REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Shimirimana Jadodiya	**Case No:** **CR 34/2024**
High Court MD Review No: 293/2024	**Division of Court:** High Court, Main Division
Coram: Shivute J et Christiaan J	**Delivered:** 06 May 2024
Neutral citation: *S v Jadodiya* (CR 34/2024) [2024] NAHCMD 212 (06 May2024)	
ORDER: 1. The conviction and sentence are set aside. 2. That the accused be released forthwith, unless lawful detained on another matter.	

REASONS FOR ORDERS:

CHRISTIAAN J (Shivute J concurring):

[1] This matter came before me on review in term of s 302(1) and s 303 of the Criminal Procedure Act 51 of 1977 (CPA) as amended.

[2] The accused appeared in the Magistrate's Court for the district of Outjo for contravening s 2(a) read with s 1, 2(i), and/or 2(iv), 7, 8, 10, 14, and Part I of the Schedule of Act 41 of 1971, as amended – possession of dependence-producing substances. The charge sheet that the accused wrongfully and unlawfully had in his possession or use a prohibited dependence-producing drug or a plant from which such a drug can be manufactured, to wit 0,325 grams of skunk cannabis valued at N$ 11 375,00.

[3] The accused made his first appearance on the 14th of February 2024 and he was unrepresented. He pleaded guilty to the charge and was questioned on his plea in terms of S 112(1)(*b*) of CPA. Subsequently, he was convicted and sentenced to 24 (twenty four) months' imprisonment.

[4] When the matter came before this court on review, a query was sent to the magistrate to explain to the court, in the absence of satisfactory evidence, how it could reasonably ascertain that the accused knew the substance was indeed cannabis. In response, the magistrate stated the following:

> 'I reasonably satisfied that the accused knew the substance was cannabis, based on the accused's admissions during the questioning under S 112(1) (b). When questioned on how the accused identified it as cannabis, the accused replied, "Because I knew it, it had a certain smell and certain colour, it was green in colour and it had a distinct smell it does not smell like other trees that is how I knew it was cannabis."

[5] It is evident from the record that learned magistrate inferred from the accused's admission made under s 112(1) (b) that he was aware of the substance's nature as cannabis and convicted the accused based on his admission.

[6] Section 112(1)(*b*) requires the court to be satisfied about the accused's guilt before convicting him or her. In the matter of *State v Benjamin Maniping*[1] and *State v Khanyse Thwala*[2] the court emphasized the need for corroborative evidence, such as an analyst's certificate or testimony from a police officer familiar with the substance.

[7] Although no question was asked, the prohibited dependence producing substance that was found in the possession of the accused is referred to as 'skunk' cannabis in the charge sheet, rendering the charge defective.

[8] In the matter of S v Griffiths[3], this court remarked as follows:

> Reference in the charge annexure and conviction is made to 'skunk' as opposed to cannabis. 'Skunk' does not appear in Part 1 of the Schedule as a prohibited substance, meaning that the conviction of the offence as charged is not in accordance with justice. The charge is defective for alleging that the accused was found in possession of 'skunk'. During the court's questioning, the accused admitted to all the elements of the offence of possession of a dependence-producing substance, to wit 'skunk'. Notwithstanding that 'skunk' is not defined in the Act, the defective charge was put to the accused. The accused was thus convicted on defective charge as far as it concerns the possessions of 'skunk'.'

[9] On the account of the charge being defective, the conviction cannot stand.

[10] Furthermore, in S v Omar (CR 50/2020)[2020] NAHCMD 297 (17 July 2020), it was stress out that:

'…When an accused is charged with a drug offence under the Act involving a prohibited

[1] *State v Benjamin Maniping* (review case 282/94)
[2] *State v Khanyse Thwala* (Review case 333/94)

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.'

[11] In *S v Classen* (CR 09/2022) [2022] NAHCMD 53 (11 February 2022), it was noted that:

'. . . 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.'

[12] When applying the abovementioned principles to the facts of this case, the magistrate, failed to adequately ascertain the reliability of the admissions made as regards the substances dealt with. The mere fact of the accused describe the distinctive smell, color and leave without the magistrate ascertaining himself with sscientific evidence or by acceptable means raises concerns. It becomes evident that the magistrate relied on the accused admission without corroborating with analyst certificate or testimony from a police officer familiar with the substance, to establish the nature of the substance.

[13] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. That the accused be released forthwith, unless lawful detained on another matter.

P CHRISTIAAN **JUDGE**	**N N SHIVUTE** **JUDGE**