

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Shilongo Ismael</i>	CR: 8/2022 Outapi 14/2022
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Division of Court: Northern Local Division Delivered on: 17 March 2022
Neutral citation: <i>S v Ismael</i> (CR 8/2022) [2022] NAHCNLD 22 (17 March 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction is confirmed with amended particulars of charge to wit the weight of the cannabis at 1,2 grams and valued at, N\$ 12;2. The sentence is set aside and replaced with the following: The accused is sentenced to 2 (two) months imprisonment;3. The sentence is antedated to 27 January 2022;4. This order to be served on the Oluno Correctional Facility.	
Reasons for the order:	
KESSLAU AJ (SALIONGA J concurring):	

[1] This is a review brought in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 as amended, (hereinafter referred to as the CPA). The review was submitted after one month instead of the required seven days¹ without any explanation provided for the delay.

[2] The accused appeared in the Magistrates Court in the district of Outapi charged with the Contravention of Section 2 (b) of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971: Possession of dagga. The State alleges that on the 26 day of September 2018 at or near Kasikili location in the district of Outapi the accused was wrongfully and unlawfully in possession of a dependence producing medicine or plant from which such medicine can be manufactured namely 15,4 grams of dagga valued at N\$ 140.02. (my underlining).

[3] The undefended accused plead guilty to the charge on his first appearance however he disputed the weight admitting to the possession of just over one gram. The accused furthermore disputed the place he was found, stating it was not Kasikili location but close to NUST. The State conceded to the location however did not accept the weight admitted by the accused and a plea of not guilty was entered in terms of Section 113 of the CPA. After a trial, during which the witness confirmed the weight as submitted by the accused, he was convicted of the possession of cannabis and sentenced to nine months imprisonment.

[4] Upon reviewing the record of proceedings it appears to this court that the proceedings are clearly not in accordance with justice. Being of the opinion that to request reasons from the presiding Magistrate will severely prejudice the accused, it was decided to proceed with the review².

[5] The first concern is that the charge annexure is describing the drug as 'medicine'. Medicines are dealt with in different legislation³ and in the legal context would normally refer to controlled/legalized medical substances used for treatment in the medical profession.

¹ See section 303 of the CPA.

² See Section 304 (2) of the CPA.

³ Medicines and Related Substances Control Act 13 of 2003.

Section 2 (b) of Act 41 of 1971⁴ states that any person who has in his possession or uses any such dependence producing drug or plant shall be guilty of an offence. Furthermore cannabis is listed under Part 1 of the Schedule to the Act as a prohibited dependence producing drug. (my underlining) There is no mention of medicine in Act 41 of 1971. Section 84 (3) of the CPA applies stating: 'In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

[6] It is also noted that the right to apply for Legal Aid was explained to the accused in the following terms: '...will be provided for you by the Government. In this case you may pay half or one third of this cost and the other two thirds will be subsidized by the Government.' (my underlining) Half or a third of total legal cost? Often accused applying for Legal Aid is unemployed and cannot contribute anything to the cost. The above explanation is misleading in that it is untrue⁵. The said explanation appears to be on a template used frequently in review cases emanating from the Division of Oshakati and should be rectified immediately. Depending on the level of education of an accused and if he was aware of his right to legal representation, the failure to properly explain the right to legal representation can amount to an irregularity in proceedings. The question to be asked is a question of fact regarding a possible failure of justice⁶. The circumstances in each case will determine if the irregularity is so grave as to vitiate the proceedings⁷. The accused in this matter was asked again in subsequent appearances if he wants legal representation and showed no interest in such. It was also not his first brush with the law. I therefore find that the failure to properly explain legal rights does not vitiate the proceedings as the accused was aware of these rights and intended to conduct his own defence.

[7] The plea of the accused was taken during September 2018. When the matter eventually proceeded with trial, in January 2022, it was before a different Magistrate. Section 118 of the CPA allows for another Magistrate⁸ to proceed with trial if the Magistrate who noted the plea is no longer available however same should be noted on the record. The record is silent in this regard which amounts to an irregularity in the trial proceedings⁹

⁴ Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971.

⁵ The Directorate of Legal Aid currently, in some cases, requires a contribution of maximum N\$ 350 which is often waived on request.

⁶ *S v Bruwer* 1993 NR 219.

⁷ *S v Mwambazi* 1990 NR 353.

⁸ See *S v Ndiwe* 1988 (3) SA 972; *S v Sibiyi en 'n ander* 1980(2) [NPA] 457.

however did not result in prejudice to the accused.

