REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2020/00049

In the matter between:

MAYANGA SHIDANGI **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation*:* *Shidangi v S* (HC-NLD-CRI-APP-CAL-2020/00049) [2022] NAHCNLD 10 (15 February 2022)

Coram: SALIONGA J and SMALL AJ
Heard: **12 December 2021**
Delivered: 15 February 2022

Flynote: Criminal Procedure- Appeal on conviction and sentence- Point in limine- Condonation- amended notice of appeal- approach on appeal- Hearsay evidence- Onus of proof.

Summary: The appellant and two co-accused accused were tried in the Magistrate Court on Charges of dealing, alternatively possession of cannabis. The

appellant and accused 1 were convicted and sentenced whilst the third accused was discharged in terms section 174 of the CPA. On 13 December 2019, accused one was sentenced to three years imprisonment of which eighteen months were suspended for a period of five years on condition that he is not convicted of contravening section 2(a) of Act 41 of 1971 committed during the period of suspension. The appellant, who had two previous convictions, one for dealing in, and the other for possession of, cannabis, was sentenced to 5 years imprisonment.

Both appellant and accused 1 were arrested following an informer giving out information and pointing-out a room to the police allegedly belonging to one Rasta saying there was cannabis in the room and that people previously came to this room to buy cannabis. Outside this room police identified shoeprints similar to those created by shoes worn by accused 1. A witness (Police officer) asked for the key to the room and accused 1 took it from his pocket and handed it to the witness. The witness and colleagues started searching the room and discovered cannabis. When accused 1 was confronted with what was found in the room, the latter denied that the cannabis belonged to him and stated that the cannabis belongs to Rasta. The witness remembered what his informer told him, and he got hold of the appellant and arrested him with accused 1. Both appellant and accused 1 respectively denied that the cannabis found belonged to them.

Held: that the points in limine on the amended notice of appeal are well taken and stands to be upheld.

Held further: that the court will deal with this matter as if the aforesaid amended notice of appeal was never filed.

Held further: that hearsay evidence is and remain inadmissible in criminal trials in Namibia.

Held further: that the intention to exercise control of the cannabis and not the room was required before possession of such cannabis is established.

ORDER

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1. The respondent's points in limine in respect of the original notice of appeal is dismissed.

2. The respondent's points in limine in respect of the amended notice of appeal is upheld.

3. The appellant's appeal against his conviction is upheld and his conviction of contravening section 2 (a) read with sections 1, 2(i) and/or 2(ii), 8, 10, 14 and Part I of the Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 - Dealing in a prohibited dependency producing drug and the subsequent sentence is set aside.

4. The conviction of accused 1, Eluida Kanghono, of contravening section 2 (a) read with sections 1, 2(i) and/or 2(ii), 8, 10, 14 and Part I of the Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 - Dealing in a prohibited dependency producing drug and the subsequent sentence is set aside.

5. Both appellant and accused 1, Eluida Kanghono, is to be released immediately.

JUDGMENT

SMALL AJ: (SALIONGA J concurring):

Introduction

[1] The appellant was arraigned as accused two in the Magistrates' Court for the District of Eenhana held at Ohangwena on one count consisting of a main charge of

contravening section 2 (a) read with sections 1, 2(i) and/or 2(ii), 8, 10, 14 and Part I of the Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 - dealing in prohibited dependency producing drug and an alternative charge of contravening section 2 (b) read with sections 1, 2(i) and/or 2(iv), 7, 8, 10, 14 and Part I of the Schedule of Act 41 of 1971 – possession of cannabis.

[2] The incident that gave raised to the aforesaid charges allegedly transpired on 25 October 2019 at Oshikango in the district of Eenhana and related to 234 grams of cannabis valued at N$2 340.00 found in a room. Both accused 1, Eluida Kanghono and the appellant were convicted of dealing in the aforesaid cannabis on 13 December 2019. Accused three, Ndashitohamba Hitopavali Butty Simeon, was however discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977 on 3 December 2019. In the court a quo the appellant was defended by Ms Shailemo while accused 1 and three conducted their own defences.

