

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: The State v Isalo Bloodstaan	Case No: CR 108/2023
High Court MD Review No: 1151/2023	Division of Court: Main Division
Heard before: Liebenberg J et Christiaan AJ	Delivered on: 16 October 2023
Neutral citation: <i>S v Bloodstaan</i> (CR 108 /2023) [2023] NAHCMD 655 (16 October 2023)	
The order: <ol style="list-style-type: none">1. The conviction and sentence on count 1 are set aside.2. The conviction and sentence on count 2 are confirmed.	
Reasons for order:	
LIEBENBERG J (concurring CHRISTIAAN AJ):	

[1] This a review in terms of section 302 (1) of the CPA.

[2] The accused persons were both charged with two counts. The first count is possession of dependence-producing drugs in that they contravened s 2(b) read with sections 1, 2(i) and/or 2(iv), 7, 8, 10, 14 and Part 1 of the Schedule of the Abuse of Dependence–Producing Substances and Rehabilitation Centres Act 41 of 1971. The dependence-producing drugs being methaqualone and cannabis.

[3] The second count is disguising unlawful origin of property in that they contravened section 4 read with sections 1, 7, 8 and 11 of the Prevention of Organised Crime Act 29 of 2004 (POCA). The charge did not describe how the accused persons contravened s 4 of POCA.

[4] On the 14th of June 2023, accused 1 opted to plead guilty to all the charges and accused 2 opted to tender his plea on another date as he was not ready. The matter was separated and the court proceeded with accused 1's plea. Accused 1 pleaded guilty to both charges, and the magistrate invoked s 112(1)(b) of the CPA in respect of both counts.

[5] During questioning in terms on count 1, amongst others, the magistrate posed the following questions to accused 1:

'Court: Now, the charge sheet indicates that the tablets contained methaqualone, do you know what that is?

Accused 1: No

Court: Did you know that mandrax is a prohibited dependence producing substance?

Accused 1: Yes'

[6] After convicting the accused and after submission of mitigating factors by the accused, the public prosecutor submitted an undated and unsigned affidavit by Elizabeth Ainima, which was accepted by the court, purportedly with the effect of s 212(4)(a) and (8) of the CPA. The affidavit was submitted as part of the aggravating factors to be

considered by the court before passing sentence.

[7] When the matter came before me in terms of s 302 of the CPA, I requested the magistrate to furnish reasons why accused 1 was convicted on his plea, when he did not know that the tablets found in his possession contained methaqualone and, mandrax not being a prohibited dependence producing substance, what satisfied the court that the accused was guilty of the offence. I further requested the magistrate to provide the basis on which the purported unsigned and undated affidavit by Elizabeth Ainima was received into evidence.

[8] In response, the magistrate conceded that with the accused not possessing knowledge that the tablets contained methaqualone, the matter ought to have proceeded to trial. He further conceded that the acceptance of the unsigned affidavit is a major oversight as the affidavit was never supposed to be received. I am satisfied that the concession is correctly made. Evidently from the record before me, the accused did not admit to being in possession of tablets containing the substance methaqualone. The magistrate could also not have been satisfied that the tablets contained methaqualone at the time of conviction as this had not been established in terms of section 212(4)(a) and (8). Even if the affidavit was available, it is unsigned and undated and cannot be relied upon. In the review judgment of *S v Omar*¹ the court stated the position as follows:

‘Justice, in this regard will dictate that when an accused is charged with a drug offence under the Act involving a prohibited substance which can only be proven by scientific evidence or by acceptable means, such evidence must be disclosed to the accused and placed on record for the court to judiciously satisfy itself that the substance so possessed or dealt in, is indeed a prohibited substance in the Act.’

[9] In the circumstances, the conviction on count 1 cannot be allowed to stand. Although the review court is required to remit proceedings to the trial court in terms of s 312 of Act 51 of 1977 with applicable directions, it is my respective view that it will not be in the best interest of justice to do so in the present instance as it would mean, while the

¹ *S v Omar* (CR 50/2020) [2020] NAHCMD 297 (17 July 2020) para 11.

accused has already pleaded in terms of s 112, the matter must go back to investigation stage, considering the fact that there is no valid affidavit in relation to the determination that the tablets contain methaqualone. Either Elizabeth Ainima has to be found and reconsider the affidavit and eventually sign it before a commissioner of oath if satisfied, or another person has to be appointed to conduct another test on the tablets to make a determination that they contain the prohibited substance. During this period, the accused would be serving his sentence. It would therefore not be in the interests of justice to do so and I decline to make such order.

[10] Based on the authorities cited above, the conviction on the second count cannot be allowed to stand and must be set aside.

[11] In the result, I make the following order:

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

J C LIEBENBERG JUDGE	P CHRISTIAAN ACTING JUDGE