REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 20/2019

In the matter between:

THE STATE

v

ROMASDI ROOI **ACCUSED**

Neutral citation: *S v Rooi* (CR 20/2019) [2019] NAHCMD 61 (20 March 2019)

Coram: ANGULA DJP, LIEBENBERG J *et* SHIVUTE J

Delivered: **20 March 2019**

Flynote: Criminal Procedure – Review – Applicability of Proclamation No. 277 of 1977 in Namibia – Proclamation amended Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 by adding methaqualone to Part I and removing it from Part II – Proclamation finds application in Namibia.

Criminal Procedure – Review – Court guided by classification set out in Jutastat where methaqualone is listed under Part II of Schedule in prior decisions made – Proclamation No. 277 of 1977 – Amendment of Schedule applicable in Namibia – Decisions previously made by court that methaqualone falls under Part II wrong and not to be followed.

ORDER

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1. The charge in count 1 is substituted with a contravention of s 2(b) of Act 41 of 1971, the unlawful possession of dependence-producing substances (methaqualone and cannabis).
2. The conviction on count 1 is confirmed.
3. The sentence on count 1 is confirmed.
4. The conviction and sentence on count 2 are set aside.

JUDGMENT

LIEBENBERG J (concurring ANGULA DJP *et* SHIVUTE J)

[1] The accused appeared in the magistrate's court for the district of Keetmanshoop on 2 (two) counts for contraventions committed under sections 3(b) and 2(b) of the Abuse of Dependence Producing Substances and Rehabilitations Centres Act 41 of 1971(the Act). He pleaded guilty to both counts and was accordingly convicted and sentenced.

[2] The charge formulated in count 1 was for the unlawful possession of potentially dangerous dependence-producing drugs, to wit, 29 quarter tablets containing the substance methaqualone. In respect of count 2 the accused was found in possession of cannabis, a dependence-producing substance.

[3] It should be noted that from previous review matters considered by this court, conflicting judgments were delivered as regards the classification of the substance methaqualone. In some instances, as the present, methaqualone was classified as a potentially dangerous dependence-producing drug listed under Part III of the Schedule of the Act, whereas in other cases, it had been classified either under Part I or Part II of the Schedule. The court until now has been guided by the classification as set out in Jutastat e-publications which provides, as far as methaqualone is concerned, that it is classified under Part II as a dangerous dependence-producing substance. This resulted in the review judgments of *S v Nguvauva;*[1] *S v Wilson;*[2] and *S v Goagoseb*[3] where the court concluded that where the accused has either dealt in or possessed methaqualone, he or she should have been charged with a contravention of section 2(c) or (d) of the Act.

[4] This court has subsequently come to realise that the Jutastat classification did not incorporate earlier amendments made to the Schedule as provided for in Proclamation No. 277 of 1977.[4] The relevant part of the Proclamation reads that Part I and Part II of the Schedule to the Act is amended by:

‘ (a) the deletion of the item “Methaqualone” in Part II and the addition of the item “Methaqualone” to Part I; . . .’.

[5] In view of the amendment being enacted during the period when powers were transferred from the South African functionaries to the transitional structures created by the South African Government prior to Namibia’s independence, the question arose as to its applicability in present Namibia. In view thereof an opinion was obtained from the Directorate: Legislative Drafters of the Ministry of Justice to whom the court expresses its gratitude. There is no need for purposes of this judgment to deal with the opinion in any detail. Suffice it to say that after a thorough discussion of the transitional structures and the legislative and administrative powers vested

[1] CR 65/2018 [2018] NAHCMD 257 (23 August 2018).
[2] CR 67/2018) [2018] NAHCMD 254 (23 August 2018).
[3] CR 64/2018) [2018] NAHCMD 256 (23 August 2018).
[4] (Government Gazette No. 5789 dated 28 October 1977).

either in the Administrator-General, or other bodies at various times, and finally in the Namibian Government, it was ultimately concluded that Proclamation No. 277 of 1977 indeed finds application in Namibia.

[6] The effect thereof is that methaqualone is classified as a dependence-producing substance under Part I of the Schedule, and not under Part II. Past judgments delivered by this court to the contrary has thus been wrongly decided and should not be followed.

[7] Returning to the review matter under consideration, the accused on count 1 was found in possession of 29 quarter tablets containing methaqualone and charged under Part III (potentially dangerous dependence-producing substance). On count 2 he was found in possession of cannabis, a dependence-producing substances listed under Part I.

[8] During the court's questioning in terms of section 112(b) the accused admitted having possessed the 29 quarter tablets containing methaqualone as well as cannabis, albeit in two different counts. Whereas the unlawful possession of methaqualone ought to have been incorporated in the same count as the possession of cannabis, and the accused having admitted such possession, he should have been convicted of only one offence, namely, contravening section 2(b) of Act 41 of 1971 for the possession of dependence-producing substances, to wit, methaqualone and cannabis.

[9] Although reference is made in count 1 to the wrong part of the Schedule under which the accused is charged, the accused during the court's questioning, admitting all the particulars of the charge and that he possessed methaqualone unlawfully. This raises the question as to whether the accused suffered any prejudice as a result of the manner in which the charge is drawn when convicted as charged.

[10] The court in *The State v Bettie Somses*[5] stated the following in this regard:

[5] (Unreported) Case No CA 51/98 delivered on 02.08.1998.

'As a general rule, an accused should not be allowed to escape conviction only as a result of the prosecution's attachment of an incorrect "label" to a statutory offence or an erroneous reference to the applicable statutory provision which has allegedly been contravened.'

The court further endorsed the remarks made as per Henochsberg J in *R v Ngcobo; R v Sibega*[6] stating thus:

'(The) principle is that, if the body of the charge is clear and unambiguous in its description of the act alleged against the accused, e.g. where the offence is a statutory and not a common law offence and the offence is correctly described in the actual terms of the statute, the attaching of a wrong label to the offence or an error made in quoting the charge, the statute or statutory regulation alleged to have been contravened, may be corrected on review if the court is satisfied that the conviction is in accordance with justice, or, on appeal, if it is satisfied that no failure of justice has, in fact, resulted therefrom.'

[11] When applying the above stated principles to the present facts, I am satisfied that the accused admitted all the elements of the offence of a contravention of s 2(b) of Act 41 of 1971, (possession of a dependence-producing substance) and that the charge may be corrected on review.

[12] As regards count 2, though having been found with a different substance (cannabis), it constituted the same offence committed at the same time and place as charged under count 1. Hence, to allow the conviction to stand would result in a duplication of convictions and in my view count 2 falls to be set aside and the prohibited substance possessed by the accused on that count to be incorporated under count 1 ie that the accused possessed methaqualone and cannabis in contravention of s 2(b) of Act 41 of 1971.

[13] Despite the accused now only found guilty of one count, the offence convicted of remains serious, moreover where the accused has a previous

[6] 1957(1) SA 377 (N) at 381B-D.

conviction. There is thus no reason for this court to interfere on review with the sentence imposed on count 1.

[14] In the result, it is ordered:

1. The charge in count 1 is substituted with a contravention of s 2(b) of Act 41 of 1971, the unlawful possession of dependence-producing substances (methaqualone and cannabis).
2. The conviction on count 1 is confirmed.
3. The sentence on count 1 is confirmed.
4. The conviction and sentence on count 2 are set aside.

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JC LIEBENBERG

JUDGE

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E H T ANGULA

DEPUTY JUDGE-PRESIDENT

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N N SHIVUTE

JUDGE