

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no.: CR 57/2022

THE STATE

v

PANDULENI  
ACCUSED

SHIPOPYENI

HAIKALI

(HIGH COURT NORTHERN LOCAL DIVISION REVIEW REF NO. 323/2021)

**Neutral citation:** *S v Haikali* (CR 57/2022) [2022] NAHCNLD 111 (14 October 2022)

**Coram:** SALIONGA J and KESSLAU AJ

**Delivered:** 14 October 2022

**Flynote:** Accused was charged with unlawful dealing in cannabis – contravening s 2 (a) of Act 41 of 1971 – Alternatively possession of cannabis contravening s 2(b) of the same Act - Court convicted the accused on alternative charge-- State not given the opportunity to lead evidence or accept a plea on alternative – Misdirection by magistrate – Plea of guilty on alternative charge which magistrate convicted accused left issues of the main charge unresolved between State and accused –

Wrong for magistrate to assume that main charge was disposed of – Conviction on alternative charge cannot be allowed to stand

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### **ORDER**

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1. The conviction and sentence are set aside.
  2. If accused had paid a fine, same should be refunded.
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### **REVIEW JUDGMENT**

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SALIONGA J, (KESSLAU AJ concurring):

[1] The accused was charged with the offence of contravening s 2(a) read s 1, 2(i) and/or 2 (ii), 8, 10, 14 and part 1 of the Schedule of Act 41 of 1971 as amended – Unlawful dealing in a prohibited dependence producing drug or a plant from which such drug can be manufactured (cannabis) as the main count with an alternative count of contravening s 2(b) read with s1, 2(i) and/or 2 (iv), 7, 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1971 as amended-Unlawful possession or use of a prohibited dependence producing drug or a plant from which such drug can be manufactured (cannabis).

[2] The accused pleaded guilty, was convicted on the alternative charge and sentenced to a fine of N\$1800 or 9 months' imprisonment in default thereof. It is clear from the record that the accused had pleaded not guilty on the main count and guilty on the alternative count but the record does not reflect a verdict on the main count.

[3] I raised a query with the magistrate as to what became of the main charge to which the accused had pleaded not guilty and whether the State did accept the plea of guilty on the alternative.

[4] The learned magistrate responded as follows:

'In respect of the main charge I was supposed to indicate that the accused was found not guilty. I concede that it was not reflected as such in the record. I further concede that it is not reflected on record that the state accepted the plea of guilty on the alternative charge. I submit the record back to the honourable reviewing judge and any further guidance would be much appreciated.

[5] Where an accused pleads not guilty to the main charge and guilty to the alternative charge or lesser offence of which he can be convicted of, the main charge is only impliedly disposed of if the prosecutor accepts the plea of guilty on the alternative charge or lesser offence of which the accused may be convicted of. However, if the prosecutor does not accept the plea of guilty in respect of an alternative or lesser offence the trial on the main charge should proceed.

[6] In the present matter the accused was charged with dealing in cannabis as the main charge alternatively possession of cannabis. Although the record reflected that the accused pleaded not guilty to the main count, no verdict was recorded. The plea of guilty on the alternative count of which the magistrate convicted the accused left the issue of the main charge unanswered. The prosecutor did not accept the plea of guilty on the alternative count either. It is wrong for the magistrate to convict the accused on the alternative charge and proceed to finalise the matter in this regard assuming that the main charge was disposed of. The magistrate should have given the prosecutor an opportunity to either lead evidence or accept a plea on the alternative count before he convicted the accused.

[7] The aforesaid legal principle was in my view correctly enunciated in *S v Mumpayi*<sup>1</sup> where Shivute J with January concurring found that the learned magistrate's conviction of the accused on the alternative charge without the acceptance from the prosecutor, was impermissible because the court had denied the State the opportunity to prosecute the accused on the main charge preferred against him. For the above reasons, the conviction and sentence on the alternative charge cannot be allowed to stand.

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<sup>1</sup> *S v Mumpayi* (CR 49 /2017) [2017] NAHCMD 220 (11 August 2017)

[8] The accused was sentenced on 16 June 2021 and had already served his sentence. It will not be in the interest of justice to remit the matter to the magistrate in terms of s 312 of the Act in order to enter a plea of not guilty and proceed with the trial.

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

1. The conviction and sentence are set aside.
2. If accused had paid a fine, same should be refunded.

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J T SALIONGA  
Judge

I agree,

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E E KESSLAU  
Acting Judge