

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Emilia Kakuhi Nsamba</i>	Case No: CR 41 /2021
High Court MD Review No: 526/2021	Division of Court: Main Division
Heard before: Judge January et Judge Claasen	Delivered on: 18 May 2021
Neutral citation: <i>S v Nsamba</i> (CR 41/2021) [2021] NAHCMD 239 (18 May 2021)	
The order: <ol style="list-style-type: none">In respect of count 1 the conviction and sentence are set aside.In respect of count 1, the matter is remitted to the trial court and the Magistrate is directed to act in terms of s 113 of Act 51 of 1977 and to bring proceedings to its natural conclusion.In the event of a conviction the sentence already served by the accused on count 1 must be taken into account.In respect of count 2 the conviction and sentence are confirmed.	
Reasons for order:	

Claasen J (concurring January J)

1. This is a review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 as amended, (the CPA).

2. The accused was charged in the district court of Rundu with two counts. The review court had a query in respect of count one only. The allegation in count 1 was that the accused traded in illicit tobacco products, to wit 58 boxes of "Yes" cigarettes as well as 16 loose "Yes" cigarettes to the value of N\$ 1600. She was convicted in terms of s 112(1)(b) of the Criminal Procedure Act as amended (the CPA) and sentenced to pay a fine of N\$ 10,000-00 or 2 years imprisonment.

3. The nub of the offense in contravention of s 17(1) of The Tobacco Products Control Act 1 of 2010, (the Act) is an act of selling or importation for sale, a tobacco product that does not bear the statement of 'Sales only allowed in Namibia' or any other effective marking indicating the origin thereof and the final destination for sale.

4. The only issue was whether the court a quo could have been satisfied that the accused admitted all the elements contained in the offence. The question was posed in view of the affirmative answer given by the accused when asked about the packaging of the 'Yes' cigarettes. The dialogue about that aspect is set out below:

' Question: Do you dispute this statement that they were not bearing the statement " sales only in Namibia or any other effective marking indicating the origin thereof and final destination for sale and import for sale which failure to inscribe it made the products illicit in Namibia.

Answer: Yes' (sic)

5. Firstly it must be said that the question could have been phrased in a simpler way or broken down into parts. The accused's answer is indicative thereof that the cigarettes in question had the prescribed markings on the packaging that meet the criteria for sale in Namibia. In that case it cannot be regarded as illicit cigarettes.

6. The court a quo was correct to canvass the attributes on the branding of the cigarette packages. It is apparent that the Magistrate also understood that the accused disputed that the packets did not bear the required statements. The Magistrate's answer to the query stated that:

'Unfortunately the answer tendered was an affirmative and no further question was posed to find out as to what dispute she had over the concept put to her. The rest of her answer were compatible with unequivocal guilty thus convicted' (sic) My emphasis.

7. At the end of the day, it means that the accused did not admit one the elements of the offence in count 1. In this circumstances the magistrate could not have been satisfied that the accused admitted to all the elements of the offense in count 1. The court should have altered the plea in terms of s113 of the CPA and proceeded from there.

8. Therefore the conviction on count 1 is not in accordance with justice and it is set aside.

9. In the result, I make the following order:

- a. In respect of count 1 the conviction and sentence are set aside;
- b. In respect of count 1, the matter is remitted to the trial court and the Magistrate is directed to act in terms of s 113 of Act 51 of 1977 and to bring proceedings to its natural conclusion;
- c. In the event of a conviction the sentence already served by the accused on count 1 must be taken into account;
- d. In respect of count 2 the conviction and sentence are confirmed.

CLAASEN C M JUDGE	JANUARY HC JUDGE