[3] On the same date, being 13 December 2019, accused one was sentenced to three years imprisonment of which eighteen months were suspended for a period of five years on condition that he is not convicted of contravening section 2(a) of Act 41 of 1971 committed during the period of suspension. The appellant, who had two previous convictions, one for dealing in, and the other for possession of, cannabis, was sentenced to 5 years imprisonment.

[4] The appellant, a layman, clearly dissatisfied with the severity of his sentence of imprisonment and the evidence accepted by the court a quo in convicting him drafted a notice of appeal on 18 December 2019. From the date stamp of the officer in charge of the Correctional Facility where appellant was detained it is clear that the document was received by them on 24 December 2019. This notice of appeal was subsequently filed with the clerk of court of Eenhana on 6 January 2020 according to that office’s date stamp.

[5] During the hearing of the appeal, the appellant was represented by Mr. Nyambe and the respondent by Ms. Petrus.

[6] Mr Nyambe filed an amended notice of appeal on 17 May 2021. I will return to this later in the judgement.

Argument in Limine

[7] Ms Petrus raised two points in limine in respect of the appellant's original notice of appeal. She stated that not only was the notice of appeal filed out of time but it also, contained no valid grounds of appeal.

[8] Regarding the amended notice of appeal dated 17 May 2021, Mr Petrus raised additional points in limine. She submitted that counsel filed the notice mentioned above well out of the prescribed time, filed no application for condonation and filed the purported amended notice of appeal without a power of attorney as is required. Accordingly, she submitted that the amended notice of appeal is invalid, and no appeal on its basis should be entertained.[1] Mr Nyambe did not make any submissions in this regard.

[9] The points in limine in respect of the amended notice of appeal are well taken and stands to be upheld. However, upholding these arguments in respect of the amended notice of appeal cannot result in the striking of the appeal for the reasons set out hereinafter. It however does mean that this Court will, and must, deal with this matter as if the aforesaid amended notice of appeal was never filed. Sadly the filing of the amended notice of appeal unnecessarily delayed the hearing of this appeal.

[10] Although our Courts must maintain the principle that they should strike appeals if notices of appeal do not contain clear and specific grounds of appeal, some leniency should be given to a layperson drawing up a notice of appeal while

[1] What was required was explained as follows in *S v Kavari* 2011 (2) NR 403 (HC) in paragraph 7: 'More particularly rule 67(1) sets out the prescribed steps to be taken as follows: "67(1) A convicted person desiring to appeal under s 103(1) of the Act, [now s 309(1) of the Criminal Procedure Act, 1977] shall within 14 days after the date of conviction, sentence or order, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based: Provided if such appeal is noted by a legal practitioner on behalf of a convicted person he shall simultaneously with the lodging of the notice of appeal lodge a power of attorney authorising him to note an appeal and to act on behalf of the convicted person.'"

serving a custodial sentence. Especially if one can decide what the appellant is taking issue with and wants the appeal court to consider. [2]

[11] As I have stated herein, it is clear from the notice of appeal that the appellant challenged the severity of his sentence of imprisonment, the decision by the court a quo not to impose a fine and the evidence accepted by the court a quo in convicting him. Counsel for respondent also had no problem drafting her heads of argument and addressing the Court in this regard.

[12] I find that the appellant's original notice of appeal in reasonably clear and in specific terms informed the trial magistrate which part of the judgment is appealed. The grounds also show the basis on which the appellant brings the appeal. The notice also informed the respondent of the case it was required to meet. Finally, it reasonably crystallises the disputes and determines the Court of Appeal's parameters to decide the issues.[3] The attack on the notice of appeal thus must therefore fail.

[13] I now turn to the submission by counsel for the respondent that the original notice of appeal was filed out of time and required an application for condonation before this court could entertain the appeal.

