



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**JUDGMENT**

Case no: CR 25/2012

In the matter between:

**THE STATE**

and

**BETU KANDITU**

**High Court NLD Review Case Ref No.: 152/2012**

**Neutral citation:** *The State v Kanditu* (CR 25/2012) [2012] NAHCNLD 05  
(02 November 2012)

**Coram:** LIEBENBERG J and TOMMASI J

**Delivered:** 31 Oktober 2012

**Flynote:** Criminal Procedure – Section 112 (1)(b) questioning – Accused admits being in room where prohibited substance found – Accused disputes

having been in possession of substance – Court should have entered a plea of not guilty.

**Summary:** The accused pleaded guilty on a charge of possession of cannabis, a dependence-producing substance but when questioned in terms of s 112 (1)(b) of Act 51 of 1977, disputed being in such possession. The court notwithstanding convicted instead of entering a plea of not guilty in terms of s 113. Conviction and sentence set aside with direction to enter a plea of not guilty and to proceed to trial.

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### ORDER

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In the result the following orders are made:

1. The conviction and sentence are set aside.
2. The matter is remitted to the Magistrate's Court, Opuwo in terms of s 312 (1) of Act 51 of 1977 with the direction to act in terms of s 113.
3. In the event of a subsequent conviction, the court when sentencing, must take into account the sentence already served by the accused.
4. If in the mean time a part-fine has been paid, the accused must be refunded.

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### JUDGMENT

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LIEBENBERG J (TOMMASI J concurring):

[1] The accused was unrepresented when he appeared in the magistrate's court in the district of Opuwo on a charge of being found in possession of 0.07 grams of cannabis, a dependence-producing substance, in contravention of s 2 (b) of Act 41 of 1971.<sup>1</sup> He was convicted on his plea of guilty and sentenced to a fine of N\$400 alternatively 4 months imprisonment.

[2] Pursuant to the plea of guilty the magistrate questioned the accused in terms of s 112 (1)(b) of the Criminal Procedure Act 51 of 1977 and when asked what he intended doing with the substance (cannabis/dagga) found in his possession, he responded in the following terms:

'A: It was not my dagga as I was just found in the room where dagga was found as I was lying down after coming from the club.

Q: Who was with you in the room?

A: I was alone in the room as I went to my room in order to sleep and found a friend with a girlfriend so I just went in that room.

Q: Do you know dagga?

A: I only heard about it.

...

Q: Whom did you say the room belonged to?

A: Katjima.

Q: Was Katjima present when the dagga was found?

A: No.

...

Q: Where exactly dagga was found?

A: It was found under the pillow.' (Emphasis provided)

[3] When the matter came on review, a query was directed to the magistrate enquiring from her whether the accused's answers to the court's questioning did not raise a defence in that he disputed being the owner of the substance

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<sup>1</sup> Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971.

and claimed only to have been present in a room of a friend where it was subsequently found under a pillow.

[4] The magistrate correctly concedes that she, in view of the answers given by the accused on the court's questioning, should have entered a plea of not guilty so that the State could lead evidence on the circumstances under which the accused was arrested; hence she requests the setting aside of the conviction and sentence.

[5] From the excerpt above it is evident that the accused did not unambiguously admit possession of the substance in question, but rather alleges that he was merely in Katjima's room where the substance was found under a pillow. When asked why he pleaded guilty he replied by saying: 'I was found at the place where [there] was dagga', and at no stage did he admit that he had the intention to possess the cannabis found in the room where he was sleeping. The fact that the accused admitted that he was present when the substance was weighed; the value thereof being N\$3; and that he knew the possession of cannabis is punishable by law, did not place him in possession of the prohibited substance. He clearly lacked the required *mens rea* and the court, therefore, should not have been satisfied and convicted. Hence, the conviction cannot be permitted to stand.

[6] Consequently, it is ordered:

The conviction and sentence are set aside.

1. The matter is remitted to the Magistrate's Court, Opuwo in terms of s 312 (1) of Act 51 of 1977 with the direction to act in terms of s 113 and to proceed to trial.
2. In the event of a subsequent conviction, the court when sentencing, must take into account the sentence already served by the accused.

3. If in the mean time a part-fine has been paid, the accused must be refunded.

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**JC LIEBENBERG**

JUDGE

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**MA TOMMASI**

JUDGE