REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Webster Gurirab	**Case No:** CR 93/2023
High Court MD Review No: 857/2023	**Division of Court:** High Court, Main Division
Coram: Liebenberg J *et* Christiaan AJ	**Delivered:** 21 September 2023
Neutral citation: *S v Gurirab* (CR 93/2023) [2023] NAHCMD 586 (21 September 2023)	
ORDER: The conviction and sentence are set aside.	
REASONS FOR ORDERS:	

LIEBENBERG J (CHRISTIAAN AJ concurring):

[1] Before court is a review application from the Magistrate's Court for the district of Khorixas where the accused was arraigned on two counts of possession of dependence producing substances in contravention of s 2(*b*) read with s 1, 2 (*i*) and/or 2 (*iv*), 7, 8, 10, 14 and Part I of the Schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 (the Act), as amended. In respect of count 1, the accused was in the unlawful possession of tablets containing methaqualone, whilst on count 2 he was in possession of cannabis.

[2] The accused was unrepresented and pleaded not guilty. After evidence was led, he was convicted on both counts and sentenced to N$4000 or 12 months' imprisonment on count 1, and to N$3000 or six months' imprisonment on count 2.

[3] The court, on review, *inter alia* queried the absence of the transcribed record of proceedings for 14 July 2022; and, considering that mandrax containing methaqualone and cannabis are both dependence-producing substances under the Act, whether the convictions on both counts do not constitute a duplication of convictions.

[4] On account of the trial magistrate having left the employ of the magistracy, the query was attended to by the divisional magistrate who provided this court with the typed record of proceedings for 14 July 2022. Along with this, was a concession that the conviction on the second count should be set aside as it amounts to a duplication of convictions.

[5] Upon closer scrutiny of the record, the review court discovered further discrepancies in the record which could be futile to both the convictions and sentences imposed on the accused. The record seems to have been supplemented with what appears to be the handwritten notes of the trial magistrate and not the transcribed record as would be prepared by the transcribers from the transcription company responsible for independently transcribing court proceedings. As previously mentioned, the accused was unrepresented during the proceedings. The record, as it is, does not indicate whether any

of the rights of the accused were explained to him i.e. whether he was sworn in. Similarly with state witnesses, with the exception of one state witness. Whether the rest of the state's witnesses were sworn in prior to them tendering their evidence is not borne out by the record. This is based on the observation in the typed record after the state closed its case in that what follows immediately thereafter is the evidence of the accused person where he delves right into his evidence.

[6] It is not ascertainable from the record whether, indeed, proper procedure was followed during the proceedings. It must be noted however, that pro-forma forms purporting to indicate that the rights of the accused were explained to him, are appended at the end of the record. It is further evident from the record before court that exhibits were handed up in court, however, the record does not reflect at what stage this was done and whether the accused was informed of his rights in that regard.

[7] It is trite that for the reviewing judge to ascertain whether proceedings in the magistrate's court were in accordance with justice as stipulated in s 304 of the Criminal Procedure Act 51 of 1977 (the CPA), s/he relies on the record of proceedings placed before the judge. This then presupposes that the record must be proper in order for the determination to be made. Further to this, according to rule 66(1) of the Magistrates' Courts Rules 'the plea and explanation or statement, if any, of the accused, the evidence orally given, any exception or objection taken in the course of proceedings, the rulings and judgment of the court and any other portion of criminal proceedings, may be noted in shorthand… either verbatim or in narrative form or recorded by mechanical means.' It is further stipulated under rule 66(5) of the rules that 'subject to the provisions of subrule (6), any shorthand notes and any transcript thereof, certified as correct, shall be deemed to be correct and shall form part of the record of the proceedings in question.'

[8] It is common cause that all court records that are transcribed are accompanied by a certificate from the transcribers, certifying the correctness and accuracy of the proceedings. This requirement is also borne out from rule 66. In the present instance, what is purported to be the proceedings of 14 July 2022 are merely the cryptic handwritten notes of the trial magistrate who has since left the magistracy. Not only were his handwritten notes merely typed out, there is no certificate certifying them to be correct and accurate. Neither does the record constitute a reconstructed record of the

proceedings conducted on the day. It is not clear whether there is no mechanical recording available for the date in question as all other proceedings were recorded and the transcribed record forming part of the review record before court. The record, as it stands, is therefore so defective that it would not serve the interests of justice if it is confirmed, especially when regard is had to all the discrepancies as alluded to above.

[9] Notwithstanding pro-forma forms attached at the end of the record purporting to indicate that the rights of the accused were explained to him, this is not borne out from the record of proceedings as it stands. To draw inferences from the record before court would not only trample on the rights of the accused, but also amount to a travesty of justice. The convictions and sentences can thus not be allowed to stand and must be set aside.

[10] In addition, the convictions on both counts constitutes a duplication of convictions as both substances (methaqualone and cannabis), are listed under Part 1 of the Act. In view of the conclusion reached, the duplication of convictions has become moot.

[11] In the result, it is ordered that:

The conviction and sentence are set aside.

JC LIEBENBERG **JUDGE**	**P CHRISTIAAN** **ACTING JUDGE**