

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

“ANNEXURE 11”

Case Title: <i>The State v David Maniraho</i>	CR No.: 49/2020 Case No.: OH 226/2020
	Division of Court: Northern Local Division
Heard before: Honourable Ms. Justice Diergaardt AJ <i>et</i> Honourable Mr. Justice January J	Delivered on: 28 August 2020
Neutral citation: S v Maniraho (CR 49/2020) [2020] NAHCNLD 120 (28 August 2020)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The matter is remitted to the Magistrate to enter a plea of not guilty in terms of section 113 of the Criminal Procedure Act, Act 51 of 1977 and for the case to follow its natural course.	
Reasons for the order	
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 Centres Act 41 of 1971, dealing in cannabis and sentenced to seven thousand five hundred Namibia dollars or in default twelve (12) months imprisonment. [2] The accused was sentenced on 25 June 2020 and the record of proceedings was	

received by this court on 15 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 the weight of the dagga exceeded 115 grams.

[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 3.985 kilograms grams of cannabis. The accused's explanation for the possession of the cannabis was that he met a man from Opuwo who informed him that it was medicine for his cattle and then told him to collect it from Oshikango. This owner of the cannabis promised to give him N\$1000-00 for delivery and advanced him with N\$200-00. He averred that he did not know what he was carrying. He acknowledge that the cannabis was in a bag he was carrying. He further submitted that he realized that it was cannabis when the bag was opened in his presence.

[5] 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. The Magistrate 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] I also queried the Magistrate on the following question he posed to the accused; Do you admit or dispute that you dealt –in or possessed a dependence producing substance? I commented that the question is too general having elements of dealing, possession and knowledge of the substance. The magistrate's answer was that the question should have been broken up in two sections as per main and alternative count.

[7] The question is whether the magistrate was entitled to convict the accused of dealing.

[8] I fully agree with the sentiment shared In *S v Kuvare* 1992 NR 7 (HC) where the court held that 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.

[9] I also agree with the finding in the case of *S v Rooi* 2007 (1) NR 282 (HC) that 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.

[10] It is clear from the record in *casu* that the accused persisted that he was not aware of what he was carrying but the magistrate persisted in asking ambiguous questions to the accused that prompted the accused to answer and say 'I admit'. The learned magistrate then recorded '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 and that it was his intention to admit to such a statement put to him.

[11] I am of the view that the accused did not admit to all elements of the offence of dealing. It is evident that he raised a defense of lack of knowledge which amounted to a lack of *mens rea* to deal or possess cannabis. In the circumstances the Magistrate should have recorded a plea of not guilty in terms of s 113 of Act 51 of 1977.

[12] 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 for the case to follow its natural course.

Judge(s) signature	Comments:
January J	NONE
Diergaardt AJ	NONE