



CASE NO.: CR 23/2010

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

JUDAS SIMON IMMANUEL

(HIGH COURT REVIEW CASE NO.: 236/2010)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: September 29, 2010.

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused was arraigned and convicted in the Magistrate's Court, Oshakati on a charge of contravening s 2 (b) of Act 41 of 1971 for having been found in possession of an insignificant quantity of cannabis (less than 1 gramme).

[2] The accused pleaded guilty to the charge before magistrate Namweya, but during the questioning in terms of s 112 (1)(b) of the Criminal Procedure Act, 1977 (Act No 51 of 1977), the accused denied that he had the required intent of possessing the prohibited drug and suspected that it had been planted on him. A plea of not guilty was entered in terms of s 113 of the Act, whereafter proceedings were adjourned for trial.

[3] On July 22, 2010 the matter came before magistrate Haihambo and after the prosecutor informed the court that the matter was up for trial, he presented the evidence of one State witness. The accused testified in his defence but in the end, was convicted as charged.

[4] When the case was called before magistrate Haihambo, the prosecutor did not inform the court as to the unavailability of magistrate Namweya; as he was supposed to do under s 118 of the Act, when bringing the matter before a different magistrate than the one who took the accused's plea. Section 118 of the Act reads:

“If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court.” (My emphasis)

[5] In *S v Wellington*, 1991 (1) SACR 144 (Nm) at 148g-h Frank AJ, (as he then was), dealt with a similar situation and stated the following:

*“Section 118 of the Criminal Procedure Act only sanctions this procedure where the original presiding officer is ‘not available’ and does not entitle the prosecution to proceed before another presiding officer for any other reason. I agree with M T Steyn J, (as he then was) that to continue with a trial in front of another magistrate where the original magistrate is still available constitutes an irregularity. If the original magistrate is not available it is the duty of the State to place this fact on record. See: *S v Mkhuzangewe*, 1987 (3) SA 248 (O) at 266F-267A.”*

(My emphasis)

[6] In the present case there is no indication on the record of proceedings of the 22nd of July 2010 that magistrate Namweya was *not available* to continue with the trial and in the absence of such an indication, it was irregular for magistrate Haihambo to continue with the trial as [she] did. In the circumstances the conviction and sentence cannot be permitted to stand.

[7] It must be emphasised that it is not irregular for one magistrate to commence with the trial where the accused had pleaded before another magistrate *as long as the record reflects that the magistrate before whom the accused had pleaded, is not available* and no evidence has been adduced yet.

[8] Although s 118 only refers to cases where “*an accused at a summary trial pleaded not guilty*”, it was held in *The State v Sakaria Ekandjo and Another* (unreported) Case No. CR 21/2000 delivered on 22.01.2002 that “*s 118 not only applies to those instances where an accused has pleaded not guilty but also to those cases where a judicial officer, not satisfied that an accused had intended to plead guilty, enters a plea of not guilty on his or her behalf in terms of s 113 of the Act ...*”

[9] In the result, the Court makes the following order:

1. The proceedings of July 22, 2010 and the accused’s subsequent conviction and sentence are hereby set aside.
2. The matter is remitted to the Magistrate’s Court Oshakati with the direction that the trial should commence before magistrate Namweya, unless unavailable; in which instance the matter should be dealt with in terms of s 118 of Act 51 of 1977.

LIEBENBERG, J

I concur.

TOMMASI, J