



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 47/2019

In the matter between:

THE STATE

and

JOHAN SWARTBOOI

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 801/2019)

Neutral citation: *S v Swartbooi* (CR 47/2019) [2019] NAHCMD 222 (03 July 2019)

Coram: NDAUENDAPO, J and UNENGU, AJ

Delivered: 03 July 2019

Flynote: Criminal Procedure – Plea of guilty – Questioning in terms of s 112 (1) (b) of the Criminal Procedure Act 51 of 1977 – Questioning proceedings riddled by multiple errors – Questioning not done following the annexures attached to the charge sheet which set out the offences the accused charged with – Apart from one

question asked about the possession of cannabis, no other question put to the accused to establish whether he admits the essential allegations of possession of dependence-producing substance.

Summary: The accused in the matter was charged with, convicted and sentenced for possession of dependence-producing substance, an offence under the provisions of s 2 (b) of Act 41 of 1971, and common law escaping from lawful custody. The conviction on both counts came after the accused pleaded guilty to both charges and questioned in terms of s 112 (1) (b) by the learned magistrate. Apart from one question asked with regard to possession of cannabis in count 2, no other questions were put to the accused to establish from him whether he admits or denies the essential allegations or elements of the offence of possession of dependence-producing substance. As a result, therefore, the court *held* that the proceedings in terms of s 112 (1) (b) were riddled by multiple errors.

Held further that the proceedings not conducted following the annexures attached to the charge sheet. Consequently, the conviction and sentence on both counts are set aside and the matter sent back to the magistrate to properly question the accused in terms of s 112 (1) (b) and deal further with the matter in accordance with the law.

ORDER

- a) The conviction and sentence in both counts 1 and 2 are hereby set aside.

 - b) The matter is remitted to the Magistrate's Court Usakos for the magistrate to properly question the accused in terms of s 112 (1) (b) and further deal with the matter in accordance with the law.
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REVIEW JUDGMENT

UNENGU, AJ (NDAUENDAPO, J concurring):

[1] This matter was submitted for automatic review pursuant to the provisions of s 302 of the Criminal Procedure Act¹ (herein referred to as the CPA).

[2] The accused who elected to conduct his own defence was charged in the Usakos Magistrate's Court with the common law crime of escaping from lawful custody and possession of dependence producing substance in contravention of s 2 (b) read with sections 1, 2 (i) and 2 (iv), 7, 8, 10, 14 and part one of the schedule to the Act² as counts 1 and 2 respectively.

[3] He pleaded guilty to both counts and was questioned in terms of s 112(1)(b) of the CPA. After questioning, the learned magistrate was satisfied that the accused had admitted all allegations of the charges put to him, convicted and sentenced him as follows:

'In terms of count 1: Accused is sentence to a prison term of 18 months. In terms of count 2: accused is fined N\$2000 or 12 months imprisonment in default of payment, wholly suspended for a period of 3 years on condition that accused is not convicted of possession of dependence producing substances committed during the period of suspension.'

[4] I addressed the following query for the attention of the magistrate:

- '1. The record does not show the proceedings in terms of s 112 (1)(b) of the Criminal Procedure Act 51 of 1977 in respect of count 2.
2. Correct the confusion in the record of proceedings. It would seem to be a repetition of one and the same notes bound three times and submitted for review. Your urgent response is appreciated.'

[5] Two weeks later, the response to the query was received.

'Your letter dated 6 May 2019, which I received on 14 May 2019 has reference.

1. In response to the query by the honourable Justice Unengu, I concede that a typing mistake was made with regard to count 2 and that both counts indicated count 1.
2. It was an oversight on my part and I thus pray that the sentence be confirmed.

¹ Act 51 of 1977 as amended.

² Act 41 of 1971 as amended.

3. I would further appreciate guidance from the honourable Justice in this regard. Regards.'

[6] Apart from the typing mistake in respect of the numbering of counts which has been conceded by the magistrate, the proceedings in terms of s 112 (1) (b) are riddled by multiple errors. The questioning was not conducted following the annexures attached to the charge sheet which set out the offences the accused was charged with.

