of Keetmanshoop. He gave this answer after the court questioned him as to which date this incident happened and where.

[10] After the court applied section 220 of the Criminal Procedure Act, the matter was postponed several times for trial. However, the trial did not take place. On 16 August 2021 the accused appeared before another magistrate, Ms Konjore and the following took place:

Public Prosecutor: Matter is for trial final. Ready to proceed. Accused told me he wants to finalise this matter today. I informed him the matter comes for trial and he can make additional admissions if he so deems fit. Court may enquire.

‘Court: Forced or influenced to speak to the court today?

Accused: No

Court: Doing so freely and voluntarily?

Accused: Yes

Court: You pleaded not guilty on 23 July 2019 and remained silent. What is it that you want to tell the court?

Accused: I want to plead guilty for having cannabis in my possession wrongfully and unlawfully. It was 3 grams of cannabis.

Court: When did this incident happen?

Accused: It was in 2019. I can’t remember the date very well.

Court: Charge alleges that it was on 26 January 2019, do you dispute?

Accused: No, it is the correct date.

Court: Where did this incident happen?

Accused: In Westdene in Keetmanshoop in the district of Keetmanshoop.

Court: You said you were found with 3 grams of cannabis where was this cannabis found?

Accused: In my pocket. It was during the search that the police found in my pocket

Court: What do you say it was cannabis (sic).

Accused: At the time I used it and that’s how I knew it was cannabis.

Court: Describe the substance?

Accused: It was a green plant.

Court: What was the value of this cannabis?

Accused: N$30.00

Court: State alleges that the cannabis was 5 grams valued at N$50. Do you dispute this?

Accused: The officer that charged me weighed the cannabis in front of me and it was 0.3 grams.

Court: So you say it was not 5 grams?

Accused: Yes. He even told me the value is N$30, the Officer that charged me said that.

Court: Do you dispute that this 3 grams of cannabis is a dependence producing drug or plant meaning that you can become addicted to it if you consume it?

Accused: I don't dispute it.

Court: Did you have a permit to possess it?

Accused: No.

Court: Did you have a licence to possess this substance.

Accused: No.

Court: Did you have a medical prescription?

Accused: No.

Court: Did you have any legal right or permission to possess this cannabis?

Accused: No.

Court: Did you know that your conduct is unlawful and if you are caught with this cannabis there could be legal consequences?

Accused: Yes.

Court: Why do you say yes?

Accused: Because in Namibia cannabis is illegal and it is unlawful to have it.

Court: From what you told me accused it seems that you don't dispute any of the allegations of the charge. Take note that in terms of section 220 if formal admissions are entered then it means the state will no longer need to prove those allegations you admit today as these will become prove facts, do you understand?

Accused: Yes

Court: With your consent, can the following be entered as formal admissions in terms of section 220 of Act 51 of 1977 that on 26 January 2019 in Keetmanshoop you were found in unlawful and wrongful possession of 3 grams of cannabis valued at N$30, a prohibited dependence producing substance?

Accused: I consent.

Court: State may respond.

Public Prosecutor: State accepts the admissions and we will not lead further evidence.

Court: Formal admissions entered in terms of s 220.'

[11] The state closed its case, the accused remained silent and called no witness. The court then convicted the accused on the so called formal admissions.

[12] It is evident from the record of proceedings that although the court *a quo* attempted to explain the effect of the formal admissions to the unrepresented accused, the Court *a quo* failed to apply the precautionary measures as to the proper recording of formal admissions. The court did not inform the accused that there is no obligation on such accused to assist the state in proving its case or that the accused was not under obligation to make formal admissions.

[13] In *S v Mavundla* 1976 (4) SA 713 (N.P.D) head note it was stated as follows:

'When an accused person proposes to admit of fact under section 284 (1) of Act 56 of 1955, (which is equivalent of s 220 of the current Criminal Procedure Act 51 of 1977) but he lacks legal representation, the judicial officer trying him must satisfy himself before accepting the admission in evidence, that the accused's decision to make it has been taken with full understanding of its meaning and effect, and under no misapprehension that he is obliged or expected to supply the state or the court with it. It must also appear to be truly voluntary in all other respects.'

