REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2021/00060

In the matter between:

IMMANUEL KATIVA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kativa v State* (HC-MD-CRI-APP-CAL-2021/00060) NAHCMD 64 (18 February 2022)

Coram: CLAASEN J and MILLER AJ

Heard: **04 February 2022**
Delivered: **04 February 2022**
Reasons: **18 February 2022**

Flynote: Criminal Procedure – Criminal appeal against conviction and sentence – Irregularities– Series of gross irregularities committed by magistrate during court proceedings – Cumulative effect thereof is a failure of justice – Convictions and sentences set aside.

ORDER

1. The application for condonation for the late filing of the appeal is condoned.

2. The appeal succeeds and the conviction and sentence imposed upon the appellant are set aside and he is to be released forthwith.

3. In respect of accused 1, 2 and 4 and in the exercise of our inherent power to review the proceedings before the magistrate, the proceedings are irregular and amount to a failure of justice. Accordingly, the convictions and sentences imposed on accused 1,2 and 4 are reviewed and set aside.

4. In the event that any of accused 1,2 and 4 are in custody pursuant to this matter, it is directed that they be liberated forthwith.

APPEAL JUDGMENT

CLAASEN J, (MILLER AJ concurring)

[1] On 4 February 2022, after having heard the appeal, the abovementioned order was given. These are the reasons for that order.

[2] The appeal emanates from a conviction in district court of Karasburg where the appellant was convicted of dealing in dependence producing drugs, to *wit* 1.5kg of cannabis valued at N$ 15 000. On 16 August 2020 the appellant, who had previous convictions, was sentenced to 4 years' direct imprisonment.

[3] The appeal was accompanied by an application for condonation. The appellant was represented by Mr Muchali and the respondent was represented by Mr Itula, who stood in for Ms Meyer.

[4] The respondent not only opposed the appeal but also raised a point *in limine* as regards to the appellant's belated notice of appeal. After having considered the

merits of the appeal, this court was of the view that there are prospects of success and granted condonation for the late filing of the appeal.

[5] The appellant filed a catalogue of grounds of appeal, which can be grouped and summarised into three broad categories, namely gross procedural irregularities throughout the plea and trial proceedings, insufficient evidence to prove 'possession' of cannabis, as the package was found in bushes near a public road, and that the sentence imposed was shockingly inappropriate.

[6] We turn to all the grounds that resort under the first category of alleged procedural irregularities made in relation to the appellant, who was undefended, during the plea and trial in the lower court. The appellant pointed out that:

6.1 The court failed to explain the presumption in s 10(1)(a)(i) of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 (the Act);

6.2 The court omitted to explain the right to disclosure of the case docket prior to the commencement of the plea and trial;

6.3 The court did not explain s 115 of the Criminal Procedure Act 51 of 1977 (the CPA) insofar as the appellant was not obliged to give a statement;

6.4 The court failed to adequately explain the right to cross-examination to the appellant and did not adequately inform the appellant that he need not make incriminating statements during the cross-examination of the state witnesses;

6.5 The court misdirected itself when, at the end of the evidence of the first state witness, the court descended into the arena and started cross-examining the appellant and the co-accused;

6.6 The court failed to properly explain the rights of the appellant at the end of the state's case, in particular that the accused has the right to remain silent;

6.7 The court failed to administer an oath or affirmation to the appellant and any of his co-accused during the defense case; and

6.8 The court failed to give an opportunity to the appellant to make submissions in terms of s 175 of the CPA.

[7] Counsel for the appellant referred to his heads of argument. The gist of his argument was that the multiple violations were material and it constituted a fatal breach of the appellant's right to a fair trial and therefore, the conviction cannot stand.

[8] Counsel for the respondent also stood by the heads of argument filed. From the arguments therein it could be deduced that the respondent conceded the procedural irregularities, but it rely on the principle that the conviction need not be set aside as the court has to consider the nature of the irregularity. In view of the concession, the question arose as to how does it affect the proceedings and whether it amounts to a failure of justice?