[14] An appellant should lodge the notice of appeal with the clerk of Court within fourteen days from date of conviction and sentence. These are court days and Saturdays; Sundays and public holidays are excluded. The period is calculated by excluding the first day and including the last day of the period. [4]

[15] The original notice of appeal was completed on and dated 18 December 2019 and handed to the Correctional Services on 24 December 2019. As the Appellant’s sentence was imposed on Friday 13 December 2019 and as the first day of any

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[2] *S v Ashimbanga* 2014 (1) NR 242 (HC) paragraphs 4-5 and *Endjala v S* (HC-NLD-CRI-APP-CAL-2020/00035) [2020] NAHCNLD 161 (19 November 2020) paragraph 5

[3] *S v Kakololo* 2004 NR 7 (HC) at 8 F-I

[4] *Kornelius v S* (CA 103/2009) [2011] NAHC 110 (8 April 2011) at para 10; *Hamana v S* (HC-NLD-CRI-APP-CAL-2020/00012) [2020] NAHCNLD 156 (12 November 2020)

period prescribed,[5] as well as Saturdays, Sundays, and public holidays [6] are excluded, the period of fourteen days[7] only started to run on Monday 16 December 2019. Wednesday 25 December 2019 [Christmas Day], Thursday 26 December 2019 [Day of Goodwill] and Wednesday 1 January 2020 [New Year's Day] were all, like Saturdays and Sundays excluded from the calculation of the fourteen-day period. The last day for filing the notice of appeal was thus 7 January 2020, as such last day of a period calculated under the rules is included.[8]

[16] The appellant's original notice of appeal was filed with the clerk of court, Eenhana, on 6 January 2020. It was thus filed within the prescribed period of fourteen days. Therefore, the respondent's argument in this matter is without merit and needs to be dismissed.

Approach on Appeal

[17] An Appeal Court's powers were summarized by the Supreme Court in *Vermeulen and Another v Vermeulen and Others*[9] while applying *R v Dhlumayo and Another*[10].

[18] For purposes of this appeal the relevant parts of the aforesaid decisions can be summarized as follows: An appellate court does not anxiously look for reasons adverse to the trial Judge's conclusions but may regularly be in a similar position as the trial Judge to draw inferences. The trial judge has advantages, which the appellate court cannot have, in seeing and hearing the witnesses and being steeped in the trial's atmosphere. Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a civil or criminal case. If there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse the trial court's finding where it is convinced it is wrong. The guides are mainly common

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[5] Section 4 of the Interpretation of Laws Proclamation 37 of 1920
[6] Rule 2(2) of the Magistrates' Court Rules
[7] Rule 67 (1) of the Magistrates' Court Rules
[8] Section 4 of the Interpretation of Laws Proclamation 37 of 1920; *Nande v S* (HC-NLD-CRI-APP-CAL-2020/00025) [2020] NAHCNLD 165 (19 November 2020)
[9] *Vermeulen and Another v Vermeulen and Others* 2014 (2) NR 528 (SC) paragraph 17
[10] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706-707

sense, flexible and such as not to hamper the appellate court in doing justice in the case before it. A misdirection on fact is committed if the reasons are either unsatisfactory and the record shows them to be such or if it in its reasoning overlooked clear facts or probabilities.

The evidence presented before the court a quo

[19] The evidence placed before the Court a quo by the State can be summarized as follows. The first police officer, one Haikali Absalom,[11] was the witness who arrested both accused 1 and the appellant. He visited what he described as Mr Haidiyo's building on 25 October 2019 in Helao Nafidi Town in Oshikango. An informer pointed out a room allegedly belonging to one Rasta and said there was cannabis in the room and that people previously came to this room to buy cannabis. Outside this room he identified shoeprints. This seemed to be similar shoeprints to those created by shoes worn by accused 1. Accused 1 identified himself as Eliuda. He asked for the key to the room and accused 1 took it from his pocket and handed it to the witness. The witness and colleagues started to search the room. The witness observed a pinkish bowl which he said was put on top.[12] He opened it and inside he found green herbs and seeds which looked like cannabis to him. Another item which the witness described as a plastic which contained folded balies of cannabis, was found thereafter.[13]

[20] When accused 1 was confronted with what was found in the room, the latter denied that the cannabis belonged to him and stated that the cannabis belongs to Rasta. The witness remembered what his informer told him, and he got hold of the appellant and arrested him with accused 1. The items he found were handed to the investigation officer Sergeant Namhila. From the cross-examination it is apparent that both appellant and accused 1 denied that the cannabis found belonged to him.

