REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 54/2013

In the matter between:

THE STATE **APPELLANT**

and

VENASIU JANUARY **RESPONDENT**

Neutral citation: S *v January* (CA 54/2013) [2017] NAHCNLD 65 (11 July 2017)

Coram: DAMASEB JP and TOMMASI J

Heard: 27 July 2016

Released: 11 July 2017

Flynote: Criminal Procedure - Discharge of accused in terms of s 174 of Act 51 of 1977 at close of State case – Decision of the learned magistrate premised on conclusion that appellant failed to prove that substance was cannabis/dagga – Appellant led *prima facie* evidence that substance was cannabis/dagga – Facts and circumstances distinguishable from *S v Mteleni* 1995 NR 127 (HC) relied upon by the learned magistrate – Learned magistrate failed to apply mind – Matter remitted for district court to continue with the trial from the stage where the State closed its case.

ORDER

1. The appeal succeeds;
2. The order of the court *a quo* discharging the respondent in terms of section 174 of the Criminal Procedure Act, 51 of 1977, is set aside and substituted for the following order:

   > 'At the end of the State's case the accused is placed on his own defence.'

3. The matter is remitted to the court below before magistrate S M Tembwe of the Oshakati District Court to continue with the trial from the stage where the State closed its case, and to deal with the accused according to law;
4. The reasons for the order will be handed down on or before 19 August 2016.

JUDGMENT

TOMMASI J (DAMASEB JP concurring):

[1] The respondent was charged with having contravened section 2 (b) of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 i.e unlawful possession of cannabis. He pleaded not guilty and the court *a quo* discharged him in terms of section 174 of the Criminal Procedure Act, 1977 (Act 51 of 1977). The appellant appealed against the discharge.

[2] At the hearing of the matter the above order was made and what follows are the reasons for the above order.

[3] The respondent was charged with having been in unlawful possession of 410g cannabis with a street value of N$1230. He pleaded not guilty and gave no plea explanation in terms of section 115 of the Criminal Procedure Act. The State called police officers who participated in an operation to search certain houses for prohibited substances. According to these witnesses they found plastic containers with what they suspected to be cannabis in his room and on top of the zink sheets of his house. Sergeant Munanago testified that he identified the substance as cannabis by its appearance and smell.

[4] The respondent was unrepresented and he placed everything in dispute by remaining silent. He did not dispute during cross examination that the plastic bags were found in his house but denied having admitted that it was his or that it belonged to him. He also indicated during cross-examination that he did not know it was cannabis.

[5] At the close of the State's case, the magistrate concluded that the only issue in dispute was whether the substance was dagga. The learned magistrate referring to *S v Mteleni*[1], found that the State failed to present sufficient evidence to prove that the substance which was found in the respondent's possession was dagga. He found that the mere assertion by Sergeant Munanago that it was dagga was not enough and he discharged the respondent in terms of s 174 of the Criminal Procedure Act. The learned magistrate, in response to the grounds of appeal, stated that he had nothing to add to his reasons.

[6] The grounds of appeal were *inter alia* that the learned magistrate misdirected himself by relying on the case of *S v Mteleni, supra;* by finding that the evidence of the trained officer was insufficient; failing to find that the appellant had proven that the substance found in possession of the respondent was dagga; and failing to apply the correct approach at the close of the State's case in view of the respondent's election to remain silent.

[1] 1995 NR 127 (HC).

[7] In *S v Teek*[2], the court considered whether a higher court may interfere with the decision to discharge an accused at the close of the State's Case. It was held that a higher tribunal could only interfere if the repository of the discretion, in deciding that the prerequisite facts or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his or her mind. It is the submission of counsel for the appellant (the State) that the learned magistrate failed to apply his mind at the close of the case for the prosecution.

[8] Section 174 of the Criminal Procedure Act provides that, if the judicial officer at the close of the State's case, is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, he may return a verdict of not guilty. This court has to determine whether the learned magistrate applied his mind when he discharged the respondent on the strength of his conclusion that the State had failed to sufficiently prove that the substance is dagga.

[9] Sargent Munango testified as follow:

> 'I know cannabis, it's green in colour and has seeds. It has (a) moff (sic) smell that is not in any other plant. I received training course (sic) in detecting drugs, for (2) months and the advanced one was for three months in Windhoek.'

[10] In *S v Mteleni, supra,* Teek J[3] states the following:

> 'The evidence given by Shilunga namely 'I know that it is dagga. I have seen dagga before and at the police station' can hardly be regarded as *prima facie* evidence that the substance found was what the State alleges it was namely dagga. She does not say how and where she obtained her experience to identify dagga or dependence producing drugs.'

[2] 2009 (1) NR 127 (SC) at 131G-I.
[3] at page 128 D

[11] It is my considered view that the facts and circumstances of this case are distinguishable from those in *Mteleni* above. Sergeant Munanago clearly indicated what his qualifications were and the reasons for his conclusions.

[12] In *S v Ndaba*[4] it was held that on a charge of dealing in dagga in contravention of s 2 (a) of Act 41 of 1971 a policeman's statement that he knows dagga and that what he found was in fact dagga is accepted as sufficient identification unless his statement is challenged and his experience with and knowledge of dagga is put in issue. The respondent did not put in issue Sergeant Mananago's qualifications or his ability to detect drugs.

[13] The State adduced *prima facie* evidence in the court *a quo* that the substance which was found in the possession of the respondent was in fact dagga and the learned magistrate thus erred when he opined that there was not "sufficient evidence" adduced to prove that the substance was dagga.

[14] Having concluded thus the court upheld the appeal and issued the following order:

1. The appeal succeeds;
2. The order of the court *a quo* discharging the respondent in terms of section 174 of the Criminal Procedure Act, 51 of 1977, is set aside and substituted for the following order:

> 'At the end of the State's case the accused is placed on his own defence.'

3. The matter is remitted to the court below before magistrate S M Tembwe of the Oshakati District Court to continue with the trial from the stage where the State closed its case, and to deal with the accused according to law;
4. The reasons for the order will be handed down on or before 19 August 2016

[4] 1981 (3) SA 782 (N).

____

M A TOMMASI

JUDGE

I agree

____

P T DAMASEB

JUDGE PRESIDENT

Appearances:

For the Applicant:	Mr. Matota
Of	Office of the Prosecutor-General, Oshakati
For the Respondent:	Ms Mugaviri
Of	Mugaviri Attorneys, Oshakati