

Case Title: <i>The State v Barnabas Goagoseb</i>	Case No: CR 64/2018
Heard before: Honourable Mr Justice Liebenberg <i>et</i> Honourable Ms Justice Shivute	Division of Court: High Court Main Division
Neutral citation: <i>S v Goagoseb</i> (CR 64/2018) [2018] NAHCMD 256 (23 August 2018)	
The order: <ol style="list-style-type: none"> a) The charges in the main and the alternative to count 1 are substituted with contraventions of s 2(c) and (d) respectively. b) The conviction on the alternative to count 1 is substituted with a contravention of s 2(d) of Act 41 of 1971. c) The conviction on count 2 (alternative) is confirmed. d) The sentences imposed on counts 1 and 2 are confirmed. 	
Reasons for order:	
LIEBENBERG J (concurring SHIVUTE J) <ol style="list-style-type: none"> 1. The accused was charged in the Magistrate's Court for the district of Gobabis on various counts in contravention of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 (the Act). 2. On count 1 in the main count the accused was charged for dealing in prohibited dependence-producing drugs, namely Mandraxs, and in the alternative, with possession of prohibited dependence-producing drugs. Moreover, on count 2 the accused was charged with dealing in prohibited dependence-producing drugs, in this case it involved cannabis. In respect of the 1st alternative to count 2 he was charged with possession of prohibited dependence-producing drugs. 	

3. The accused pleaded not guilty on the main charge in counts 1 and 2, but guilty to the alternative of possession. The court then questioned him in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA). The court was satisfied that the accused admitted to all the elements of the offences stated in the alternative and he was accordingly convicted.

4. The matter came on review in terms of s 304 of the Criminal Procedure Act 51 of 1977. On review the reviewing judges took issue with the charges preferred against the accused in count 1 as it was clearly wrong.

5. The charge sheets in respect of the 1st alternative to count 1 reads as follows:

“Drugs-Possession of dependence-producing substances

Contravening section 2 (b) read with Sections 1,2(i) and/or 2(iv), 7,8,10,14 and Part I of the Schedule of act 41 of 1971, as amended.

“. . . the said accused did wrongfully and unlawfully have in his possession or use a prohibited dependence-producing drug or a plant from which such a drug can be manufactured, to wit 10 mandrax tablets. . . “

6. Section 2 of the Act is headed “Dealing in, use or possession of prohibited or dangerous dependence-producing drugs prohibited” and the sections reads that:

“Notwithstanding anything to the contrary in any law contained, any person-

(a) who deals in any prohibited dependence-producing drug or any plant from which such dependence-producing drug can be manufactured; or

(b) who has in his possession or uses any such dependence-producing drug or plant; or

(c) who deals in any dangerous dependence-producing drug or any plant from which such drug can be manufactured; or

(d) who has in his possession or uses any dependence –producing drug or plant referred to in paragraph (c), shall be guilty of an offence and liable on conviction . . .”

(Emphasis provided)

7. It is evident that section 2 of the Act distinguishes between *prohibited* dependence-producing drugs and, on the other hand, *dangerous* dependence-producing drugs. Similarly, prohibited dependence drugs are listed under Part I of the Schedule in the Act while dangerous dependence producing drugs are listed under Part II of the Schedule.
8. Therefore, s 2(a) and (b) deals with *prohibited* dependence-producing drugs such as cannabis which is listed under Part I of the Schedule, while s 2(c) and (d) deals with *dangerous* dependence-producing drugs like cocaine and methaqualone (present in Mandrax tablets) which are listed under Part II of the Schedule.
9. Whereas the heading of count 1 (in the main and the alternative) reflects contraventions under s 2(a) and (b) and not 2(c) and (d) as it should have, what remains to be decided is whether the accused suffered any prejudice as a result of the manner in which the charge was drawn when convicted as charged.

10. The court in *The State v Bettie Somses*¹ stated the following in this regard:

‘As a general rule, an accused should not be allowed to escape conviction only as a result of the prosecution’s attachment of an incorrect “label” to a statutory offence or an erroneous reference to the applicable statutory provision which has allegedly been contravened.’

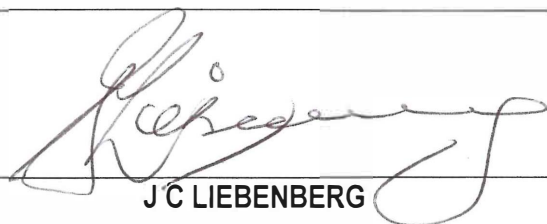

The court further endorsed the remarks made as per Henochsberg J in *R v Ngcobo; R v Sibega*² stating thus:

‘(The) principle is that, if the body of the charge is clear and unambiguous in its description of the act alleged against the accused, e.g. where the offence is a statutory and not a common law offence and the offence is correctly described in the actual terms of the statute, the attaching of a wrong label to the offence or an error made in quoting the charge, the statute or statutory regulation alleged to have been contravened, may be corrected on review if the court is satisfied that the conviction is in accordance with justice, or, on appeal, if it is satisfied that no failure of justice has, in fact, resulted therefrom.’

¹ (Unreported) Case No CA 51/98 delivered on 02.08.1998.

² 1957(1) SA 377 (N) at 381B-D.

11. In the present instance the body of the charge preferred against the accused is clear and unambiguous in its description of the prohibited substance alleged to have been found in his possession i.e mandrax. Although the charge should have read that the accused was found in possession of a dangerous dependence-producing drug, to wit, methaqualone, the magistrate covered during the court's questioning the presence of methaqualone in the mandrax tablets the accused admitted to have possessed.
12. Despite these shortcomings in the charge, we are satisfied that the accused had been duly informed of the charge he had to meet. The only problem lies with the 'label' given thereto referring i.e. a contravention of the wrong section of the Act.
13. When applying the principles stated above to the present facts, we are satisfied that the accused will not be prejudiced by an amendment of the 'label' given to the charge or that it will result in a failure of justice.
14. In the result, it is ordered:
- a) The charges in the main and the alternative to count 1 are substituted with contraventions of s 2(c) and (d) of Act 41 of 1971, respectively.
 - b) The conviction on the alternative to count 1 is substituted with a contravention of s 2(d) of Act 41 of 1971.
 - c) The conviction on count 2 (alternative) is confirmed.
 - d) The sentences imposed on counts 1 and 2 are confirmed.

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