

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case No.: CR 9/2017

In the matters between:

THE STATE

and

PAPAI JOAO

ACCUSED

PETRUS FELLIPUS NDAWEDWA

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: **210/2017**

HIGH COURT NLD REVIEW CASE REF NO: **175/2017**

Neutral citations: *S v Joao* (CR 9/2017) [2017] NAHCNLD 69 (24 July 2017)

Coram: DAMASEB JP and JANUARY J

Delivered: 24 July 2017

Flynote: Criminal Procedure – Review – Contravention of section 2(a) of Act 41 of 1971–Dealing in cannabis – No Alternative charge put – Presumption in section 10 (1)

(a)(i) of the Act not brought to attention of accused – Accused undefended – Failure of justice – Conviction and sentence set aside

Summary: In these two cases the accused, respectively were charged with dealing in cannabis. They pleaded guilty and during questioning in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977, only admitted to possession. No alternative in relation to possession was put to them neither was the presumption of dealing in relation to possession of more than 115 g of cannabis explained to either of the accused. The proceedings in both cases are not in accordance with justice. The convictions and sentences in both cases are set aside.

ORDER

1. The convictions and sentences in both cases are set aside.
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JUDGMENT

JANUARY J (DAMASEB JP concurring)

[1] Both cases emanate from the same magistrate's court presided over by the same magistrate at Ohangwena. The accused in both cases were not legally represented. The charges against both accused in the respective cases are contravening section 2(a) read with sections 1, 2(1) and 2(ii), 8, 10,14, and part 1 of the Schedule of the Abuse of Dependence producing Substances and Rehabilitation Centres Act, Act 41 of 1971 as amended – Dealing in cannabis.

[2] In Review No 57/2017 the alleged weight of the cannabis is 4.2 kg with a value of N\$12 600 and in Review case No 67/2017 the alleged weight of cannabis is 325g with a value of N\$975. The accused pleaded guilty in both cases and the magistrate applied section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977. Both accused

respectively pleaded guilty to the charges. No alternative charges were put in terms of section 2(b) of Act 41 of 1971 relating to possession of cannabis. Both accused in the respective cases admitted to all the elements of the crimes otherwise apart from the element of dealing. In the 4.2kg case the accused said that he brought the cannabis from Angola into Namibia for his friends and in the 325 g case the accused stated that he was in possession of it for his own use. No question and answer in relation to dealing is reflected in both cases.

[3] In addition, although in the charge reference is made to section 10 of the relevant Act 41 of 1971, the presumption in relation to possession in accordance with section 10(1) (a)(i) of the Act, of in possession of more than 115 g of cannabis is presumed to be dealing, was never brought to the attention of and explained to any of the two accused.

[4] The proceedings in both cases are clearly not in accordance with justice. I agree with what was held by Hannah J (as he then was) where he stated in *S v Kuvare* 1992 NR 7 (HC) F- I, Head note:

'Where an accused person is charged with dealing in dagga in contravention of s 2(a) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 (RSA), it is unfair not to inform the accused in the particulars of the charge that he is presumed, in terms of s 10(1)(a)(i) of the Act, to have dealt in the dagga because he was in possession of more than 115 grams of dagga. Furthermore, in such circumstances the accused should be informed by the prosecutor of the presumption and the content of the evidence which it is intended to lead. The failure to put the accused on notice of the presumption can properly be said to prejudice his defence.

S v Kanda 1980 (4) SA 687 (SWA) applied.

Where an accused has been charged with dealing in dagga in contravention of s 2(a) of Act 41 of 1971 without any specific reference to possession of the dagga in the charge and the evidence does not prove the commission of a contravention of s 2(a), it is not competent to convict the accused of possession of dagga in contravention of s 2(b) on the basis of s 270 of the Criminal Procedure Act 51 of 1977 (RSA).'

[5] In the circumstances I reiterate and agree with what was stated in *S v Kuvare* (supra) at p10 A-B:

'Because the prosecution chose, most unwisely as it transpires, not to lay an alternative charge of contravening s 2(b), and because the prosecution chose to make a bare allegation of dealing, it was not open to the magistrate's court to convict the accused of contravening s 2(b) and in consequence it is not now open to this Court to substitute such a verdict. I come to this conclusion with considerable regret because it is clear that the accused was guilty of such an offence but the blame for this unfortunate result must rest entirely with the prosecution for failing to cast its net wide enough.'

[6] In the result:

1. The convictions and sentences in both cases are set aside.

H C JANUARY

JUDGE

I Agree

P T DAMASEB

JUDGE PRESIDENT