[9] An accused's rights to a fair trial are entrenched in Article 12 of the Namibian Constitution. In general, a judicial officer has a duty to inform an undefended accused of his or her procedural rights in order to ensure a fair criminal trial. That this was done, should be apparent from the record of the court proceedings. In this regard we endorse what was stated in *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO*[1] at 378A-B:

> 'At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights – the right to cross-examine, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of sentence – and in comprehensible language to explain to him the purpose and significance of his rights.'

[10] In returning to the record at hand, it turns out that these basic precepts were not followed to a large extent and the proceedings were mismanaged from the beginning until the end. It is necessary to briefly refer to the complaints as averred to by the appellant.

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[1] *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO* 1989 (3) SA 386.

[11] Firstly, counsel for the appellant is correct in stating that there is no indication on the record that the right to disclosure was explained. In the absence of that, it is difficult to construe that such an explanation was given.

[12] It is a longstanding principle that an accused needs to be informed of any presumption that he or she may have to rebut. In the matter at hand, the explanation should have been words to the effect that given that the quantity of the cannabis exceeds 115 grams in mass, it shall be presumed that the appellant was engaged in the act of dealing of cannabis, unless he proves the contrary.[2] Instead, the magistrate merely stated that:[3]

> '… the Prosecutor will tell you the law after a certain quantity, the law presume that you are dealing you are just not possessing.'

This clearly lacked in particularity and failed to inform the appellant of the onus to rebut the presumption. Had this been done, the appellant may have chosen to attack the evidence on the quantity. In asking counsel for the respondent about this aspect, he conceded and added that a lay person is not likely to know what a 'presumption' in law means. We agree.

[13] One of the complaints was that the court erred in not invoking and or explaining the provisions of s 115 of the CPA, which comes into play after a plea of not guilty. In short, it provides for an accused to give a brief statement about the basis of his or her defense, but an accused should be informed that he or she is not obliged to give a statement and can also choose to remain silent. Although it is not compulsory for a magistrate to invite an accused to give a statement as contemplated in this provision, it is advisable to do so, because when properly applied, it might narrow the *lis* between the parties.

[14] As regard to the duties that arise during the stage of cross-examination Liebenberg J gave a useful synopsis in *S v Haraseb*[4] and stated that:

> ' It is settled law that it is no longer sufficient for a presiding officer to merely inform the unrepresented accused of his/her rights, but also to assist the accused when he/she experiences difficulty during cross-examination by clarifying the issues, formulating the questions, and putting his/her defence properly to the witnesses. Furthermore, where the

[2] *S v Kuvare* 1992 NR 7; S *v Daniels* (CR 31/2014) [2014] NAHCMD 170 (28 May 2014).
[3] Page 9 of appeal record.
[4] *S v Haraseb* (2) CR 90/2018) [2018] NAHCMD 380 (28 November 2018) at para 13.

accused fails to cross-examine a witness on a material issue, the presiding officer should question the witness in order to reduce the risk of a failure of justice.'

[15] The cross-examination explanation in the record is depicted in the following terms:[5]

' … This is the time for you to cross-examine the Witness or if there is any issue that you want to dispute you can go ahead.'

The above explanation of cross-examination is inadequate to inform a lay person how to properly place issues in dispute. We accept that such an explanation is not cast in stone and the formulation thereof should be left to the good sense of the presiding official, but we nevertheless want to propose that the multiple layers of the purpose of cross-examination be incorporated. These include aspects such as that the questions should aim to destroy the evidence of the state witness or to diminish the strength or validity thereof, to elicit facts favourable to the version of the accused and to show that the witness cannot be believed because of incorrect information or insufficient knowledge about certain issues. It is also important to remind an accused person to put his or her version to the state witness, insofar as it differs from the state's version, so that the state witness has an opportunity to answer and or explain that.

