

Case Title: <i>The State v Cuna Issuf Omar</i>	Case No: CR 50/2020
High Court MD Review No: 133/2020	Division of Court: Main Division
Heard before: Mr Justice Liebenberg <i>et</i> Lady Justice Claasen	Delivered on: 17 July 2020
Neutral citation: <i>S v Omar</i> (CR 50/2020) [2020] NAHCMD 297 (17 July 2020)	
The order: <ol style="list-style-type: none"> a. The convictions and sentences on counts 1 and 2 are set aside. b. In terms of s 312 of the CPA, the accused should henceforth be brought before the trial court and the magistrate is directed to comply with the provisions of s 112(1) (<i>b</i>) and bring the matter to its natural conclusion. c. In the event of a conviction, the magistrate, in considering an appropriate sentence, should have regard to the time the accused has spent in custody. 	
Reasons for order:	
LIEBENBERG J (concurring Claasen J)	

[1] The unrepresented accused appeared in the magistrate's court for the district of Katima Mulilo on 2 (two) counts, contravening section 2(c) and 2(a) of the Abuse of Dependence Producing Substances and Rehabilitations Centres Act 41 of 1971(the Act) respectively. He pleaded guilty and was questioned by the magistrate in terms of the provisions of s 112(1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA) on both counts and was accordingly convicted and sentenced.

[2] There are a number of issues that appear from the review record. Although a query was initially directed to the magistrate on the difference between the charge sheet of the typed record and the charge to which the accused pleaded, the ensuing issues outlined herein roused the court to form the view that the proceedings are clearly not in accordance with justice and the delay which is likely to be caused by the submitting of a further query to the magistrate would prejudice the convicted person. For reasons to follow, the court will dispense with such requirement.¹

[3] It is trite that a magistrate is under a duty to comprehensively check review records before same is certified. This duty cannot be said to be upheld by the magistrate in this instance. Not only was the review record not numbered correctly and chronologically, but the charge annexures to which the accused pleaded do not correspond with the charges stipulated on the review cover sheet. The review cover sheet outlined that the accused was convicted under two counts of contravening section 2(c) of the Act which, from the charge annexures, is not the case. Care should be taken in the future to avoid such errors.

[4] Moreover, the manner in which the first charge has been drawn up by the prosecutor, is materially defective. In addition, this court further takes issue with the manner in which the magistrate omitted to deal with a material issue under the court's s 112(1) (b) questioning of the accused in respect thereof.

¹ s 304(2) Criminal Procedure Act 51 of 1977

[5] The first charge relates to contravening section 2 (c) of the Act, i.e. dealing in dangerous dependence producing drugs. According to the Act, substances listed under Part 2 of the Schedule of the Act are listed as 'dangerous dependence producing drugs' and is prohibited under the above-mentioned section. It is trite that the charge sheet necessitates certain minimum requirements, Section 84 of the CPA provides the following:

'84 Essentials of charge

- (1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
- (2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.
- (3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

(My Emphasis)

Furthermore, section 88 of the CPA provides:

'Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.'

(Emphasis provided)

[6] Clear from the above sections are that the charge must contain such particulars which may be reasonable to inform an accused of the nature of the charge.² Moreover, should there be a defect for want of an essential averment, same may be cured during *trial*. It is prudent to note that trial proceedings did not begin in this matter as the accused pleaded guilty, therefore the fortification provided by s 88 would not be applicable in these proceedings. Going to the charge annexure itself, the relevant portion thereof reads as follows:

‘The said accused did wrongfully and unlawfully deal in a dangerous dependence-producing drug, or plant from which such drug can be manufactured, to wit 6 x white crystals with total weight of 43,8207 g valued at N\$17 800.00 and 1 x white crystal powder with total weight of 6,8477 g valued at N\$ 950.00’

[7] Lucidly, the description given within the body of the first charge does not specify what the prohibited substance is under section 2 (c) of the Act. On the charge annexure, the words ‘cocaine’ is written *in pen* on top of the label/description of the charge whereas the magistrate had no issue with the formulation of the first charge, it must be inferred that the court was satisfied that the word ‘cocaine’ written on top of the description of the first charge disclosed the offence of dealing in cocaine. This is however not encapsulated either in the description or the body of the charge. The words ‘cocaine’ loosely written on top of the description of the charge, does not disclose an offence. The court is therefore of the view that the charge, as it currently stands, i.e. dealing in or in possession of ‘white crystals’ or ‘white powder’, is not an offence under the Act and certainly not under any law in Namibia. The first charge, therefore is defective.

² *S v Katari* 2006 (1) NR 205 (HC) 206J – 207A.

[8] In respect of count 1, under Part 2 of the schedule, the description of cocaine reads as follows,

‘Cocaine, excluding admixtures containing not more than 0, 1 per cent of cocaine, calculated as cocaine alkaloid.’

From the extract, the Legislature clearly intended to exclude a mixture of no more than 0.1 per cent of cocaine, calculated as cocaine alkaloid. Notwithstanding the fact the accused pleaded guilty and admitted, on a leading question posed by the magistrate, the substance to be cocaine, there was no scientific evidence produced by the state, establishing that the substance the accused allegedly dealt in was in fact a substance tested and calculated as cocaine alkaloid and whether or not it falls outside the prohibition and within the category of a mixture containing not more than 0.1 percent of cocaine, calculated as cocaine alkaloid.

