

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGMENT

Case No.: CR 46/2020

In the matter between:

THE STATE

v

SHEMUKETA SAVIOR NDJODI

ACCUSED

Neutral citation: *S v Ndjodi* (CR 46/2020) [2020] NAHCNLD 113 (25 August 2020)

Coram: JANUARY J and SALIONGA J

Delivered: 25 August 2020

Flynote: Review — Criminal procedure — Section 112(1) (a) — Possession of cannabis — Considering prescribed sentences and purpose of section 112(1) (a) as amended — Not “minor offence” — Misdirection — Conviction and sentence set aside.

Summary: The accused in this case was charged with possession of cannabis in contravention of sections 2(b) read with the relevant sections of the Abuse of

Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971. The magistrate applied section 112 (1) (a) of the Criminal Procedure Act (the Act) and convicted the accused person. Considering the purpose of section 112(1)(a), and the sentence in the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971, the offence cannot be regarded as minor. The magistrate misdirected herself. The conviction and sentence are set aside and the matter is referred back to the magistrate to apply section 112(1) (b) of the Act.

ORDER

1. The conviction and sentence are set aside:
2. The case is remitted to the magistrate with a direction that it is dealt with afresh from the stage of plea.
3. In the event of a conviction the sentencing court must have regard to the sentence already served.

JUDGMENT

SALIONGA J (JANUARY J concurring):

[1] The accused in this case was charged with possession of cannabis in contravention 2(b) read with relevant section of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971. The accused pleaded guilty on the charge. The magistrate *mero motu* applied section 112(1) (a) of the Criminal Procedure Act 51 of 1977 and convicted the accused. Accused was sentenced to N\$1000 or six days imprisonment.

[2] The wording of s 112(1) (a) of the Criminal Procedure Act 51 of 1977 makes it clear that the purpose of this provision should only be applied for minor offences.¹

[3] Considering the prescribed fine of 'in the case of a first conviction for a contravention of any provision referred to in section 2(b) or (d) of Act 41 of 1971, to a fine not exceeding R20 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment'; and the purpose of section 112(1) (a) to dispose of **minor offenses** expeditiously, I am convinced the offence cannot be regarded as a minor offence.

'Where the statutory provision contravened permits a sentence exceeding the limits provided for in s 112(1) (a) the accused cannot be convicted in the absence of questioning or the proof of guilt by evidence.'²

[4] The offence is a serious offence and the sentence provided for in the Act does exceed the limit of s 112(1) (a) of the Act. It can never be dealt with under the provisions of section 112(1) (a) of the Criminal Procedure Act. What the magistrate did amounts to a misdirection.

[5] In the result;

1. The conviction and sentence are set aside:
2. The case is remitted to the magistrate with a direction that it is dealt with afresh from the stage of plea.
3. In the event of a conviction the sentencing court must have regard to the sentence already served.

¹ See also: *Hiemstra's Criminal Procedure*, Service issue 2, April 2009 by A Kruger, Lexus Nexus at p17-2 to p17-4 and; *Commentary on the Criminal Procedure Act*.

² See Lansdown and Campbell *South African Criminal Law and Procedure* vol V at 412; *S v Mkhafu* 1978 (1) SA 665 (O) with approval referred to in *S v Mostert* 1994 NR 83 (HC) and IMPORTANT; *S v Onesmus*; *S v Amukoto*; *S v Mweshipange* 2011 (2) NR 461 (HC).

J T SALIONGA

JUDGE

I agree,

HC JANUARY

JUDGE