[21] The second state witness was Frederick Namhila. He confirmed receiving the exhibits on Saturday 26 October 2019, identified it as cannabis. He weighed the

[11] Unfortunately, no evidence was led as to te rank he holds in the Namibian Police.
[12] No evidence was presented or elicited as to exactly what this means.
[13] Once again, no evidence was presented or elicited as the where this was found and whether such cannabis was clearly visible to anyone who enter the room or whether it was hidden somewhere.

cannabis in the presence of the appellant and accused 1 and indicated that it had a mass of 234 grams valued at N$2 340.00. After arresting accused 3 this witness went to the place where the cannabis was and there was a person, one Pau who said that he gave the key to the room to accused 1 and appellant.

[22] Both accused gave evidence. Accused 1 denied that the cannabis belonged to him. He stated that he just used the room on the invitation of the appellant and suggested that the cannabis must belong to appellant as he was given the key to this room by the appellant. He indicated that the cannabis was found on top of the roof inside the room.[14] He never stated that he saw the cannabis in the room or appellant placing the cannabis in the room. He further alleged that one Pau is the owner of the room and that he (Pau) and appellant had control over that room.

[23] The appellant denied having control of the room and ever giving the keys of the room to accused 1. He essentially reiterated what was stated during his plea explanation that the cannabis was found in a room that is some distance from his workshop and that the key at the time was in the possession of accused 1. He further denied dealing in prohibited dependence producing drugs and having access to the room where it was found.

[24] It appears from the record that the learned magistrate considered calling Mr Pau in terms of section 186 of the Criminal Procedure Act 51 of 1977 to give evidence in in this matter.[15] He was however not called as he apparently was in hospital.

Evaluation of the presented evidence

[25] From the aforesaid summation of the evidence and in considering the lower court's judgement it is apparent that hearsay evidence was led by the State, without

[14] Once again, where exactly it was found was not presented or canvassed in cross-examination.

[15] As I stated in *S v Hamukwaya* (HC-NLD-CRI-APP-SLA-2020/00064) [2021] NAHCNLD 59 (25 June 2021) paragraph 22:'…the court has a duty to see that substantial justice, as was spelled out in *S v Van den Berg,* 1995 NR 23 (HC) at 32F-33C is done. Substantial justice is done by ensuring that an innocent person is not punished and that a guilty person does not escape punishment. Especially if substantial justice is not done due to some omission, mistake, or technicality.'

objection by the appellant's legal representative at trial, and allowed by the Court a quo. The court allowed and used this hearsay evidence to convict the appellant. I'm aware that in *S v Ihemba*,[16] the High Court on review found that hearsay evidence can be relied on in criminal cases but found that the accused in the review case's right to a fair trial was infringed by admitting hearsay evidence that was a decisive factor to prove appellant's guilt.

[26] Insofar as that case suggests that hearsay evidence might under certain circumstances be allowed during criminal trials in Namibia I have to disagree. Perusal of the *Ihemba*-decision[17] makes it clear that the Court mistakenly relied on two South African decisions, to wit *S v Ramavhale* [18] and on *S v Dyimbane* [19] in concluding that, in the absence of compelling justification, a court should hesitate to admit hearsay evidence when it plays a decisive or significant part in convicting an accused, but where such hearsay evidence proves the accused's innocence, a court may more readily admit such evidence and by implication suggested hearsay evidence can outside the common law exceptions be admitted in Namibian courts.

[27] The South African decisions relied on by the Court in the *Ihemba*-decision deals with hearsay evidence presented after the Law of Evidence Amendment Act 45 of 1988 came into operation in South Africa on 3 October 1988 and repealed section 216 of the South African Criminal Procedure Act 51 of 1977. Section 3 of that Act now governs the admissibility of hearsay evidence in South Africa. The two cases[20] specifically refer the aforesaid Act.

[28] The Law of Evidence Amendment Act 45 of 1988 is however not part of Namibian law and never repealed section 216 [21] of the Namibian Criminal Procedure Act 51 of 1977. Hearsay evidence is and remain inadmissible in criminal trials in

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[16] *S v Ihemba* (CR 79/2020) NAHCMD 477 (19 October 2020)

[17] Ibid, paragraph 11

[18] *S v Ramavhale* 1996 1 SACR 639 (A) at 649 d stating: 'A judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused unless there are compelling justifications for doing so.'

