

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGEMENT

Case No.: 213/2020

In the matter between:

THE STATE

v

FRANS RUBEN

ACCUSED

Neutral citation: *S v Ruben* (CR 48/2020) [2020] NAHCNLD 118 (27 August 2020)

Coram: DIERGAARDT AJ *et* JANUARY J

Delivered: 27 August 2020

Flynote: Criminal procedure - Drug offences - Statutory presumption that accused dealing - Accused pleaded guilty but not admitting dealing - Accused must be given opportunity to rebut presumption - The presumption of dealing must be articulated in the charge and clearly explained by the Magistrate preferably before questioning. Questioning in terms of section 112(1) (b) must be clear and cover all the elements of an offence. The accused raised a defense of lack of knowledge and intention.

Summary: This matter came on automatic review. The accused was charged with the offence contravening section 2 (a) of Act 41 of 1971 - dealing in prohibited dependence producing substances- cannabis, alternatively contravening section 2(b) - possession or use of dependence-producing drugs - cannabis. He tendered a guilty plea on the main count of dealing and was convicted and sentenced. The magistrate relied on the presumption provided in the act in order to convict accused for dealing. The implications that comes with the presumption were not explained to the accused.

Held; that magistrate not entitled to merely convict on the presumption without having explained it to the accused.

Held; that accused should be given an opportunity to rebut the presumption if the court or State intends to rely on it.

Held that; the accused did not admit all the elements of the offence. Held that questioning in terms of section 112(1) (b) must be clear and cover all the elements of an offence.

ORDER

In the result the following order is made:

1. The conviction and sentence are set aside;
2. The case is remitted to the magistrate's court, Eenhana, in terms of s 312(1) of the Criminal Procedure Act, 51 of 1977, with the direction to act in terms of s 113 of the said Act.

JUDGMENT

DIERGAARDT AJ (JANUARY J CONCURRING)

[1] This case came before me on automatic review. The accused herein was convicted of having contravened s 2(a) of the Abuse of Dependence-Producing Substances and Rehabilitation Centers Act 41 of 1971- dealing in cannabis and sentenced to two thousand hundred Namibia dollars or in two (2) months imprisonment.

[2] The accused was sentenced on 07 July 2020 and the record of proceedings was received by this court on 22 July 2020.

[3] The accused was charged with having contravened s 2(a) read with, *inter alia*, s 10 of the Act. He was charged with an alternative charge of having contravened s 2(b), possession of dependence-producing drug or plant. It was furthermore not stated in the particulars of the charge that it would be presumed that the accused has been dealing in view of the fact that he had cannabis seeds in his possession.

[4] The accused pleaded guilty and was questioned in terms of s 112(1) (b) of Act 51 of 1977. He admitted that he was in possession of cannabis but averred that many people used his room. Amongst other concerns I queried the Magistrate on whether he was indeed satisfied that the accused admitted to dealing in cannabis or that the accused merely agreed that he was aware of such presumption.

[5] The Magistrate conceded that the accused answers to the questions was contradictory and follow up questions should have been posed to the accused prior to conviction. He further conceded that he could not have been satisfied that the accused admitted to all elements of dealing in cannabis and he should have given the accused the opportunity to rebut the presumption of dealing.

[6] The question is whether the magistrate was entitled to convict the accused on the presumption of dealing in cannabis. I refer to section 10 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act and by way of reminder the relevant presumptions contained in section 10(1) (a) of the Act are as follows:

'If in any prosecution for an offence under section 2 it is proved that the accused was found in Possession of-

(a) . . .

(i). . .

(ii). . .

(iii) dagga exceeding 115 grams in mass;

(iv) any prohibited dependence-producing drugs;

It shall be presumed that the accused dealt in such dagga or drugs, unless the contrary is proved.

(b). . .

(c) If in any prosecution for an offence under section 2(a) it is proved that the accused was the owner, occupier, manager or person in charge of cultivated land on a date on which dagga plants were found on such land, of the existence of which plants the accused was aware or could reasonably be expected to have been aware, it shall be presumed that the accused dealt in such dagga plants, unless the contrary is proved.

