

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Kashinyenga Timoteus Mwaala</i>	<b>CR:</b> 18/2020 High Court Ref. No: 13/2020
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr Justice January J Honourable Ms Justice Salionga J	<b>Delivered on:</b> 24 March 2020
<b>Neutral citation:</b> <i>S v Mwaala</i> (CR 18/2020) [2020] NAHCNLD 44 (24 March 2020)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The conviction and sentence are set aside.</li><li>2. The proceedings in terms of section 112 (1) (b) of the Act are set aside and the matter is remitted to the magistrate in terms of section 312 (1) of the Act to enter a plea of not guilty in terms of section 113 of the Criminal Procedure Act 51/1977</li></ol>	

**Reasons for Order:**

SALIONGA J (JANUARY J concurring):

1. The accused in this matter was charged with a main count of contravening section 2 (a) of Act 41 of 1971 in that he dealt in 268, 7 grams of cannabis valued N\$ 2687.
2. The accused pleaded guilty, was questioned in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977 and convicted accordingly. He was sentenced to 18 months imprisonment of which 3 months suspended for a period of 3 years on condition accused is not convicted of dealing in cannabis.
3. When I received the matter on automatic review, I directed the following query; "How did the court satisfy itself that the accused admitted all the elements of the offence charged notwithstanding that the legal presumption was not explained to the accused?"
4. The magistrate conceded that the legal presumption was not explained to the accused. However the accused was found in possession of 268.7 grams of cannabis and this weight exceeds 115 grams as stated in the Act. That the learned magistrate erred by failing to explain the legal presumption to the accused after a plea was recorded. The concession was fairly made.
5. Section 10 provides as follows:  
"If in any prosecution for an offence under section 2 it is proved that the accused was found in possession of;  
(i) dagga exceed 115 grams in mass  
(ii)..., it shall be presumed that the accused dealt in such dagga, unless the contrary is proved." (my underling).
6. It must be noted that before reliance can be placed on the presumption, proof to the

contrary is needed. The only way that the accused can present proof is by presenting evidence, which means he /she must be afforded the opportunity to do so under oath or otherwise. The accused cannot attempt to rebut the presumption by means of answers during the section 112 (1) (b) questioning process but by giving evidence in person or by calling witnesses.

7. In the present matter if the prosecutor relied on the presumption, the effect thereof should have been explained to the accused so that he could make an informed decision whether to present evidence in rebuttal. In any event the accused was charged with the main count only and the magistrate should have entered a plea of not guilty in terms of section 113 of the Act.
8. It is clear that the proceedings are not in accordance with justice and has to be set aside. (*See S v Rooi* (CR 64/07) [2007] NAHC 112 (13 April 2007).
9. There is another issue with regard to the condition of suspended sentence but since the sentence is set aside, I find no need to comment or address that.
10. In the result the following orders are made:
  1. The conviction and sentence are set aside.
  2. The proceedings in terms of section 112 (1) (b) of the Act are set aside and the matter is remitted to the magistrate in terms of section 312 (1) of the Act to enter a plea of not guilty in terms of section 113 of the Criminal Procedure Act 51/1977.

J T SALIONGA JUDGE	H C JANUARY JUDGE