

REPUBLIC OF NAMIBIA



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

Case Title: The State v Titus Jonas	Case No: High Court Ref. No.:1345/2023 CR 100/2023
	Division of Court: High Court Main Division
Heard before: Honourable Justice Liebenberg <i>et</i> Honourable Lady Shivute	Delivered on: 12 October 2023
Neutral citation: <i>S v Jonas</i> (CR 100/2023) [2023] NAHCMD 642 (12 October 2023)	
Order: <ol style="list-style-type: none">1. The conviction and sentence on the first alternative count are confirmed.2. The conviction and sentence on the second count are set aside.	
Reasons for order:	
Shivute J (Concurring Liebenberg J)	
[1] The accused was convicted of two counts namely; first alternative to count 1 – possession of dependence producing substance contravening s 2(b) read with s1, 2 (i),	

and/or 2 (iv), 7, 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1971 as amended and count 2 of disguising unlawful origin of property contravening section 4 of the Prevention of Organised Crime Act 29 of 2004 (POCA). I have no qualm in respect of the first alternative to count 1. However, the problem lies with how the court dealt with the second count.

[2] I directed a query to the magistrate as follows:

- '(i) How did the court satisfy itself that the accused committed the offence as stated in the second count? What exactly did the accused do? Does the charge disclose an offence?
- (ii) Why did the court deal with the second count in terms of section 112 (1) (a) considering the fact that it is a serious offence?'

[3] The learned magistrate responded as in the following terms:

'I concede, the charge does not mention the unlawful actions of the accused person. The court ought to have invoked section 112(1) (b). The accused person is not guilty of the offence. The charge does not mention the unlawful activity as alluded to by the reviewing justice. The matter appeared before me at the time I was acquainting myself with the Prevention of Organised Crime Act 29 of 2004. This offence is serious in nature and applying section 112 (1) (a) was not appropriate.'

[4] The learned magistrate correctly conceded that the accused was not supposed to be convicted because the way the charge was framed, was vague and did not disclose the unlawful act the accused had committed. Furthermore, the learned magistrate correctly conceded that it was inappropriate to invoke the provisions of s 112 (1) (a) of the Criminal Procedure Act 51 of 1977.

[5] As stated in *S v Swatz* 2019 (1) NR 197 (HC) section 112 (1)(a) creates the impression that the offence is minor and less serious. It therefore, amounts to a travesty of justice to invoke the provisions of s112 (1)(a) in serious cases such as this one. It is clear that the

magistrate failed to exercise his discretion judiciously, thus irregular for the magistrate to have invoked the provisions of section 112(1) (a) in this matter.

[6] Disguising unlawful origin of property contravening s 4 of POCA, is a serious offence that attracts a fine not exceeding N\$100 million or imprisonment for a period not exceeding 30 years. The learned magistrate down played the seriousness of this offence by applying section 112 (1)(a). It follows that both the conviction and sentence in respect of the second count fall to be set aside.

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

1. The conviction and sentence on the first alternative count are confirmed.
2. The conviction and sentence on the second count are set aside.

N N SHIVUTE JUDGE	J C LIEBENBERG JUDGE