[14] Applying the above principles to the present matter, the proper approach for recording admissions is that immediately it became apparent that the unrepresented accused wanted to give formal admissions, the Court *a quo* was supposed to explain to the accused that the effect of making a formal admission is to relieve the state of the burden of proving the admitted facts by evidence; and that the accused is not compelled to assist the prosecution in proving its case. However, this did not happen in this case. Instead, after the learned magistrate was informed that the accused wanted to make a formal admission she proceeded to question the accused in the manner s112 (1) (b) of the Act is being applied. The accused did not volunteer himself to advance formal admissions as required by s 220 of Act 51 of 1977. The Court *a quo* questioned him and extracted answers from him. In some instances, such admissions were advanced by the Court *a quo.*

[15] The Court *a quo* in its response stated that, she questioned the accused because he used words such as possession, unlawfulness and wrongfulness which are legal terms and she needed to clarify. I do not agree with the learned magistrate because her questions went beyond that as the record speaks for itself. Furthermore, there was no need to clarify those words because the accused is the one who mentioned those words himself and he understood them.

[16] The magistrate has failed to give the required and proper explanation to the accused immediately the possibility of formal admissions arose. She only gave an insufficient explanation at a later stage. When the admissions were extracted from the accused through questioning, the accused was not properly armed with the knowledge of the consequences of giving formal admissions. The procedure adopted by the Court *a quo* was not correct as it lacks precautionary measures as to the proper recording of formal admissions in terms of s220 of the Criminal Procedure Act. It follows that it cannot be said that the accused made an informed decision to give formal admissions nor can it be concluded that he volunteered to give those admissions as some of them were extracted from him through questioning.

[17] With regard to point C of the query directed to the magistrate as to why was it reflected on the review sheet that the accused was convicted of dealing in dependence-producing substance instead of possession of dependence – producing substance. The learned magistrate correctly conceded that it was an oversight on her part. However, judicial officers are urged to read the records before they affix their signatures on the records certifying that it is the correct proceedings that took place before them.

[18] Another issue that came to my attention although I did not direct a query to the magistrate, is that the accused initial appeared before a different magistrate before whom he pleaded not guilty. The magistrate recorded some of the so called formal admissions in terms of s 220. When formal admissions are recorded in terms of the above section, the matter becomes partly heard. Section 118 of the Criminal Procedure Act deals with the non-availability of judicial officer after a plea of not guilty as follows:

> 'If the judge, regional magistrate or magistrate before whom an accused at a summary trial had pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court.'

[19] In the present matter, it is not known why the accused did not appear before a magistrate who initial took the plea and recorded some of the admissions. Nothing appears on record why the original magistrate did not proceed with the case. There is no indication that the original magistrate was no longer in the employment of the state.

[20] Section 118 of the Criminal Procedure Act only sanctions this procedure where the original magistrate or presiding officer 'is not available' and does not entitle the prosecution to proceed before another presiding officer for any other reason. To continue with a trial in front of another magistrate where the original magistrate is still available constitutes an irregularity. *S v Wellington,* 1991 (1) SACR 144 (Nm)

[21] It must be emphasised that s 118 of the Criminal Procedure Act must only be invoked in cases where a plea of not guilty is taken and no evidence adduced as yet. Formal admissions amount to evidence and for another magistrate to proceed with a partly heard matter by the original magistrate amounts to an irregularity that results in the proceedings being null and void.

[22] Due to the fact that the procedure in taking formal admissions was riddled with irregularities and that another magistrate proceeded to hear a partly heard matter other than the original magistrate, which also amounted to an irregularity, the conviction and sentence cannot be allowed to stand.

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

(a) The conviction and sentence are set aside.

(b) If the accused had paid a fine of N$2000 in default of 6 months' imprisonment imposed by the Court *a quo,* it should be returned to the accused.

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N N SHIVUTE

JUDGE

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H C JANUARY

JUDGE