

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT**

Case No: CR 56/2017

In the matter between:

THE STATE

And

MUSHWAULE SITENGU

ACCUSED

**(HIGH COURT MAIN DIVISION REF. NO. 1229/2017)
(MAGISTRATE SERIAL NO. 111/2017)**

Neutral citation: *S v Sitengu* (CR 56/2017) [2017] NAHCMD 260 (08 September 2017)

Coram: SIBOLEKA J AND UNENGU AJ

Delivered: 08 September 2017

Flynote: Criminal law: Section 112(1)(b) of the Criminal Procedure Act 51 of 1977 only allows questioning of the accused on the elements of the offence preferred against him by the prosecution.

Summary: The accused was charged with possession of dependence producing drugs in contravention of section 2(b) read with sections 1, 2(i) and/or 2(iv), 7, 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1971, as amended. While questioning the accused on the preferred charge was still in progress the court switched over to a charge of dealing in prohibited dependence producing drugs which has not been placed before court or put to the accused, and effected a conviction thereon without laying a basis for such a move.

Held: The conviction on dealing in prohibited dependence producing drugs is substituted by that of possession or use of prohibited dependence producing drugs in contravention of section 2(b) read with sections 1, 2(1) and/or 2(iv), 7, 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1971 as amended. The sentence imposed on the accused is confirmed.

ORDER

In the result I make the following order:

The conviction of dealing in prohibited dependence producing drugs is set aside and replaced with that of possession or use of prohibited dependence – producing drugs. The sentence imposed on the accused is confirmed and antedated 24 July 2017.

REVIEW JUDGMENT

SIBOLEKA J (UNENGU AJ concurring):

[1] The accused appeared in the Katima Mulilo Magistrate's Court on the following charges:

Count 1 reads:

“

ANNEXURE “B”

STATE MUSHWAULE SITENGU

COUNT ONE

CASE NO: B 153/2017

61. PROHIBITED DEPENDENCE – PRODUCING DRUGS: DEALING

MAIN COUNT:

That the accused is guilty of contravening Section 2(b) read with Section 1, 2(i) and/or 2(iv), 7, 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1971, as amended.

In that upon or about the 30th day of May 2017 and at or near Wenela Border in the district of Katima Mulilo the said accused did wrongfully have in his possession or use a prohibited dependence-producing drug. 230 grams of cannabis valued at N\$2 300.”

[2] The Magistrate started questioning the accused in terms of section 112(1)(b) of Act 51 of 1977. For purposes of clarity I will quote verbatim the questioning up to where the court suddenly, and without any explanation or warning to the undefended accused just switched over and started questioning the accused on “dealing in prohibited dependence producing drugs ...”.

“Q: Accused were you forced or influenced to plead guilty in respect count?

A: No

Q: Why do you admit guilt?

A: I plead guilty I was found in possession of the cannabis. I bought the cannabis to smoke the cannabis.

Q: Describe this cannabis to court?

A: Its in the form of leaves and have seeds inside.

Q: Did any medical Doctor made a prescription for you to use or to smoke this cannabis?

A: No

Q: Did this incident occur on the 30th of May 2017?

A: Correct

Q: Near Wenela Border?

A: Yes

Q: Within the district of Katima Mulilo?

A: Yes

Q: The state alleges that you were dealing in wit: 230 grams of cannabis valued at N\$ 2 300?

A: Yes I admit

Q: Did you know that your actions were wrong and unlawful?

A: Yes

Q: Did any person gave you the right to deal in cannabis?

A: No

Q: Were you aware that if you were caught you will be punished by law?

A: Yes

Q: What happened to the cannabis?

A: They were taken by the officer.

Crt: Satisfied that accused admitted to all the allegations in "the main count" of dealing. Accused is found guilty."

[4] The word 'dealing' in the introductory heading of the charge sheet is substantially at variance with the contents of the charge that follows immediately thereunder. The contents of the charge relates only to possession or use of prohibited dependence producing drugs

[5] Instead of questioning the accused on the elements of possession only which is the charge he pleaded to, he was in between and without any basis also questioned on the elements of dealing in prohibited dependence producing drugs.

[6] Procedurally it was traditionally much safe for the prosecution to have charged the accused on dealing in prohibited dependence producing drugs in contravention of section 2(a) of Act 41 of 1971 as amended as the main count. In the alternative a charge of possession or use of prohibited producing drugs should have

been preferred against him.

[6.1] In the above example if the accused could have pleaded guilty on the main count of dealing and after questioning him, the Court was satisfied that he indeed intended pleading guilty on the said main count, a conviction would then have appropriately followed thereon, and the alternative count would then have automatically fallen off.

[7] On this matter the prosecution preferred to charge the accused on possession of or use of prohibited dependence producing drugs as the main count only without any alternative. This choice by the prosecution restricted the Court to relate only to possession and to nothing else. The Court was however at liberty to warn and explain to the undefended accused the applicability of the presumptions of dealing in prohibited dependence producing drugs. This should have been done immediately after he pleaded guilty when the Court realized that he possessed drugs (dagga) in excess of 115 grams. This should have been coupled with a warning of a possible conviction on dealing in the said drugs.

[7.1] This warning is to the fact that the Act regards a person who is found in possession of drugs (dagga) in excess of 115 grams to have not only possessed and used it himself, but that he is also dealing in it and is selling it to other members of the public at a price, which is a more serious offence than possession.

[8] Failure by the trial Court to explain to the undefended accused the legal consequences of being found with cannabis in excess of 115 gram is a material irregularity which goes to the core of the conviction that followed immediately thereafter on dealing in prohibited dependence producing drugs.

[9] It follows therefore that the conviction of the accused on dealing in prohibited dependence producing drugs should not be allowed to stand.

[10] In the result I make the following order:

The conviction of dealing in prohibited dependence producing drugs is set aside and replaced with that of possession or use of prohibited dependence producing drugs.

The sentence imposed on the accused is confirmed and antedated 24 July 2017.

A M SIBOLEKA
Judge

P E UNENGU
Acting Judge