

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CR NO: 36/2020

In the matter between:

THE STATE

and

ABRAHAM BERNADIKTUS FREEMANN

(REVIEW CASE NO: 1327/2019)

Neutral citation: *S v Freemann* (CR 36/2020) [2020] NAHCMD 205 (2 June 2020)

Coram: **LIEBENBERG J, RAKOW, AJ**

Delivered on: **2 June 2020**

Flynote: Criminal procedure – Criminal review – s 112(1)(a) of the Criminal Procedure Act 51 of 1977 – Prohibited Dependence Producing Drug Methaqualone – Whether guilty plea could be dealt with under the provisions of section 112(1)(a) of the Criminal Procedure Act 51 of 1977.

Criminal Procedure – Review – Classification of Methaqualone under Schedule I

of the schedules - The Abuse of Dependence-Producing Substances and Rehabilitation Centers Act 41 of 9171 – charge under contravention of section 2(b) of the Act.

The Abuse of Dependence-Producing Substances and Rehabilitation Centers Act 41 of 1971 – possession of “Methaloqule” – Not listed under any of the schedules to the Act – Not prohibited substance – Charge defective.

ORDER

In the result I make the following order:

1. The conviction and sentence on count 1 are confirmed.
2. The conviction and sentence in respect of count 2 are set aside.

JUDGMENT

RAKOW, AJ, (LIEBENBERG, J concurring)

[1] This matter came before me on automatic review. The accused in this matter was charged with two counts. Count 1 relates to the possession of a dependence-producing substance, contravening section 2(b) of the Abuse of Dependence-Producing Substances and Rehabilitation Centers Act 41 of 1971 (the Act). The conviction and sentence in relation to count 1 are in order and will be confirmed.

[2] Count 2 is in respect of a charge under the same Act, specifically a contravention of section 3(b) which relates to the possession of potentially dangerous dependence producing drugs, to wit 1 quarter tablet of Mandrax

containing “Methaloqule”. It was the conviction and sentence on this charge which gave rise to the query forwarded to the magistrate.

[3] The questions forwarded to the magistrate were two-fold; in the first instance whether “Methaloqule” is a potentially dangerous dependence-producing drug and secondly, whether, if that is indeed the case, whether such a matter should be dealt with under the provisions of section 112(1)(a) of the Criminal Procedure Act 51 of 1977, as it was dealt with in the current matter under review.

[4] The magistrate responded and indicated that she, in the meantime, learnt of the decisions in *S v Kandando* (CR 30/2018) [2018] NAHCMD 115 and *S v lipumbu*, (CA 16/08) [2009] (06 March 2009) and in both these decisions the charges related to Methaqualone. There it was held that the onus rests on the state to prove that the tablet the accused had in their possession contained Methaqualone which will require scientific evidence. The magistrate concedes that she could therefore not have proceeded in terms of section 112(1)(a) of the Criminal Procedure Act, 51 of 1977.

[5] The judgement in *S v Rooi* (CR 20/2019) [2019] NAHCMD delivered by Liebenberg J on 20 March 2019 was in the meantime brought under my attention. In essence this judgement deals with the classification of Methaqualone under Part I of the Schedule to the Act. Upon closer inspection it seems that Methaqualone started out as a drug under Part III of the Schedule which sets out Potentially Dangerous Dependence Producing Drugs in 1971, when the Act came into operation.

[6] Under the initial Act, with its inception, the correct charge for being found in possession of any tablet containing Methaqualone would have been a charge under section 3(b) of the Abuse of Dependence-Producing Substances and Rehabilitation Centers Act, 41 of 1971. During the years the substance was

however removed from Part III of the Schedule and included under Part II of the Schedule dealing with Dangerous Dependence-Producing Drugs (as per Proclamation 141 of 1976¹). The placing of the substance Methaqualone again changed from Part II of the Schedule Part I as per Proclamation No 277 of 1977.² Currently that is still the position.

[7] Possession of any tablet containing the substance Methaqualone is therefore a contravention of section 2(b) of the Act and the charge should reflect the Possession of Prohibited-Dependence Producing Drugs. The accused in this matter was wrongly charged in count 2 with the contravention of section 3(b) and should have been charged under section 2(b) of the Act. In that event, the possession of a Mandrax tablet containing Methaqualone should have been included under count 1, which is also a charge under section 2(b) of the Act, relating to the possession of cannabis.

[8] It is however not the end of the matter. The active ingredient as per the charge, "Methaloqule" is not listed in the Schedule, it therefore is not a prohibited dependence-producing drug under the Act. It might be that when drafting the charges the prosecutor miss-spelled the active ingredient but because no scientific evidence was produced and no questioning in terms of section 112(1) (a) of the Criminal Procedure Act, 51 of 1977 was required and therefore the defective charge was never detected by the Magistrate when convicting on the accused's mere plea of guilty.

[9] The result is that the charge referring to "Methaloqule" is defective as it does not refer to any substance listed under any part of the Schedule and the element of unlawfulness is lacking in the averment made by the state.

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

1 Government Gazette no 5237 dated 30 July 1976.

2 Government Gazette no. 5789 dated 28 October 1977.

1. The conviction and sentence on count 1 are confirmed.
2. The conviction and sentence in respect of count 2 are set aside.

E RAKOW
ACTING JUDGE