[9] In these circumstances the magistrate was under a duty to ensure that the unrepresented accused is afforded a fair trial. Fairness in this regard would require from the magistrate to not simply accept the mere say-so by the accused, but require from the state to show or hand up acceptable documentation stating that the substance is indeed cocaine. This is normally done through a scientific analyst’s report which the state hands up after an accused pleads guilty. The same procedure is adopted when the state is in possession of a blood alcohol analysis report in matters involving specific contraventions of the Road Traffic and Transportation Act.³ In this instance, if the state was unwilling to do so, the court must enter a s 113 plea of not guilty on behalf of the accused. Although decided in the context of methaqualone, the court *in S v lipumbu*⁴ at para 6 stated:

³ Road Traffic and Transportation Act 22 of 1999.

⁴ *S v lipumbu* 2009 (2) NR 546.

‘What is prohibited is the drug called Methaqualone and where an accused is charged with dealing in, use or being in possession of mandrax, the onus is on the State to prove that what the accused was dealing in, used or had in his possession, contained Methaqualone. Ordinarily, this will require scientific evidence.’

(Emphasis provided)

In addition, the court in *S v Maniping; S v Thwala*,⁵ on this point stated at 75 C:

‘In a case where the charge is one of dealing in or possessing a prohibited drugs common sense dictates that is almost inevitable that an admission made as to the nature of the substance which is subject of the charge will

be based on previous illegal associations with that substance. In such a case the normal course to take should therefore be to refrain from asking further questions. And it follows from this that in such cases the state should be in a position to produce an analyst’s certificate or adduce other acceptable evidence of the nature of the substance.’

(Emphasis provided)

[10] The heedless approach taken by the court in accepting the mere admission by the accused to stand as evidence of such element of the offence during the 112 (1) (b) questioning cannot be endorsed. In this regard it seems necessary to restate what the court in *S v Maniping; S v Thwala* (supra) said about the court’s duty when dealing with a guilty plea under s 112 (1) (b):

‘To summarise, where an accused who pleads guilty makes an admission when questioned pursuant to s 112(1)(b) of a fact which is palpably outside his personal knowledge:

⁵ *S v Maniping; S v Thwala* 1994 NR 69.

- (a) the court has a duty to satisfy itself of the reliability of that admission where the accused is not legally represented;
- (b) if there appears to be any real risk that the exercise of testing the reliability of such an admission will result in the accused having to admit to previous criminal conduct the court should refrain from asking further questions;
- (c) instead, the court should simply record the admission and invite the prosecutor to present evidence on that aspect of the charge and, if the prosecutor declines to do so, the court should record a plea of not guilty and leave it to the prosecutor to prove that particular element;
- (d) where the charge is one of dealing in or possessing a prohibited drug the State should be in a position to produce an analyst's certificate and the accused should be given the opportunity of examining such certificate;
- (e) where the charge is one of dealing in or possessing dagga the State should be in a position to prove by any acceptable means that the substance in question is dagga; and
- (f) where the admission is made by the accused's legal representative more weight can usually be attached to such an admission and normally the court would be justified in accepting that the legal representative has satisfied himself that the admission can properly be made.'⁶
- (Emphasis provided)

[11] When applying the abovementioned principles to the facts of this case, the magistrate, in respect of both counts, did not put questions to the unrepresented accused to ascertain the reliability of the admissions made as regards the substances dealt in. Thus the court could not have satisfied itself thereto judiciously. It was incumbent on the magistrate to, at the very least, have asked the accused person how he came to know that the substances which he dealt in was cocaine/dagga and further

⁶ *S v Maniping; S v Thwala* Supra, at 75H.

enquire whether in respect of the cocaine, he knew the percentage of the cocaine alkaloid. Moreover, the magistrate did not invite the state to present evidence on that aspect, resulting in the accused being deprived of the opportunity to examine same. Justice, in this regard will dictate that when an accused is charged with a drug offence under the Act involving a prohibited substance which can only be proven by scientific evidence or by other acceptable means, such evidence must be disclosed to the accused and placed on record for the court to judiciously satisfy itself that the substance so possessed or dealt in, is indeed a prohibited substance in the Act.

[12] The accused only at sentencing testified that he used to smoke cannabis and that he did not know that cocaine was dangerous because he didn't have experience with it. Notwithstanding the above averments, justice demands that the court cannot have regard thereto in order to vitiate a tainted and irregular s 112(1) (b) procedure. Therefore, the convictions cannot be allowed to stand.

[13] In the result, the following order is made:

1. The convictions and sentences on counts 1 and 2 are set aside.
2. In terms of s 312 of the CPA, the accused should henceforth be brought before the trial court and the magistrate is directed to comply with the provisions of s 112 (1) (b) and bring the matter to its natural conclusion.
3. In the event of a conviction, the magistrate, in considering an appropriate sentence, should have regard to the time the accused has spent in custody.

J C LIEBENBERG JUDGE	C CLAASEN JUDGE