

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no.: CR 30 /2018

THE STATE

v

HENDRIK KANDANDO

(HIGH COURT MAIN DIVISION REVIEW NO. 156/2018)

Neutral citation: *S v Kandando* (CR 30/2018) [2018] NAHCMD 115 (02 May 2018)

Coram: SHIVUTE J et SALIONGA AJ

Delivered: 2 May 2018

Flynote: Criminal Law - Statutory offence – Accused charged with possession or use of potentially dangerous dependence producing drug – 11 Full Mandrax tablets – Contravening Section 3 (b) of Act 41 of 1971 – Mandrax not listed as potentially dangerous dependence producing drugs under Part 111 of the Schedule – What is listed is Methaqualone – State has the onus proving that Mandrax found in possession of accused contained Methaqualone – To be proved scientifically.

ORDER

1. The conviction and sentence on the first count are set aside.
 2. The conviction and sentence on the second count are confirmed.
 3. Accused to be released forthwith. Warrant of liberation issued.
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REVIEW JUDGMENT

SHIVUTE J, (SALIONGA AJ concurring)

[1] The above named person appeared before the magistrate's court Windhoek charged with two counts namely:

1st Count: Possession of potentially dangerous dependence-producing drugs namely mandrax – contravening section 3 (b) read with sections 1, 3 (ii), 7, 8, 10, 14 and Part 111 of the schedule of the abuse of dependence producing substances and rehabilitation centres Act 41 of 1971 as amended and;

2nd Count: Possession of dependence producing substance – contravening section 2 (b) read with sections 1, 2 (i) and/or 2 (iv) 7, 8, 10, 14 and Part 1 of the schedule of Act 41 of 1971, as amended.

He was sentenced to 9 months imprisonment on the 1st count and cautioned and discharged on the 2nd count.

[2] After conviction and sentence, the learned magistrate realised that the accused was wrongly convicted on the 1st count as the charge was defective. He sent this matter for special review for the conviction and sentence to be set aside. The magistrate further stated that the state did not prove that what was found in possession of the accused contained Methaqualone.

[3] The allegations on the 1st count reads: In that upon or about 8th day of September 2017 and at or near Freedom Land, Omhana Street in the district of Windhoek the said accused did wrongfully and unlawfully have in his possession or use a potentially dangerous dependence – producing drug to wit 11 full mandrax tablets, 2 x half quarter mandrax, 2 x quarter mandrax tablets all valued at N\$750.

[4] Section 3 (b) of Act 41 of 1971 refers to potentially dangerous dependency producing drugs. Such drugs are listed under Part 111 of the Schedule. Mandrax is not listed as a potentially dangerous dependence producing drug but what is listed is Methaqualone. The accused never made an admission that the Mandrax that was in his possession contained Methaqualone. The state had also not produced any scientific evidence that the substance that was found in possession of the accused contained Methaqualone. The State bears the onus to prove beyond a reasonable doubt that what the accused used or had in his possession contained Methaqualone and this can only be proved by scientific evidence which is lacking in the present matter. See *S v Andreas lipumbu* Case no: CA 16/2008 delivered on 16 March 2009.

[5] I fully agree with the learned magistrate that the accused was wrongly convicted on the 1st count. The accused did not admit all the elements of the offence hence the court could not have been satisfied that the accused is guilty as charged. In view of this the conviction as well as the sentence cannot be allowed to stand.

[6] With regard to the 2nd count this court is satisfied that the accused was correctly convicted. Since the cannabis that was found in possession of the accused was only worth N\$25 the sentence imposed by the magistrate namely a caution and discharge is in order.

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

1. The conviction and sentence on the first count are set aside.
2. The conviction and sentence on the second count are confirmed.
3. Accused to be released forthwith. Warrant of liberation issued.

NN SHIVUTE
Judge

J SALIONGA
Acting Judge