[16] Based on the record what happened during cross-examination shows that the accused persons did not comprehend the exercise. Instead of posing questions in cross-examination, each of the accused persons, including the appellant, started telling his story. The court did not point out that cross-examination takes the format of questions and answers and or put statements and elicit responses from the witness on that. Nor did the court steer them in the right direction or assist them in accordance with the guidance given in the *Haraseb* matter. Cross-examination is integral in the adjudication of a trial and considering the deficiencies herein it is clear that justice was not done.

[17] A further complaint was that the court acted un-procedurally by descending into the arena and started 'cross-questioning' the appellant after the evidence of the first state witness. In looking at the court record, it duly depicts the bizarre phenomenon wherein all accused were questioned by the court after the evidence

[5] Page 40 of appeal record.

of the first state witness, before the commencement of the next state witness. During a trial, a court is entitled to ask clarifying questions to a witness, but that is usually done at the end of re-examination of that particular witness. My emphasis. There is this no sensible explanation for the technique utilised by the magistrate herein.

[18] The ground that pertains to an ostensible failure to properly explain the rights of the accused at the end of the state case, also has some merit in it. The right was explained in words to the effect that the accused can 'raise' their case, or decide that they do not want so say anything. Then they were reminded as to what the prosecutor was doing and told that they now have the same opportunity to call witnesses ' to make up your case to justify your whereabouts, whatever you had in defending yourselves.'[6] This explanation is not a model of clarity, and the quoted extract is problematic as it invites the accused to fabricate their case to justify their whereabouts. It is not proper to do so. Furthermore, the explanation by the court omitted to include the consequences of choosing to remain silent at the end of the state's case.

[19] Again, it is clear from the record that the accused were confused as to their options. Initially accused 1 said he has nothing to say but thereafter, upon being prompted by the court, each of them started telling their stories, without being sworn in or affirmed as required by the CPA[7]. It also appears that the counsel for the appellant is correct in that the accused were not informed of the right to make submissions before sentence as provided for in s 175 of the CPA.

[20] The law is clear that not every irregularity is fatal. In *Kandovazu v S* [8] it was held that:

'The test proposed by our common law is adequate in relation both to constitutional and non constitutional errors. What has to be looked at was the nature of the irregularity and its effect. If the irregularity is of such a fundamental nature that the accused has not been afforded a fair trial, then a failure of justice per se has occurred and the accused

[6] Page 61 of appeal record.
[7] S 162 and s 163 of the CPA.
[8] *S v Kandovazu* [1998] NASC 2 (10 February 1998).

person is entitled to an acquittal for there has not been a trial, therefore there is no need to go into the merits of the case at all. ‘

[21] Though this was stated in relation to the right to disclosure, it also applies to the instant matter. The question was posed to the counsel for the respondent that considering the numerous irregularities during the course of the proceedings, whether it does not amount to a miscarriage of justice?. Counsel for the respondent answered that question in the affirmative. It was a concession properly made. The appeal court came to the same conclusion. Throughout the proceedings there were too many deviations from established formalities, rules and principles of criminal procedure. The cumulative effect of these gross irregularities is that justice was not done and as such the conviction cannot stand.

[22] In considering these proceedings, it crossed our minds that the appellant, who was accused 3 in the district court proceedings, was not the only one that suffered the prejudice of the gross irregularities. His co-accused in this matter was Joseph Matjayi as accused 1, Tankisa Moekoena as accused 2 and Junior Michael Banganda as accused 4. The co-accused were also convicted on count 1. Each of them was given a fine of N$ 7500.00 or 24 months’ imprisonment, plus another 12 months’ imprisonment fully suspended for 3 years on the condition that the accused is not found guilty of dealing or possession of drugs committed during the period of suspension. In addition, accused 4 was also convicted on count 3 for entry into Namibia at a place other than at a port of entry and sentenced to a fine of N$ 5000. or 12 months’ imprisonment.

[23] It will be apparent that, apart from accused 3, there is no appeal before us by accused 1, 2 and 4.

