"ANNEXURE 11"

IN THE HIGH COURT OF NAMIBIA

Case Title:	**Case No:**
The State // Elaine Elena Wilson	CR.65/2018 **High Court Ref.No**.: 260/2018 **Magistrate's Serial No**:02/2018 **Case No.: LUD-CRM**:1/2018
	Division of Court: High Court
Heard before: Honourable Mr Justice Liebenberg et Honourable Ms Justice Shivute	**Delivered on:** 23 August 2018
Neutral citation: S v Wilson (CR 67/2018) [2018] NAHCMD 254 (23 August 2018)	
The order: The conviction and sentence are set aside.	
Reasons for order:	

SHIVUTE J (concurring LIEBENBERG J)

1. The accused was charged with possession of dependence producing substance contravening s 2(b) read with ss1, 2, (1) and 2(iv) 7, 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1941 as amended.

2. The substance alleged to be in accused's possession were:
   8 x crack cocaine unit
   1x full mandrax tablet
   3 balies of cannabis

3. The accused was convicted of contravening s 2 (a) and 2 (b) possession of a dangerous dependence substance (cocaine) and possession of prohibited dependence substance (cannabis).

4. I queried the magistrate why the accused was convicted of two counts if he was charged with one count. Furthermore the magistrate was asked how she/he satisfied herself that the accused admitted

that he was found in possession of a dangerous dependence substance and possession of cannabis. Again it is not clear for which offence was the accused sentenced.

5. The learned magistrate responded that when the matter appeared for plea and trial the state only proceeded with s 2 (b) of Act 41 of 1971 possession of dependence – producing substance and the accused was convicted of s 2 (b) possession of dangerous dependence – producing substance. However, she made a mistake for not indicating the charge the accused pleaded guilty to she/he further stated that when passing sentence she/he indicated that the accused should not be convicted of the offence of possession of prohibited dependence-producing drug or substance or plant. The magistrate again stated that a mistake was made for not asking the accused to explain to the court how cannabis, mandrax and cocaine look like. However, when the accused was asked what substance were found in his possession he said he was in possession of cannabis, mandrax and cocaine and on that basis, the learned magistrate was satisfied that all the elements were admitted.

6. The accused was charged with one count containing different types of drugs which is not permissible. The magistrate in an attempt to cure the situation convicted the accused with two counts which is also not permissible. It appears to me the magistrate could not differentiate what types of drugs the accused was charged with.

7. The drugs grouped in one count are two different types. Cannabis is listed in part 1 of the schedule as a prohibited Dependence – Producing drug. Cocaine and Methaqualone (mandrax) are listed in Part 11 of the schedule as dangerous Dependence – Producing drugs. Mandrax is not listed as dangerous dependence producing drug but what is listed is Methaqualone. The state bears the onus to prove that what was found in possession of the accused contained Methaqualone.

8. In this matter, the accused was allegedly found in possession of two different types of drugs. He was supposed to be charged with two counts. The accused was supposed to be questioned separately on each count. These drugs cannot be grouped together as they are totally distinctive from each other.

9. When the court invoked the provisions of s 112 (1) (b) of the Criminal Procedure Act 51 of 1977 none of the elements of the two offences were fully covered through questioning.

10. The conviction and sentence cannot be allowed to stand

J C LIEBENBERG **JUDGE**	**N N SHIVUTE** **JUDGE**