[8] A witness testified regarding the weighing of the cannabis. The 'Scale Operators Certificate' [Exhibit 'A'] was handed in through the evidence of this witness indicating the weight as 14,2 grams and value at N\$ 140.02 on the first page and the weight at 14,02 grams on the second page. These values were then deleted and replaced with the weight of 1, 2 grams and value of N\$ 12 clearly written in a darker colour ink. No endorsement was made next to the alterations on the document. No questions were asked by the State or the Magistrate to the witness to clarify the alterations. It is unclear who did the alterations and if it was done before or after the plea was taken from the accused. The weight and value are integral parts of the charge and as the accused was undefended it is expected from the magistrate to clarify essential parts of the evidence with questions to the witness for the just decision of the case.¹⁰

[9] After the State witness confirmed the weight of cannabis as indicated by the accused in his plea, three years and four months earlier, his right to cross-examination was explained to him. The accused indicated he understood these rights and he will ask questions. The record then reflects that without any question to the witness from the accused 'cross-examination' is explained again however this time the rights to cross-examination contains the rights normally explained at the end of the State's case. The accused then asked one question in cross-examination and hereafter the State closes its case and the rights at the close of the State's case was explained again. Another annexure attached to the record reflects a third version of 'right to cross-examination' explained to the accused. The level of carelessness displayed with the record keeping by the Magistrate is alarming. It remains the duty of the Magistrate to keep a proper and intelligible record of proceedings¹¹.

[10] During judgment the Magistrate stated: 'Initially accuse (sic) pleaded guilty to the charge in terms of section 112(1)(b) CPA 51/77 and disputed the quantity of 15.4 and said it was 1 point something according to him, such plea was altered to a plea of not guilty in terms of section 113 CPA 51 Oof 1977. (sic) The state then called its witness.....who arrested the accused and weighed

⁹ *S v Mwalyombu* (CR 58/2017) [2017] NAHCMD 271 (25 September 2017); *The State v Lucas* (CR 02/2013) [2013] NAHCNLD 10 (04 March 2013); *S v Mkhuzangewe* 1987 (3) SA 248 (O).

¹⁰ See section 167 of the CPA; *S v Haraseb* (CR 90/2018) [2018] NAHCMD 380 (28 November 2018).

¹¹ *S v Hoadoms* 1990 NR 259 (HC); *S v Sanders* 1990 NR 348 (HC); *S v Haibeb* 1993 NR 457 (HC).

the cannabis. In brief, she cured the state's evidence on the disputed quantity being 15.4. Accused did not ask anything regarding the disputed quantity'. From the judgment it appears that the magistrate convicted the accused of the possession of 15.4 grams of cannabis. As the Magistrate also referred to the disputed location of the crime at Kasikili, it is doubtful if the magistrate took the time to read the initial plea and properly apply his mind. Evidence presented was that the empty exhibit bag weighed 15.4 grams thus the Magistrate convicted the accused on the weight of an empty exhibit bag. Furthermore the accused 'did not ask anything regarding the quantity' because the witness confirmed the weight at 1.2 gram.

[11] After conviction the State produced a previous conviction. The events then played out according to the record as follows:

'Crt: acc, the state alleges that you have a previous conviction pertaining to the possession of cannabis, do you confirm this?

A. Yes I am aware.

Crt: the state wants to bring an application for it to be admitted, any objection?

A. Previous admitted as exhibit B for the state.'

The objection of the accused, if any, is not recorded. On closer inspection of Exhibit "B", the J14 previous conviction, it is apparent that the space allocated for the reply of an accused, when confronted with the allegation of a previous conviction, is incomplete and unsigned by the Magistrate. In terms of Section 271(2) of the CPA 'the court shall ask the accused whether he admits or denies any previous convictions...' If the accused denies such previous conviction the State may present evidence to prove it¹² and if the accused admits the previous conviction the court shall take it into account when imposing sentence¹³. The accused admitted that he is 'aware' that the State is alleging that he has a previous conviction but never admits the allegation. The previous conviction was thus not properly before court and could not have been considered as such.

[12] The right to mitigation is then explained on the record as well as per annexure and once again the wording of the two versions is different.

[13] According to the record the accused in mitigation said he has a five year old boy

¹² Section 271(3) of the CPA.

¹³ Section 271 (4) of the CPA.

which he had to take to the hospital because he was 'beaten by the dog' (sic). The State submitted in aggravation that drugs is the 'core casue to crimes'(sic); 'accused person fuels detriys our society' and 'it is oin acses lie this where the interest of socirty demands harsh sentences'. (sic) The State then requested imprisonment of six months as a fine 'will be a mere slap on his face.' In sentence the magistrate stated that there is no doubt that the 'offence is quite serios' (sic); 'accused has a previous convtion and did not show any remorse during his mitigation., (sic) in the circumstaces, accused you are sentenece to nine moths direct imprisonment' (sic). The Magistrate indicated that the accused showed no remorse however a guilty plea is normally an indication of some remorse from an accused.

[14] The accused plead guilty to the possession of 1, 2 gram of cannabis and throughout the proceedings confirmed his guilt. The accused will suffer no prejudice if the conviction is confirmed on the amended particulars of charge.

[15] The Magistrate's sentence however was based on the incorrect weight of cannabis whilst also considering a non-admitted previous conviction. It follows that the sentence cannot stand and will be replaced with an appropriate sentence.

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

1. The conviction is confirmed with amended particulars of charge to wit the weight of the cannabis at 1,2 grams and valued at, N\$ 12;
2. The sentence is set aside and replaced with the following: The accused is sentenced to 2 (two) months imprisonment;
3. The sentence is antedated to 27 January 2022;
4. This order to be served on the Oluno Correctional Facility.

Judge(s) signature	Comments:
E. E. KESSLAU ACTING JUDGE:	
J. T. SALIONGA JUDGE:	

