



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 67/2017

In the matter between:

THE STATE

And

NELSON COETZEE

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1578/2017)

Neutral citation: *S v Coetzee* (CR 67/2017) [2017] NAHCMD 331 (22 November 2017)

Coram: USIKU, J and UNENGU, AJ

Delivered: 22 November 2017

Flynote: Criminal Procedure – Automatic Review – Accused charged with possession of 11 x Ballies of unknown drug and 2 x full Mandrax without allegation of Methaqualone – such charge does not disclose an offence in Namibia.

Summary: The accused in the matter was charged, convicted and sentenced for seven months imprisonment for possession of 11 x Ballies of an unknown drug and 2 full Mandrax without alleging that the Mandrax contain Methaqualone. On review, the court held that the charge is defective and does not disclose an offence. Therefore, the conviction and sentence were set aside and ordered the immediate release of the accused from jail.

ORDER

- (i) The conviction and sentence are hereby set aside.
 - (ii) The accused person if still in jail serving this sentence, must be released immediately.
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REVIEW JUDGMENT

UNENGU, AJ (USIKU, J concurring):

[1] The accused in the matter was charged with and convicted of contravening s 2(b) and / or read with section 1, 2, and /or (iv) 7, 8, 10, 14 and part 1 of schedule of Act 41 of 1977 as amended i.e. possession of dependence producing substance namely 11 x Ballies and 2 x full Mandrax with a total value of N\$232.00.

[2] He pleaded guilty to the charge after he had indicated to the court that he will conduct his own defence. The court questioned him in terms of s 112 (1)(b) of the Criminal Procedure Act,¹ convicted him as charged and sentenced him to seven months imprisonment.

[3] When the matter came before me for review, I found the proceedings not to be in accordance with justice and addressed the following query to the learned magistrate:

¹ Act 51 of 1977.

1. Does a charge referring to Mandrax only disclose an offence? (Compare *S v Maniping*, *S v Thwala* 1994 NR 69 and *S v lipumbu* 2009 (2) NR 546 (HC)).

2. In view of the decisions in the cases cited in para 1 above, does the learned magistrate still hold the views that the accused in the matter admitted all the elements of the offence he has been charged with?

Your urgent response is appreciated.'

[4] In his reply to the query, the learned magistrate, after acquainting himself with the decisions in the judgments referred to in the query, conceded that he was satisfied that the charge is defective therefore, it could not be said that the accused admitted all the elements of the offence and suggested that both conviction and sentence be set aside.

[5] I agree. In the *State v Maniping* and *State v Thwala* matters,² the court held that in Namibia, it is wrong to charge a person with dealing in or possession of Mandrax, without referring to Methaqualone. Therefore, a charge referring to Mandrax only does not disclose an offence. (see also *State v lipumbu* 2009 (2) Nr 546 (HC))

[6] In the present matter, the accused was charged with possession of 11 x Ballies and 2 x full Mandrax without an allegation that the two Mandrax contained the substance Methaqualone. It is also not clear from what type of drug were the 11 x Ballies. The learned magistrate during the questioning in terms of s 112(1)(b) of the CPA also omitted to establish from what type of drug they were made from.

[7] That being the case, the learned magistrate erred in law to convict the accused person of an offence which does not exist in Namibia.

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

- (i) The conviction and sentence are hereby set aside.
- (ii) The accused person if still in jail serving this sentence, must be released immediately.

² 1994 Nr 69.

P E UNENGU
Acting Judge

D USIKU
Judge