

<b>Case Title:</b> <i>The State v Chris Hanse</i>	<b>Case No:</b> CR 15/2020
<b>High Court MD Review No:</b> 2414/2019	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Mr Justice Liebenberg <i>et</i> Mr Justice Sibeya ( <i>Acting</i> )	<b>Delivered on:</b> 20 March 2020
<b>Neutral citation:</b> <i>S v Hanse</i> (CR 15/2020) [2020] NAHCMD 104 (20 March 2020)	
<b>The order:</b> <p style="text-align: center;">The conviction and sentence are set aside.</p>	
<b>Reasons for order:</b>	
<p>LIEBENBERG J (concurring SIBEYA, AJ)</p> <p>[1] This is a review brought in terms of s 302 (1) of the Criminal Procedure Act 51 of 1977 (the CPA) as amended.</p> <p>[2] The accused was found in possession of three ‘balies’ of cannabis (the substance) valued at N\$150 at a Keetmanshoop Police Station. The three ‘balies’ were found stashed in a blanket that he was given to deliver to someone held in custody at the Police Station. He was subsequently charged with one count of possession of a dependence-producing substances, to wit three ‘balies’ of cannabis, a contravention of section 2(b) r/w Part I of the Schedule of Act 41 of 1971, as amended.</p> <p>[3] On 25 June 2019 the accused pleaded not guilty to the charge where after the matter was postponed to 22 October 2019 for trial. On that date the accused changed his stance and stated that he wants to plead guilty. The magistrate there after proceeded questioning the accused along the lines of section 112(1)(b) (although not reflected in the record as such), during which the accused maintained his earlier view that he was unaware that the blanket contained the prohibited substance. Subsequent thereto and mindful of the accused having initially pleaded not guilty, the magistrate</p>	

informed the accused that it would appear that he does not dispute all the allegations contained in the charge and then warned him of the implications of his admissions. The court further enquired from him whether he consented to the following admissions to be recorded as formal admissions made in terms of section 220 of the CPA to which he agreed, to wit:

- (a) 'That on 17 March 2019,
- (b) At Keetmashoop,
- (c) You were found in wrongfully and unlawfully,
- (d) Possession of 3 'balies' of cannabis valued at N\$150,
- (e) That it is a prohibited dependence-producing drug or plant.'

[4] The state thereafter closed its case and so did the accused. At the end of the trial he was convicted, on the strength of his formal admissions and sentenced to a fine of N\$2 000 or, in default of payment, to 12 months' imprisonment.

[5] When the matter came on review a query was sent to the magistrate enquiring as to why the accused was convicted as he never admitted having had knowledge of the three 'balies' of cannabis found wrapped in the blanket.

[6] The magistrate replied by saying that the offence created by section 2(b) of Act 41 of 1971 is one of strict liability and *mens rea* is not an element of the offence. Consequently, it did not matter whether or not the accused had any knowledge of the cannabis.

[7] Section 2(b) of Act 41 of 1971 reads as follows:

'Notwithstanding anything to the contrary in any law contained, any person who has in his possession or uses any such dependence-producing drug or plant...shall be guilty of an offence.'

[8] 'Possess' is defined as including "keeping, storing or having in custody or under control or supervision."<sup>1</sup> Possession consists of two elements, namely a physical (*corpus*) and mental element

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<sup>1</sup> S 1.

(*animus*). *Corpus* means physical control by a person over a thing and this control may exist either in the direct physical control of the article by the person concerned or, the mediate control through another having control on behalf of the former.<sup>2</sup> Whilst *animus* is fundamentally the intention to have *corpus*, i.e. control.<sup>3</sup> Therefore, if either of the elements are lacking a person cannot be said to have been in possession of an article under his control.

[9] The facts of this case postulate that the accused admitted that cannabis was found wrapped inside the blanket he had brought to the charge office. However, the accused pertinently raised a defence of lack of awareness and therefore oblivious of the prohibited substances inside the blanket. The accused thus denied having had the required *animus* to possess the prohibited substance.

[10] In *S v Paulo*<sup>4</sup> the Supreme Court approved the *dictum* enunciated in *S v Smith*<sup>5</sup> where the following is said at 171D-E:

‘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*, i.e. the intention to exercise control over the thing.’

The judgment further reads at E-G:

‘At the same time there is a general rule that, ordinarily speaking, a crime is not committed if the mind of the person doing the act in question is innocent: *actus non facit reum nisi mens sit rea*. This principle applies to statutory offences, save that a statutory enactment may be construed as having absolutely prohibited certain conduct and as having constituted it an offence without reference to whether the wrongdoer had an innocent or guilty state of mind. Whether a statutory enactment should be so construed depends upon its wording and various other considerations. The express words of

<sup>2</sup> *R v Binns and Another* 1961 (2) SA 104 (T) at 107C-D.

<sup>3</sup> *Ibid.*

<sup>4</sup> 2013 (2) NR 366 (SC) at 378D-F.

<sup>5</sup> 1965 (4) SA 166 (C).

the statute may indicate that *mens rea* was intended to be an essential element of the offence, in which case the onus is upon the State to establish *mens rea*.' (Emphasis provided)

[11] With regards to the magistrate's contention that *mens rea* is not an element of a contravention of section 2(b) of Act 41 of 1971 *Snyman*; Criminal Law 2<sup>nd</sup> (ed) categorically states that *mens rea* in the form of intention (*dolus*) is required for the offence of possessing or using dependence-producing drugs.<sup>6</sup> Furthermore, by illustration 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*.<sup>7</sup>

[12] In the present instance the magistrate cited no authority for her contention and solely relies on the wording of the section from which it is inferred that the section does not obligate intention as an element of the offence. The magistrate reasons that the accused had constructive possession of the blanket containing the cannabis and therefore his act was wrongful. From the authorities quoted above it is clear that *animus* by the accused to possess the cannabis is lacking and furthermore, that *mens rea* is indeed an element of the offence. If the accused was unaware of the cannabis hidden in the blanket (as he said), he then could not have been convicted on the strength of the other admissions he made when questioned by the court. It thus follows that in order to have secured a conviction under section 2(b) of Act 41 of 1971 in this instance, *mens rea* was required by the accused. The magistrate's reasoning in this regard is clearly wrong.

[13] In the premises the conviction cannot be permitted to stand and falls to be set aside.

[14] It is ordered that the conviction and sentence are set aside.

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<sup>6</sup> *S v Majola* 1975 2 SA 727 (A) – 'In view of the formidable lists of offending drugs and the severe penalties imposable for possessing any of them, it is highly unlikely that the penalising of possession was intended to be absolute and that innocent possession was also meant to be punished. *Mens rea* must therefore be regarded as being an essential ingredient of such an offence (see *R. v H.*, 1944 A. D. 121 at p. 126; *R. v Langa*, 1936 C. P. D. 158, and cf. *R. v Moyage and Others*, 1958 (3) S. A. 400 (A. D.) at p. 414G.)' (Emphasis provided)

<sup>7</sup> At page 414.

<b>J C LIEBENBERG</b> <b>JUDGE</b>	<b>O SIBEYA</b> <b>JUDGE</b>