REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
MAIN DIVISION WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTION 61

Case Title:	**Case No:**
The State v Llewellyn Beukes	CR 32/2024
High Court MD Review No:	**Division of Court:**
450/2024	Main Division
Heard before:	**Delivered on:**
Usiku J et Christiaan J	3 May 2024

Neutral citation: *S v Beukes* (CR 32/2024) [2024] NAHCMD 209 (3 May 2024)

The order:

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:

CHRISTIAAN J (concurring USIKU J)

[1] This matter hails from the district court of Windhoek and was referred to this court by way of automatic review in terms of s 302(1) of the Criminal Procedure, Act 51 of 1977 (the CPA).

[2] The accused was charged with one main count of dealing in dependence producing substance, alternatively, possession of dependence producing substance, thereby contravening s 2(*a*) of Act 41 of 1971, as amended, alternatively, s 2(*b*) of Act 41 of 1971, as amended. He pleaded not guilty on the main count and guilty on the alternative count and was convicted in terms of s 112(1)(*b*) of (the CPA), on the alternative count. He was subsequently sentenced to a fine of N$6000 or 2 years' imprisonment.

[3] Upon receipt of the review record, I directed the following query to the magistrate:

> 'Could the court have been satisfied that the accused indeed knew it was cannabis based on his response and in light of the fact that there was no laboratory analysis presented during the proceedings to substantiate this fact?'

[4] In essence, the magistrate responded that he was satisfied that the accused knew what the drugs were and as such, laboratory results were not needed. The magistrate was adamant that the accused admitted all the allegations in the charge and was rightly convicted. This court respectfully, does not agree. The learned magistrate was of the further view that the matter of *S v Zulu*[1] finds application in this matter. I will therefore first deal with the first part of the response and thereafter address the second response to the query.

[5] The relevant s 112(1)(*b*) questioning as borne by the record is reflected below:

> 'Court: The annexures reads that what was found in your possession is 115 grams

[1] *S v Zulu* 1967(4) SA.

of cannabis and the total value is three thousand nine hundred and fifty Namibian dollars (N$3 950-00) is that correct?
Accused: Yes Your Worship.
Court: And how did you know that the said substances were indeed cannabis?
Accused: Because I know cannabis Your Worship.
Court: Because you know cannabis?
Accused: Yes.' [My Emphasis]

[6] This court has dealt with numerous authority in respect of admissions made by an accused when questioned pursuant to s 112(1)(*b*) of a fact which is palpably outside his personal knowledge.[2] The court in *S v Maniping; S v Thwala 1994 NR 69* summarised guidelines to assist where an accused pleads guilty and notably held as follows:

'(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…'

[7] The above guidelines, were emphasised in *S v Omar*[3] where 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 instant matter, the court a quo merely relied on the accused person's contention that 'because I know cannabis Your Worship', based on his own admission. It is unfathomable that the magistrate could have been satisfied with that description. The accused's admission did nothing to salvage the situation as this court cannot discern

[2] *S v Maniping; S v Thwala* 1994 NR 69*; Coetzee v State* (CC 2019/00016) [2019] NAHCMD 275 (2 August 2019)*; S v Omar (CR 50/2020) [2020] NAHCMD 297 (17 July 2020), S v Classen (CR 09/2022) [2022] NAHCMD 53 (11 February 2022).*
[3] *S v Omar* (CR 50/2020) [2020] NAHCMD 297 (17 July 2020)

whether it was based on his own experience with the substance or on other people's rendition thereof. The magistrate further did nothing to resolve the situation by failing to ask clarifying questions.

[9] Had an analyst's certificate been produced by the State and the accused been afforded an opportunity to examine such certificate, the court a quo could have satisfactorily determined the reliability of the admission. Alternatively, as stated in *S v Classen* (CR 09/2022) [2022] NAHCMD 53 (11 February 2022),

> '…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] The learned magistrate further argued that judges on review not need to certify the proceedings to be in accordance with the law but in accordance with justice. The learned magistrate further maintained that according to his understanding of the matter of *S v Zulu*, a reviewing judge is performing an administrative function whereas the appeal judge is performing a legal duty to see that the proceedings are strictly in accordance with the law. And therefore, the proceedings should be confirmed. This court respectfully, does not agree.

[11] It is our considered view that judges of the High Court have a constitutional duty to supervise the magistrate's courts and other subordinate courts. That supervision is confined to how they should apply substantive and procedural law, and can be done through review and appeal judgments. This ensures that there is no interference with their decision making process. Administrative supervision is the responsibility of the administrative structure within and outside the magistracy. The judge's supervisory and review powers creates a buffer between a magistrate's judicial work and the supervisory role of purely administrative supervisory structures.

[12] It is further important to mention that the system of review is there to ensure that every accused person who obtains a sentence of some severity automatically enjoys an independent investigation of his conviction and sentence by a senior judicial officer who is enjoined to satisfy himself that the proceedings meet the

requirement of being in accordance with substantial justice.

[13] In a society such as ours where the overwhelming majority of persons standing trial in the magistrates' courts are members of the less favoured section of the community, and on the whole unrepresented, it is imperative to ensure that the review system, which is aimed at providing a curb upon any misdirected or arbitrary exercise of power, is administered efficiently and speedily.

[14] Magistrates should not live in fear of the reviewing judge and constantly be looking over their shoulder, but should rather regard the reviewing judge as the second member of a two-man team. The reviewing judge is not there to criticize, to nit-pick or to show off his knowledge and experience; he is there to assist as far as he is able in the administration of justice; and to ensure that an accused receives fair treatment.

[15] In the premises, it is our considered view that the magistrate could not have been satisfied that the accused indeed knew it was cannabis. Accordingly, the conviction and sentence stand to be set aside.

[16] 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.

P CHRISTIAAN **JUDGE**	**D USIKU** **JUDGE**