REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGMENT

Case No.: CR 9/2021

In the matters between:

THE STATE

v

JONASIU JOHN **ACCUSED**

HIGH COURT NLD REVIEW CASE REF NO: (88/2021)

THE STATE

v

KOTOKENI JOAO **ACCUSED**

HIGH COURT NLD REVIEW CASE REF NO: (91/2021)

THE STATE

v

MOVILONGO TJEKULILE **ACCUSED**

HIGH COURT NLD REVIEW CASE REF NO: (86 /2021)

Neutral citation: *S v John; S v Joao; S v Tjekulile* (CR 9/2021) [2022] NAHCNLD 26 (28 March 2022)

Coram: SALIONGA J *et* KESSLAU AJ

Delivered: **28 March 2022**

Flynote: Criminal Procedure – Review – Record – Not proofread – Magistrate and clerk of court should take proper care when preparing records – Magistrate has final and ultimate responsibility of ensuring proper record is submitted on review.

Summary: These 3 abovementioned cases are before me for automatic review. They are from the same magisterial district and have common mistakes. The manner in which the records were submitted is a concern. Magistrate failed to keep proper record. Some contents of the record were erroneously inserted and in some cases magistrate continued with the matter when she was not supposed to do so. It appears that the magistrate did not proofread the records. Documents not relevant to a particular case were included in some records of the proceedings. It also appears the record was corrected after queries were directed. Magistrate *functus officio*.

ORDER

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1. In High Court reference no 88/2021

1.1 The conviction is confirmed.

1.2 The sentence on review cover sheets is corrected to read: 18 months imprisonment as reflected on the original record.

2. In High Court reference no 91/2021

2.1 The conviction is confirmed.

2.2 The sentence is confirmed. However, the remarks in paragraph 1 on the reasons for sentence is removed.

3. In High Court reference no 86/2021

3.1 The conviction and sentence on the main count are set aside.

3 .2 The matter is remitted to the magistrate in terms of section 312(1) of this Act to properly explain the presumption and to question the accused afresh.

JUDGMENT

SALIONGA J (KESSLAU AJ concurring):

Introduction

[1] The above itemised cases were sent for automatic review by the same magistrate having sat at Okahao and Outapi respectively. They were all allocated to my brother Munsu AJ who directed similar queries to the magistrate. Responses have been received after the reviewing judge has in the meantime left the bench and are now placed before me.

[2] These cases reflect common mistakes and errors resulting from failure of the magistrate to proof-read the record and keeping proper record. The importance of keeping proper and proof-reading records has been articulated by January J in *S v Kamenye*[1]. It seems same has escaped the attention of some magistrates in cases such as these resulting in massive increase of review cases. I have decided to deal with all of the aforesaid cases in one judgment.

[3] It is apparent from the records that the magistrate in all three cases did not proofread the final typed record to ensure that incomplete or incorrect records were not sent on review. I will deal with these cases individually to emphasize the point.

[4] In High Court Review Case No 88/2021 of *S v Jonasiu John*, three accused persons were charged with assault with intent to do grievous bodily harm. The proceedings of 22 February 2021 indicates that the charge of assault with intent to do grievous bodily harm (common purpose) was only put to accused 1 and 2 who pleaded guilty to the charge. It is not apparent from the record whether the charge was put to 3rd accused or what happened to him.

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[1] *S v Kamenye* (CR 9/2019) [2019] NACNLD 31 (26 March 2019)

[5] Notwithstanding the above, accused 1, Immanuel Ndeipanda was questioned in terms of section 112 (1) (b) of the Criminal Procedure Act, 51 OF 1977 as amended (CPA). The court was not satisfied with accused 1's explanation on the main account. This accused stated that he was not having the intention to assault but that the complainant was following him. A plea of guilty was thereby altered to a plea of not guilty in terms of section 113 of the CPA. The court proceeded to question accused 3 hereby referred on record as Jonasiu John in terms of section 112 (1) (b) of the Act (CPA) and was satisfied that accused 3 admitted all the essential elements in the charge annexure and the state accepted the plea. Thereafter the court convicted accused 3 of Assault with intent to do grievous bodily harm read with common purpose as per the charge annexure.

