

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: <i>The State v Beukes Davinio</i>	Case No: CR 17/2023
High Court MD Review No: 1620/2022	Division of Court: Main Division
Heard before: Judge January <i>et</i> Judge Claasen	Delivered on: 04 April 2023
Neutral citation: <i>S v Davinio</i> (CR 17/2023) [2023] NAHCMD 113 (04 April 2023)	
The order: <ol style="list-style-type: none">1. The conviction and sentence 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) 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 already served in this matter.	
Reasons for order:	

January J (concurring Claasen J):

[1] The case was submitted from the Katutura Magistrate's Court for automatic review pursuant to s 302(1) of the Criminal Procedure Act No. 51 of 1977 (the CPA).

[2] The accused was charged with possession of a dependence producing substance in contravention of s 2(b) read with ss 1, 2(i) and 2(iv), 7, 8, 10, 14 and Part I of the schedule of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act No. 41 of 1971 (the Act) to wit: 10 grams of cannabis valued at N\$500.

[3] The accused pleaded guilty, was questioned in terms of s 112(1)(b) of the CPA, convicted and sentenced to N\$4000 or 36 months' imprisonment of which N\$2000 or 18 months are suspended for three years on condition that the accused is not convicted of possession of dependence-producing substances committed during the period of suspension.

[4] We find it necessary to quote the proceedings to emphasise the issue in the proceedings. The record of proceedings reflects as follows:

'Court: Were you forced or influenced by anybody to plead guilty?

Accused: No one forced me to plead guilty

Court: Why do you plead guilty? What did you do wrong?

Accused: I had the drugs in my possession cannabis, it was found in my pocket, my rights (sic) trouser in front

Court: On which day did this incident take place?

Accused: Yesterday the 2 Sept 2020.

Court: where did this incident take place?

Accused: At Windhoek Correctional Facility in the district of Windhoek.

Court: The State alleges that you wrongfully, unlawfully have in your possession or use a prohibited dependence-producing drug or plant from which such a drug can be manufactured, to wit 10g Dagga weighing at N\$500. Do you admit or deny this?

Accused: I admit this

Court: Why were you in possession of these dependence producing substances?

Accused: I just had them on me to smoke

Court: Are you aware that should you be convicted, your actions are punishable by a competent court of law?

Accused: Yes

Court: Why were you in possession of these dependence producing substances?

Accused: I just had them on me to smoke

PP: State accepts the plea

Court: is satisfied that the accused has admitted all the allegations in the charge and is therefore guilty as charged

.....'

[5] It is evident from the proceedings that no question was directed by the Magistrate that the substance was indeed cannabis, in other words how the accused knew that it was indeed cannabis. In the circumstances, the Magistrate could not have been satisfied that the substance is indeed cannabis, a dependence producing substance.

[6] Consequently, I directed a query to the Magistrate to explain how he was satisfied. that the substance was indeed a dependence producing substance without a certificate to that effect or having an answer from accused to the effect. The Magistrate replied that he was satisfied because the accused admitted these facts. It is incumbent on the Magistrate when questioning in terms of s 112(1)(b) of the CPA, that the court must be satisfied about the guilt of the accused before convicting him or her. In *State v Benjamin Maniping*¹ and the *State v Khanyse Thwala*² the court held that:

‘The court is enjoined by section 112(1)(b) to satisfy itself of the guilty of the accused before convicting and I fail to see how any court can properly be so satisfied on the basis of a bare admission of a fact which the court know must be outside the personal knowledge of the accused. It must, in my view, have material before it from which it can properly determine the dependability of the admission.’

The court further stated: ‘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. For example, where possession of dagga is alleged the state should be in a position to call a police officer to testify that he is familiar with dagga and that the substance found in possession of that accused is indeed dagga.’ (my underlining)

“To summarise, 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 –

- (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

¹ *State v Benjamin Maniping* (review case 282/94).

² *State v Khanyse Thwala* (Review case 333/94).

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."³

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

1. The conviction and sentence 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) 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 already served in this matter.

H C JANUARY JUDGE	C M CLAASEN JUDGE

³ *Coetzee v State* (CC 2019/00016) [2019] NAHCMD 275 (2 August 2019).