[19] *S v Dyimbane* 1990 2 SACR 502 (SE) at 504 d

[20] *S v Ramavhale (supra) at 647e-g and S v Dyimbane (supra) at 503g-504c*

[21] Section 216 of the Namibia Criminal Procedure Act 51 of 1977 still reads as follows: 'Except where this Act provides otherwise, no evidence which is of the nature of hearsay evidence shall be admissible if such evidence would have been inadmissible on the thirtieth day of May 1961.'

Namibia. The only exceptions to this general rule are the well-known common law exceptions. Suffice to say for purposes of this judgement that the hearsay presented in this case to wit the informer's report as well as what other non-witnesses [like Mr Pau] told the two police officers do not fall under the common law exceptions.

[29] The Supreme Court in *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* [22] quoted *R v Miller and Another* 1939 AD 106 at 119 with approval. The latter decision stated:

'But statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (ie, as evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends upon the credit of the asserter which can only be tested by his appearance in the witness-box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if what they are tendered to prove is relevant to the enquiry.' [23]

[30] The hearsay evidence should thus not have been allowed by the Court a quo. It committed a misdirection and irregularity when it allowed and accepted that evidence.

[31] The court a quo concluded from the evidence summarized above that both appellant and accused 1 had access and control of the room in which the police found the cannabis. It also concluded that the mere fact that the room belonged to one Pau did not exonerate them from being in control of the cannabis found in that room because accused 1 should have mentioned Pau as the owner of the cannabis.

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[22] *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* 2013 (3) NR 664 (SC) in paragraph 62

[23] The Supreme Court also approved *the definition given in Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others* 1984 (4) SA 295 (SWA) at 312F that stated*:* 'For establishing that reports were made to the persons concerned, the evidence is admissible, but in my opinion it is not admissible to prove the correctness of the contents of such reports*.'; S v Munuma and Others* 2016 (4) NR 954 (SC) paragraph 72 stated: 'According to Phipson on Evidence (1982) at 16-02: "(A)n assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted.' [See also Cross on Evidence 6 ed (1985) at 38.]"

As the appellant and his co-accused possessed more than 115 grams of cannabis the trial court convicted them of dealing in the aforesaid cannabis.

[32] Before evaluating the aforesaid reasoning it is necessary to once again refer to the trite principles that the State carries the onus of proving an accused's guilt beyond a reasonable doubt. There is no onus on an accused to prove his innocence.[24]

[33] No onus rests on the accused to convince the Court of the truth of any explanation he gives. If he explains, even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied not only that the explanation is unlikely, but that beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true, he is entitled to his acquittal.[25]

[34] Reasonable doubt about the accused's guilt does not depend on whether the Court subjectively believes him or not. Thus, the Court does not even have to reject the State's evidence to acquit him. But, if there is a reasonable possibility that his evidence might be true, he must be acquitted or be given the benefit of the doubt.[26]

[35] *In S v Paulo and Another (Attorney-General as Amicus Curiae*)[27] the Supreme Court approved the dictum enunciated in *S v Smith* [28]and indicated that:

'The concepts of custody or possession comprise two main elements: they are, firstly, the physical element of corpus, i.e. physical custody or control over the res in question, exercised either mediately or immediately, and the mental element of animus, ie the intention to exercise control over the thing.'

[36] Before the court could use the presumption to convict the accused of dealing in the cannabis, possession, consisting of physical custody or control and the