[6] The prosecutor applied for a separation of trial in terms of section 157 of the CPA as amended in order for accused 3 to be tried separately. The court granted the application for separation and ordered accused 1 and 2 to be entered on a new charge sheet. Accused 3 mitigated under oath and was thus sentenced to 18 months direct imprisonment.

[7] Surprisingly, on a J15; the following appears:

'Plea taken on 22.2 2021 accused 1 NG- section 113 applied.
Acc 3 Guilty section 112 (1) (b);
Judgment on 22.2.2021; Acc 3 only-Guilty as charged.
Accused 1 and 2 separated –See151 of Act 51/1977
Accused 3 only –See Record.'

[8] The record is in a shamble and more confusing when one checks the review cover sheet. The review cover sheets indicate a conviction of accused 3 Jonasiu John only. There is no indication on the record of the charge being put to this accused person and neither a sign that he plead to the charge. According to the review cover sheets accused 3 was sentenced to 38 months imprisonment which sentence is totally different from the 18 months depicted on J15 and on the original record of proceedings.

[9] Queries were directed to the magistrate to clarify why if there are three accused persons charged only two accused persons pleaded to the charge. The reviewing Judge further wanted clarity why the sentence on review cover sheets was different from the one on the record.

[10] The magistrate responded that it is indeed correct that three accused persons were involved in this case. She explained that as follows:

> '….the record erroneously indicates a plea was taken in respect of accused 1 and 2 but it was actually taken in respect of accused 1 and 3 who are Ndeipanda Immannuel and Jonasiu John respectively. … accused 1 and 3 pleaded to the charge because the state placed the matter on the roll for purposes of plea in respect of only those two accused people, it is out of the court hands, the state is dominis litus. Accused 2 on bail as per proceedings dated 14.11.2020 (Sic). Thus a separation of trials was granted in respect of accused two as the State is dominis litus.'

She added that '…the correct sentence imposed by the court in respect of John Jonasiu is 18 months direct imprisonment.' She furthermore explained that the sentence of 38 months direct imprisonment was an error by the typist.

[11] I am satisfied with clarity given owing to the magistrate's failure to inspect the record properly. In my view the proceedings appear to be in accordance with justice as the names of the accused persons who were questioned in terms of section 112 (1) (b) of the Act and the sentence of 18 months were correctly reflected on the original record. I find the error not material to vitiate the proceedings and confirm the proceedings with some correction.

[12] In High Court ref no 91/2021 and 86/2021 it appears from the reasons on sentence that the magistrate in both cases introduced, considered and relied on facts not placed before her. In High Court ref no 91/2021 she remarked that 'the court is in agreement with the state that accused person had planned the commission of the offence and executes (sic) it, and this is aggravating.' In the latter case (88/2021) she remarked that 'the

accused person himself stated that he intended to sell that cannabis to make money and this is very aggravation.' Whereas the record in the former case does not contain such submission by the state and the latter record does not contain such statements by the accused. She was also asked to clarify whether the accused's rights to appeal and review were explained to him as there was no indication on the record that they were explained and no pro-forma to that effect was attached to the case record in High Court ref no 91/2021.

[13] The learned magistrate responded that introducing, considering and relying on materials/facts not placed before her may have been as a result of her being overwhelmed by dealing with too many cases on the roll in a single day. That this may have also led to her mistakenly indicating and including what she believed were facts that formed part of another case. Further that the contents of paragraph 1 in the reasons for sentence, were erroneously inserted and do not form part of the proceedings. On whether the accused's rights were explained she confirmed that the rights were explained and the pro-forma might have been lost through too many hands between the typist and the clerk.

[14] In High Court ref no 86/2021 the reviewing judge further wanted clarity in that' if during questioning in terms of section 112(1) (b) of the CPA, the court did not establish from the accused whether cannabis is a dependence producing drug, can it be said that the accused admitted to all the allegations and essential elements of the offence?

[15] The learned magistrate conceded that in this case (86/2021) no question was put to the accused to establish from him whether cannabis is a dependence producing drug and as a result all the essential elements of the offence were not established.

THE LAW

[16] In *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019) January J agreed with the sentiments expressed and endorsed the approach taken in *S v*

Nomvula Linah Tsabalala, an unreported judgment from the High Court of South Africa, Free State Division, Bloemfontein, Review No: 102/2015, Delivered on 05 May 2016. This court in accepting and reiterating the approach taken in *S v Nyumbeka* 2012 (2) SACR 367 (WCC) also concluded that the ultimate responsibility is on the magistrate to see to it that a proper record is sent to the High Court.