[7] To illustrate the point that the learned magistrate struggled to question the accused, the questioning in respect of count 2 is reproduced verbatimly hereunder:

'PP: The accused has indicated that he will appear in person as he abandoned his lawyer and the matter is for the continuation of trial. The accused has indicated that he would plead guilty on this count also.

Court: Accused you indicated that you want to represent yourselves and that you are abandoning the legal aid lawyer to plead guilty.

Accused: yes, I will represent myself

Prosecutor: Put charges as per annexure a

Court: How do you plea on count 2

Accused: Guilty, I am pleading guilty on count 2

Prosecutor: Can the court continue in terms of Sec. 112 (1) (b)

Court: Explain Sec 112 (1) (b) to accused.

As you have pleaded guilty, the court will not question you to establish if you admit all the elements of the offence. You are not compelled to answer any questions, as you have the right to remain silent and a right to incriminate yourself. No negative inference may be drawn should you wish not to answer any questions all that will happen is that a plea of not guilty will be interested and the state will have to prove all the elements of the offence.

Do you understand that?

Accused: yes

Courts questions as per section 112 (1) (b) in terms of count 2

1. Q: Accused did you pleaded guilty freely and voluntarily
A: yes
2. Q: Why did you plead guilty to the charge?
A: I escaped from the Usakos Police Holding Cells by climbing through the roof. I went to the location and on my return I was arrested by the Police as I wanted to go back inside. 5 ballies of Cannabis was found on me by the Police and I was arrested
3. Q: Where did this happened?
A: It happened at the Usakos holding cells in December 2018
4. Q: Did you know it was wrongful to escape from lawful custody
A: yes, it was unlawful?
5. Q: Do you know that it was unlawful?
A: Yes, I knew
6. Q: Did you or do you have any medical certificate or prescription to be in possession of cannabis?
A: No, I do not have

Crt: accused the court is convinced that you have admitted all the allegation in the charge you and therefore you are found guilty as you have pleaded on that count alone PP: The state proof no previous conviction.' (emphasis added)

[8] The only question relevant to the offence of possession of dependence producing substance is the question at para 6 which reads "Did you or do you have any medical certificate or prescription to be in possession of cannabis?" Other than that, no question was put to the accused to establish from him whether he admits the essential allegations or elements of possession of dependence producing substance as prescribed under s 2 (b) of the Act.

[9] In this matter with the questioning cited above in para 7 hereof, the learned magistrate claimed to have been satisfied that the accused admitted the allegations in the charges and found the accused guilty as charged on both counts: What allegations in counts did the accused admit to be found guilty as charged? What have been admitted by the accused are scanty or hardly enough to warrant a verdict of guilty as charged.

[10] Therefore, the conviction and the sentences imposed will be set aside and the matter remitted for proper questioning in terms of s 112 (1) (b).

[11] Before I make that order, I would like to point out that this jurisdiction has delivered a raft of judgments on s 112 (1) (b).³ But for reasons known only to magistrates, they prefer not to follow the principles and guidelines captured in the undermentioned decisions by reputable men and women of this court which decisions are binding on them. Magistrates are therefore encouraged to read and acquaint themselves with the principles captured in the Namibian case law.

[12] In the result, I make the following order:

- a) The conviction and sentence in both counts 1 and 2 are hereby set aside.
- b) The matter is remitted to the Magistrate's Court Usakos for the magistrate to properly question the accused in terms of s 112 (1) (b) and further deal with the matter in accordance with the law.

E P UNENGU
Acting Judge

N NDAUENDAPO
Judge

³ *S v Kaevarwa* 2004 NR 144 (HC); *S v Taseb and Others* 2011 (1) NR 326 (HC); *S v Combo and Another* 2007 (2) NR 619 (HC); *S v Nashapi* 2009 (2) NR 803 (HC); *S v Goagoseb* 1995 NR 165 (HC) among others.