(d) If in any prosecution for an offence under section 2(a) or (c) or section 3(a) it is proved that the accused conveyed any dependence-producing drug or any plant from which such a drug could be manufactured, it shall be presumed that the accused dealt in such drug, unless the contrary is proved.

(e). . .

(f) If in any prosecution for an offence under section 2(a) or (c) or section 3 (a), it is proved that the accused was upon or in charge of or that he accompanied any vehicle, vessel or animal on or in which any dependence-producing drug, or any plant from which such a drug could be

manufactured, was found, it shall be presumed that the accused dealt in such drug or plant, unless the contrary is proved.

(3) If in any prosecution for an offence under this Act it is proved that any dependence-producing drug or plant from which such a drug could be manufactured was found in the immediate vicinity of the accused, the accused shall be deemed to have been found in possession of such drug or plant, unless the contrary is proved.'

[7] I am of the view that in order to give effect to the presumptions that the accused is presumed to have committed the offences of either dealing in or being in possession of a prohibited or dangerous dependence-producing substance, bearing in mind that the onus rests on the accused to prove the contrary the court must ask questions in clarification.

[8] In the light of the reverse onus on the accused person to prove that he had not dealt in the drug, it is not seen from the record that the learned magistrate questioned the accused any further in order to afford him (accused) an opportunity to rebut the presumption. The court was therefore not supposed to convict the accused based on the said presumption without having explained the presumption to the accused. It cannot be over-emphasized that the court is under a duty to explain the content of the presumption at the earliest opportunity. It is suggested therefore that the presumption be at least explained to the accused person before or after plea the moment the court becomes aware of the fact that the State intends on relying on the said presumption.

[9] I fully agree with the sentiment shared in *S v Kuvare* 1992 NR 7 (HC) where the court held that 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, 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. In that case the accused pleaded not guilty and testified under oath. The court set aside the conviction and sentence as it held that the accused was prejudiced in his defense by the failure to inform him of the presumption and secondly because the court was of the view that, on the evidence, the presumption was rebutted.

[10] To further substantiate my conclusion I rely on the case of *S v Rooi* 2007 (1) NR 282 (HC) where the court held 'that before the prosecution and the court could rely on this presumption, it must remember that the presumption was rebuttable by proof to the contrary. The only way that the accused could present proof was by presenting evidence, which meant that he/she must be afforded the opportunity to do so under oath, either by giving evidence in person, or by calling witnesses. The prosecution must also be given the opportunity to cross-examine on the evidence presented by the accused. The accused could not attempt to rebut the presumption by means of answers during questioning in terms of s 112(1) (b) of the Criminal Procedure Act 51 of 1977.'

[11] *In casu* it is clear from the record that the accused raised a defense when he indicated that he was not the only person using the room where the cannabis seeds were found. The learned magistrate then convinced himself and the record reflects that "the court is satisfied that accused has admitted to all the allegations in the charge and is found guilty as charged'. The fact of the matter is that the accused did not admit that he was dealing with cannabis. I am also not convinced that the accused being a layperson could have been aware of the said presumption of dealing when the magistrate put it to the accused that he was presumed to be dealing in cannabis.

[12] I am of the view that the accused did not admit to all elements of the offence of dealing. The Magistrate could in all honesty not have been satisfied that the accused admits to the elements of the offence more specifically *mens rea*. In the result the magistrate should have recorded a plea of not guilty in terms of s 113 of Act 51 of 1977 and the court should have given the accused the opportunity to rebut the presumption.

The conviction therefore cannot stand.

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

1. The conviction and sentence are set aside;
2. The case is remitted to the magistrate's court, Eenhana, in terms of s 312(1) of the Criminal Procedure Act, 51 of 1977, with the direction to act in terms of s 113 of the said Act and the case to follow its natural course.

A Diergaardt
Acting Judge

I agree,

H C January
Judge