[17] I have read and considered the record in High Court Review Case no 91/2021 of S v Kotokeni Joao and in High Court ref no 86/2021 of S v Movilongo Tjekulile, I could not find the remarks made by the learned magistrate in paragraph 1 on the reasons for sentences nor could I find the said statement by the accused. In other words the aforesaid records do not contain such facts/statements. With regards to the magistrate's failure to question whether accused knew if cannabis was a dependence producing drug as part of the essential elements, I find that the concession was properly made.

[18] At the time of preparing this judgment I have noticed that although the magistrate heavily relied on the presumption in convicting the accused on the main charge of dealing in High court ref no 86/2021, the purported explanation of section 10(1) (a) of Act 41 of 1971 was not properly made to this accused.

[19] Section 10(1) (a) of Act 41 of 1971 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 exceeding 115 grams in mass;
>
> (ii) .....,
>
> it shall be presumed that the accused dealt in such dagga, unless the contrary is proved.' (my underlining)

[20] It is clear that the purpose of this provision (and the remainder of section 10) is to assist the prosecution in proving its case with a rebuttable evidentiary presumption. The

legislature has set a threshold requirement for the presumption to apply namely, that it must be proved beyond reasonable doubt that the accused was in possession of dagga exceeding 115 grams in weight. (See *S v Noble* 2002 NR 67 (HC) 69C-D.) The section was legislated to assist in cases where the accused in the course of questioning in terms of Section 112(1) (b) of Act 51 of 1977 admits that he was in possession of dagga exceeding 115 grams in weight.

[21] Sight should not be lost that this is a rebuttable presumption by proof to the contrary. The only way the accused can rebut the presumption is by way of presenting evidence, which means 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 cannot attempt to rebut the presumption by means of answers during the section 112(1) (b) questioning process. In *casu,* the accused was not given that opportunity to rebut the presumption and that is a misdirection capable of vitiating the proceedings.

[22] In the circumstances of this case accused pleaded guilty to the main and alternative charges and the following appears on record:

‘Crt: Accused person before you plea the legal presumption in respect of the count 1 you are facing is that if the weight of the cannabis you dealt in exceeds 115 grams as per section 10 of Act 41 of 1971, is that it is presumed dealing with an alternative charge of possession, do you understand.

Acc: Yes I understand.’

[23] It is not clear to this court what the aforesaid explanation entails or means and whether the undefended accused understood the explanation and what was expected of him to do either. Accused during questioning admitted that he possessed cannabis but maintained that he had it in his pocket for personal use. It is not disputed in this case that cannabis possessed exceeded 115 grams and the state alleged that he was dealing in cannabis. If the prosecutor relied on the presumption, the effect thereof

should have been clearly explained to the undefended accused so that he could make an informed decision whether to present evidence in rebuttal. Instead the prosecution accepted the plea on the main charge which allegations were not admitted by the accused. In my view the conviction on the main charge was not admitted and I am not inclined to confirm the proceedings.

[24] From the remarks made in the last two cases it appears as if the magistrate has developed a self-pro-forma for use in judgment on sentence which she fails to accordingly adjust whenever she deals with a particular case to ensure that the remarks are suitable to the circumstances of the case at hand. This is unacceptable as her action has the effect of unnecessary queries being sent instead of cases being confirmed immediately on review. It is imperative that the record should reflect exactly what happened in court unlike what happened in the present matters. To a large extent the said practice should be discouraged and discontinued.

[25] In the result, the following orders are made:

1. In High Court reference no 88/2021;
1.1 The conviction is confirmed.
1.2 The sentence on review cover sheets is corrected to read: 18 months imprisonment as reflected on the original record.

2. In High Court reference no 91/2021
2.1 The conviction is confirmed.
2.2 The sentence is confirmed. However, the remarks in paragraph 1 on the reasons for sentence is removed.

3. In High Court reference no 86/2021
3.1 The conviction and sentence on the main count are set aside.
3.2 The matter is remitted to the magistrate in terms of section 312(1) of this Act to properly explain the presumption and to question the accused afresh.

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J. T. SALIONGA

Judge

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E .E. KESSLAU

Acting Judge