[24] It is under these circumstances, necessary to consider whether we should resort to what is undoubtedly our inherent power to review proceedings in the lower court.

[25] In the event that we conclude that it cannot be said the trial can be regarded as fair or that we conclude that there was a miscarriage of justice, the proceedings cannot be allowed to stand.

[26] For the reasons indicated in this judgment we find that the trial constituted a complete miscarriage of justice. In these circumstances the proceedings must be reviewed and set aside, which is what we shall do.

[27] Incidentally, apart from the procedural issues pointed out by the appellant, the court came across more muddled up areas. During the plea phase it appears that the magistrate was oblivious that the charge particulars of both count 1 and count 2 were exactly the same, with the exception that in count 1 the act complained of was dealing and in count 2 the act complained of was that of possession. That should have brought to mind that count 2 could be an alternative to count 1. Had he enquired from the prosecutor, the position could have been corrected at that time. Throughout the accused were left with the impression of count 2 as a separate charge to defend. Fortunately, at the end, the light dawned which can be deduced from the phrase that 'count 2 was the alternative charge and thus becomes unavailable.' [9] It is deduced that he meant that count 2 was the alternative of count 1, which though the formulation is not quite correct, one finds solace that the accused were not convicted of count 2.

[28] The second issue that pertains to the plea stage concerns the ostensible guilty plea of accused 4 on count 3. Based on the record he indicated that he pleads guilty to that count and wanted to advance the reason why he said he was guilty. But, the magistrate stopped him and said: 'No we are not yet at the reason.'[10] No examination took place in terms of s 112(1)(b) of the CPA, as was required in that circumstances. Had the magistrate contemplated a conviction in terms of s 112(1)(a) of the CPA, such intention had not been documented in the record. Needless to say, that does not constitute a proper guilty plea by an undefended accused.

[29] The record keeping in this matter also deserves a comment. In glancing at the front page of a J-15, once a matter is finalised, the template provides for a

[9] Page 182 of appeal record – court record typed on NAMCIS.
[10] Page 14 of the appeal record.

recording of each of the accused's pleas, the convictions and or acquittals, the sentences and the dates. In the matter herein the magistrate recorded only part of that information and left the rest to the imagination of the reader. This sloppy approach cannot be endorsed. Accurate and complete recordkeeping is an integral function of the position of a magistrate. We endorse the sentiments as expressed in *S v Heibeb*[11] that:

'It is the duty of the presiding officer to keep a proper record and record the proceedings in a clear and intelligible manner in the first person and also to record the explanation of the rights of the accused fully and clearly.'

[30] This court noticed that this magistrate had been on the bench for only 5 months at the time of this irregular proceedings. Whilst it is not an excuse, it underscores the need for induction training for newly appointed magistrates. If training is not afforded to such presiding officers they will not be able to properly fulfil their roles as… 'guardians of the Constitution, protectors of the fundamental human rights of the citizen and the guarantors of a fair trial to those accused before them.'[12]

[31] For these reasons, the following order was made:

1. The application for condonation for the late filing of the appeal is condoned.

2. The appeal succeeds, and the conviction and sentence imposed upon the appellant are set aside and he is to be released forthwith.

3. In respect of accused 1, 2 and 4 and in the exercise of our inherent power to review the proceedings before the magistrate, the proceedings are irregular and amount to a failure of justice. Accordingly, the convictions and sentences imposed on accused 1,2 and 4 are reviewed and set aside.

4. In the event that any of accused 1,2 and 4 are in custody pursuant to this matter, it is directed that they be liberated forthwith.

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[11] *S v Heibeb* 1994 (1) SACR 657 (Nm) at 663 I-J.
[12] *S v Heita and another* 1992 (3) SA 785(NmHC) p791.

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C M Claasen

Judge

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K Miller

Judge

APPEARANCES

APPELLANT:	Mr Muchali Jermaine Muchali Attorneys, Windhoek
RESPONDENT:	Mr Ituta Office of the Prosecutor-General, Windhoek