

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

CR No.: 51/2020

Case No.: OH 262/2020

In the matter between:

THE STATE

V

HILIA OSHOSHENI

FIRST

ACCUSED

SALVADOR DOMINGOS NDALA

SECOND

ACCUSED

Neutral citation: *S v Oshosheni* (CR 51/2020) [2020] NAHCNLD 121 (31 August 2020)

Coram: DIERGAARDT AJ *et* JANUARY J

Delivered: 31 August 2020

Flynote: Criminal Drug offences - Statutory presumption that accused dealing - Accused pleaded but not admitting dealing - Accused must be given opportunity to rebut

presumption - The presumption of dealing must be articulated in the charge and clearly explained by the Magistrate preferably before questioning. Questioning in terms of section 112(1) (b) must be clear and cover all the elements of an offence. The accused raised a defense.

Summary: The accused two was convicted for dealing in cannabis in the magistrates' court following questioning in terms of section 112 (1) (b) of the CPA. He admitted being in possession of cannabis and intended to use it as medicine for his cattle. The Magistrate relied on the presumption in terms of section 10 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971 and found that he was dealing in cannabis.

Held that presumption of dealing must be articulated in the charge and clearly explained by the Magistrate preferably before questioning.

Held also that questioning in terms of section 112(1) (b) must be clear and cover all the elements of an offence.

Held further that accused should be given an opportunity to rebut the presumption under oath and be cross-examined.

ORDER

In the result the following order is made:

1. The conviction and sentence for accused no 2 on count 1 are set aside;
2. The case is remitted to the magistrate's court, Eenhana, in terms of s 312(1) of the Criminal Procedure Act, 51 of 1977, with the direction to act in terms of s 113 of the said Act.

JUDGMENT

DIERGAARDT AJ (JANUARY J concurring);

[1] This case came before me on automatic review. Accused no 2 herein was convicted of having contravened s 2(a) of the Abuse of Dependence-Producing Substances and Rehabilitation Centers Act 41 of 1971- dealing in cannabis and sentenced to eight thousand five hundred Namibia dollars or in default twelve months (12) months imprisonment

[2] The accused was sentenced on 29 June 2020 and the record of proceedings was received by this court on 15 July 2020.

[3] The accused was charged with having contravened s 2(a) read with, *inter alia*, s 10 of the Act 41 of 1971. He was charged with an alternative charge of having contravened s 2(b), possession of dependence-producing drug or plant. It was furthermore not stated in the particulars of the charge that it would be presumed that the accused has been dealing in view of the fact that he had cannabis in his possession.

He was also charged with contravention of section 16(1) read with section 16 (1) (a) and a second count of contravening section 16 (2) of Act 1 of 2010-dealing in illicit tobacco products of which he was correctly convicted and sentenced.

[4] The accused pleaded guilty and was questioned in terms of s 112(1) (b) of Act 51 of 1977. He admitted that he was in possession of cannabis but averred that he wanted to use the cannabis for his cattle.

[5] Amongst other concerns, I queried the Magistrate on whether he was indeed satisfied that the accused admitted to dealing in cannabis or that the accused agreed that he was aware of such presumption. The Magistrate conceded that he misunderstood the presumption and he could not have been satisfied that the accused admitted to all the elements of the offence.

[6] The question is whether the magistrate was entitled to convict the accused on the presumption of dealing in cannabis. I refer to section 10 of the Abuse of

Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971, the presumptions contained in section 10(1) (a) of the Act are as follows:

'If in any prosecution for an offence under section 2 it is proved that the accused was found in Possession of-

- (a) . . .
 - (i) . . .
 - (ii) . . .
 - (iii) dagga exceeding 115 grams in mass;
 - (iv) any prohibited dependence-producing drugs;

It shall be presumed that the accused dealt in such dagga or drugs, unless the contrary is proved.'

[7] In the light of the reverse onus on the accused person to prove that he had not dealt in the drug. It cannot be over-emphasized that the court is under a duty to explain the content of the presumption at the earliest opportunity and ascertain whether the accused understands the consequence of the presumption. It is suggested therefore that the presumption be at least explained to the accused person at the moment the court becomes aware of the fact that the State intends on relying on the said presumption.

[8] I fully agree with the sentiment shared in *S v Kuvare* 1992 NR 7 (HC) where the court held that '...where an accused person is charged with dealing in dagga in contravention of s 2(a) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971, it is unfair not to inform the accused in the particulars of the charge that he is presumed, in terms of s 10(1)(a)(i) of the Act, to have dealt in the dagga because he was in possession of more than 115 grams of dagga.' In this case the accused pleaded not guilty and testified under oath. The court set aside the conviction and sentence as it held that the accused was prejudiced in his defense by the failure to inform him of the presumption and secondly because the court was of the view that, on the evidence, the presumption was rebutted.

[9] To further substantiate my conclusion I rely on the case of *S v Rooi* 2007 (1) NR 282 (HC) where the court held that '...before the prosecution and the court could rely on this

presumption, it must remember that the presumption was rebuttable by proof to the contrary. The only way that the accused could present proof was by presenting evidence, which meant that he/she must be afforded the opportunity to do so under oath, either by giving evidence in person, or by calling witnesses. The prosecution must also be given the opportunity to cross-examine on the evidence presented by the accused. The accused could not attempt to rebut the presumption by means of answers during questioning in terms of s 112(1) (b) of the Criminal Procedure Act 51 of 1977.'

[10] *In casu* it is clear from the record that the accused raised a defense when he indicated that he intended to use the high quantity of dagga as medicine for his cattle. The learned magistrate then recorded that "the court is satisfied that accused has admitted to all the allegations in the charge and is found guilty as charged'. The fact of the matter is that the accused did not admit that he was dealing with cannabis and I am also not convinced that the accused being a layperson could have been aware of the said presumption of dealing to be able to admit when the magistrate put it to the him that he was presumed to be dealing in cannabis.

[11] I am of the view that the accused did not admit to all elements of the offence of dealing. The Magistrate could not in all honesty be satisfied that the accused admitted to all the elements of the offence more specifically *mens rea*. In the result the magistrate should have recorded a plea of not guilty in terms of s 113 of Act 51 of 1977 and give the accused the opportunity to rebut the presumption.

The conviction therefore cannot stand.

[12] In the result the following order is made:

1. The conviction for accused two (2) on count one (1) and sentence are set aside;
2. The conviction and sentence of accused two (2) on count (2) is confirmed;

3. The case is remitted to the magistrates' court, Eenhana, in terms of s 312(1) of the Criminal Procedure Act, 51 of 1977, with the direction to act in terms of s 113 of the said Act and the case to follow its natural course.

A Diergaardt
Acting Judge

I agree,

HC January
Judge