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[24] *Woolmington v Director of Public Prosecutions* [1935] 1 AC 462 at 481 – 482 as followed in *S v Koch* 2018 (4) NR 1006 (SC) paragraph 10
[25] *S v Haileka* 2007 (1) NR 55 (HC) in paragraph 7 approving and applying *R v Difford* 1937 AD 370 at 373; *R v Vlok and Vlok* 1954 (1) SA 203 (SWA) at 207B – D
[26] *S v Haileka* 2007 (1) NR 55 (HC) in paragraph 7 approving and applying *S v Kubeka* 1982 (1) SA 534 (W)
[27] *S v Paulo and Another (Attorney-General as Amicus Curiae*)*2013 (2) NR 366 (SC) at 378D – F*
[28] *S v Smith 1965 (4) SA 166 (C) at 171D – E*

intention to exercise such control, of the cannabis, not the room, was required. This was not proven in this case. The Court a quo mistakenly equated mere access to the room with the intentional [29]and deliberate physical custody or control of the cannabis. In the absence of evidence indicating exactly where the police found the cannabis, such finding is unsubstantiated, especially when the evidence shows that the room, and most of its contents, belonged to someone else.[30]

[37] Furthermore, the Court a quo allowed evidence as to what accused 1 said after the cannabis was found without any evidence whatsoever that accused was informed of his rights before he did so. This evidence should never have been presented and allowed in the manner that it was. In the absence of this evidence there is nothing whatsoever linking the appellant to either the room or the cannabis found in the room in the State's case.

[38] The trial court also did not adequately evaluate the evidence presented by accused 1. A perusal of the record makes it abundantly clear that accused 1 did not incriminate the appellant in his evidence. His evidence indicates that he believed that the cannabis belonged to the appellant as the appellant previously smoked cannabis at work, and the appellant, like him, had access to the key and room. Nowhere did he directly link the appellant to the cannabis in the room.

[39] Furthermore, the trial court also seems to have disregarded accused 1's additional evidence that he knew nothing of the cannabis in the room. In addition, the Court a quo gave no weight to the evidence that accused 1, when requested for the key to the room without hesitation, took it out of his pocket and handed it to the police officer when it was apparent that they were about to search the room. This conduct is doubtful if he had been aware of the cannabis in the room. A conclusion that accused one's evidence that he was unaware of the cannabis in the room is false beyond a reasonable doubt is not possible as no evidence was led to show

[29] It is now settled in our law that mens rea is an essential ingredient of the offence created by s 2(1)(a) of the Act. See S v Pillay 1974 (2) SA 470 (N) at 472F, S v Smith 1965 (4) SA 166 (C) at 171C and S v Paulo and Another (Attorney-General as Amicus Curiae) 2013 (2) NR 366 (SC) paragraph 29.

[30] *In R. v Moyage and Others,* 1958 (3) S.A. 400 (A.D.) at p. 414 a scenario is sketched which is identical to the set of facts in this case. The illustration provides that a railway porter who has packets and suitcases under his control but is unaware that there is cannabis in one of the packets, cannot be guilty of possessing the said substance as he lacks mens rea.

precisely where the cannabis was found in the room or why mere access to the room should equate to knowledge of the cannabis in the room.

[40] In view of what was stated hereinbefore there is simply no admissible evidence linking either appellant or accused 1 to the cannabis found in the room and to substantiate the conviction. Although accused 1 did not appeal his conviction or sentence this Court is entitled to use its inherent jurisdiction to set aside his conviction and sentence.[31]

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

1. The respondent's points in limine in respect of the original notice of appeal is dismissed.

2. The respondent's points in limine in respect of the amended notice of appeal is upheld.

3. The appellant’s appeal against his conviction is upheld and his conviction of contravening section 2 (a) read with sections 1, 2(i) and/or 2(ii), 8, 10, 14 and Part I of the Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 - Dealing in a prohibited dependency producing drug and the subsequent sentence is set aside.

4. The conviction of accused 1, Eluida Kanghono, of contravening section 2 (a) read with sections 1, 2(i) and/or 2(ii), 8, 10, 14 and Part I of the Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 - Dealing in a prohibited dependency producing drug and the subsequent sentence is set aside.

5. Both appellant and accused 1, Eluida Kanghono, is to be released immediately.

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[31] *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* 2010 (2) NR 703 (HC) paragraph 30

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D. F. SMALL

ACTING JUDGE

I agree,

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J. SALIONGA

JUDGE

APPEARANCES

APPELLANT:	Mr. M. Nyambe Mukaya Nyambe Incorporated, Ongwediva
RESPONDENT:	Ms. S. Petrus Office of the Prosecutor-General. Oshakati