REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTION

Case Title:	**Case No:**
The State v Benno Kauaaita	CR 33/2024
High Court MD Review No:	**Division of Court:**
449/2024	Main Division
Heard before:	**Delivered on:**
Usiku J et Christiaan J	3 May 2024
Neutral citation: *S v Kauaaita* (CR 33/2024) [2024] NAHCMD 210 (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] The matter hails from the district court of Windhoek and was referred to this court by way of automatic review in terms of s302(1) of the Criminal Procedure, Act 51 of 1977 (the CPA).

[2] The accused was charged with one count of possession of dependence producing substance, thereby contravening s 2(*b*) of Act 41 of 1971, as amended. He pleaded guilty and was convicted in terms of s 112(1)(*b*) of the CPA. He was subsequently sentenced to a fine of N$2000 or 12 months imprisonment. The cannabis weighing 709g and valued at N$3 500 found in his possession was not forfeited to the State.

[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 conceded that the questioning by the court was in adequate for the court to have been satisfied that the accused knew that the said substances were indeed cannabis.

[5] 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.[1] The court in *S v Maniping; S v Thwala* 1994 NR

[1] *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).

69 summarized 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…'

[6] The above guidelines, were emphasised in *S v Omar* (CR 50/2020) [2020] NAHCMD 297 (17 July 2020) 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.'

[7] In the instant matter, the court a quo merely relied on the accused person's contention that it was cannabis because upon his own admission, the accused is smoking it. The magistrate further did nothing to resolve the situation by failing to ask clarifying questions.

[8] If the State had produced an analyst's certificate for the accused to examine, the court may have determined the reliability of the admission. Alternatively, as stated in *S v Classen*[2]*:*

'…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.'

[9] 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.

[2] *S v Classen* (CR 09/2022) [2022] NAHCMD 53 (11 February 2022).

[11] 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**