REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title:	**Case No:**
The State v Ray Charles Classen	CR 09/2022
High Court MD Review No:	**Division of Court:**
2111/2021	Main Division
Heard before:	**Delivered on:**
Claasen J et Usiku J	11 February 2022
Neutral citation: *S v Classen* (CR 09/2022) [2022] NAHCMD 53 (11 February 2022)	

The order:

1. The conviction and sentence is 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) of the CPA and bring the matter to its natural conclusion.
3. In the event of a conviction, the trial magistrate, in considering an appropriate sentence, must take into account the period of imprisonment that the accused has served in this matter.
4. The order of 22 October 2021 to the effect that cash in the amount of N$ 4 387. is forfeited to the state, is set aside. Pending the outcome of the new proceedings, that money should either be returned to the accused or forfeited to the state, as applicable.

Reasons for order:

Claasen J (concurring Usiku J)

1. The accused was charged with a main count of dealing in dependence producing substance and an alternative count of possession of dependence producing substance in terms of Act 41 of 1971 as amended. After questioning in terms of s 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977 (CPA), the accused was convicted in the Otjiwarongo Magistrates' Court, sentenced to 12 months imprisonment and the money found on him amounting to N$ 4 387. was forfeited to the State.

2. A query was directed to the trial magistrate with 3 questions. The first issue concerned the indiscriminate manner in which the plea was record as it was a main and alternative charge but the recordkeeping did not specify that. Secondly, a question was posed as to how, in the absence of any satisfactory evidence, the trial court could have been reasonably satisfied that the accused knew that the substance was indeed cannabis. Finally, it was asked whether the trial court had been justified to forfeit the N$4 387. confiscated from the accused.

3. The magistrate responded accordingly. In respect of the first issue, the magistrate's reply has clarified on what charge the accused was convicted. It comes down to record keeping, specifically that when an accused is faced with a main and an alternative charge, that the court specifies it at the outset of the plea and also clearly state at the end of the questioning on which of the main or the alternative count the accused is convicted, as applicable.

4. As far as the forfeiture was concerned, the magistrate conceded that that there was no link between the money confiscated and the commission of the offence thus, it should not have been forfeited to the State.

5. We move to the last aspect, namely by virtue of what could the magistrate have been satisfied that indeed it was cannabis and that the accused knew that. Notably, no question was posed as to how the accused knew it was cannabis. The magistrate indicated that it was not an issue, because during the questioning as to how the accused knows that cannabis is a dependence producing drug, the accused said that he ' learnt it from school.'

6. The law on convictions under s 112(1)(b) of the CPA is very clear that for a conviction under that provision a court has to be satisfied about the guilt of that person before convicting him or her. This issue formed the crux of the appeal in *Coetzee v State* (CC 2019/00016) [2019] NAHCMD 275 (2 August 2019). The court in that matter referred to *S v Maniping; S v Thwala 1994 NR 69* which summarized guidelines to assist where an accused who pleads guilty makes an admission when questioned pursuant to section 112(1)(b) of a fact which is palpably outside his personal knowledge as follows:

   (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 possession of dagga the state should be in a position to prove by any acceptable means that the substances 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. Emphasis added.

7. The above guidelines were underscored in *S v Omar* (CR 50/2020) [2020] NAHCMD 297 (17 July 2020) a criminal review case which turned on the same issue. In the *Omar* matter the position was summarised as follows:

'…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 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.'

8. In the matter at hand, the court was satisfied of this aspect on the bare admission of the accused that he learnt in school that cannabis was a prohibited dependence producing drug. That description hardly resolve the point as to by virtue of what did the accused make an admission of a fact that falls outside his personal knowledge or experience and whether the court could have been satisfied by virtue of his answer alone. It just evoked more questions. Was the accused taught in school to identify the active substance in cannabis or was it merely conversations amongst fellow scholars? Speculation will not suffice.

9. Had the magistrate asked further clarifying questions, and depending on the answers, maybe the issue would have been resolved, if it turned out that for some

or other reason the accused, in terms of his own realm of knowledge or experience, knew it was cannabis. The bottom-line is that there should be material before the court on which it can satisfactorily determine the reliability of the admission. Alternatively, that aspect is to be proven through other evidential means, be it documentary or orally, for example, by a police officer who was familiar with the substance and examined the package and confirms it to be cannabis.

10. In these circumstances, the *court a quo* could not have been satisfied about this aspect. The accused was not specifically asked by virtue of what does he know the substance cannabis, nor did the answer that he gave to another question satisfactorily resolve the issue.

11. For these reasons, the following order is made:

    1. The conviction and sentence is 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) CPA and bring the matter to its natural conclusion.
    3. In the event of a conviction, the trial magistrate, in considering an appropriate sentence, must take into account the period of imprisonment that the accused has served in this matter.
    4. The order of 22 October 2021 to the effect that cash in the amount of N$ 4 387. is forfeited to the state, is set aside. Pending the outcome of the new proceedings, that money should be returned to the accused or forfeited to the state, as applicable.

C M CLAASEN **JUDGE**	**D N USIKU** **JUDGE**