

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case No.: CR 42 /2020

In the matter between:

THE STATE

v

JOSUA MWATONGWE

ACCUSED

(HIGH COURT NLD REVIEW CASE REF NO: (167/2020))

Neutral citation: *S v Mwatongwe* (CR 42/2020) [2020] NAHCNLD 88 (20 July 2020)

Coram: SALIONGA J *et* DIERGAARDT AJ

Delivered: 20 July 2020

Flynote: Drug offences — Statutory presumption that accused dealing — Accused pleaded guilty but not admitting dealing — Accused must be given opportunity to rebut presumption — This cannot be done as part of questioning in terms of s 112(1) (b) of Criminal Procedure Act 51 of 1977.

Summary: 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 two years imprisonment.

The accused pleaded guilty and was questioned in terms of s 112(1) (b) of the Criminal Procedure Act 51 of 1977. He admitted that he was in possession of 3.984 kilograms grams of cannabis and when asked what it was for, he answered that he smokes it and did not want to go from person to person in order to obtain the said substance for his personal use.

Court *held*: that a magistrate cannot convict an accused if the accused was not afforded the opportunity to rebut the presumption by giving evidence in person.

ORDER

1. The conviction and sentence are hereby 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 for **another magistrate** to act in terms of s 113 of the said Act.

REVIEW JUDGMENT

DIERGAARDT AJ (SALIONGA 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 two years imprisonment.

[2] The accused was sentenced on 11 June 2020 and the record of proceedings was received by this court on 29 June 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 if it would be presumed that the accused has been dealing in view of the fact that the weight of the dagga exceeded 115 grams. However the magistrate indeed informed the accused of the presumption of dealing during questioning in terms of section 112(1) (b).

[4] The accused pleaded guilty and was questioned in terms of s 112(1) (b) of the Criminal Procedure Act 51 of 1977. He admitted that he was in possession of 3.984 kilograms (grams) of cannabis and when asked what it was for, he answered that he smokes it and did not want to go from person to person in order to obtain the said substance for his personal use. It is clear from the accused answers that he insisted that he was in possession of cannabis for his own use and not with the intention of dealing though he confirmed that he was aware of the presumption of dealing.

[5] The leaned magistrate recorded that: 'the court is satisfied that accused has admitted to all the allegations in the charge and is now found guilty as charged.' The fact of the matter is that, the accused did not admit that he was dealing with cannabis. The accused admitted to possession of cannabis.

[6] The question is whether the magistrate was entitled to convict the accused of dealing?

Applicable Law

[7] 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-

...

(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'.

[8] I am of the view that essentially the effect of the presumptions are 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, unless the contrary is proven by the accused.

[9] This section places a 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 allowed further questioning in order to afford the accused person an opportunity to

prove his onus, the magistrate rather convicted the accused instead of asking the accused further questions.

[10] In *S v Kuvare* 1992 NR 7 (HC) 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 defence 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.

[11] I rely on the case of *S v Rooi* 2007 (1) NR 282 (HC) where the court held that before the prosecution or 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.

[12] I further agree with Tomassi J in the case of *State vs Hafeni* (CR 5/2017) [2017] NAHCNLD 50 (13 June 2017) that the magistrate cannot convict an accused if the accused was not afforded the opportunity to rebut the presumption by giving evidence in person.

[13] Furthermore, the effect of the entrenchment of the presumption of innocence requires that, where a presumption may give rise to the conviction of an accused despite the existence of a reasonable doubt as to his or her guilt, it must be justified. I am of the opinion that *in casu* although the accused indicated that he understood the presumption put to him by the magistrate he did not admit guilt on dealing. He merely indicated that he understands the magistrate's statement.

[14] In the absence of an admission on dealing the magistrate could not have convicted the accused. He should have recorded a plea in terms of s 113 and given the accused the opportunity to rebut the presumption.

[15] The conviction therefore cannot stand and the matter should be remitted to the magistrate in terms of the provisions of s 312 of the Criminal Procedure Act, 51 of 1977 with the direction to act in terms of s 113 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

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

1. The conviction and sentence are hereby 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 for **another magistrate** to act in terms of s 113 of the said Act.

A Diergaardt
Acting Judge

I agree,

JT Salionga
Judge