

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Danny Johannes	CR: 12/2024
	Division of Court: Northern Local Division
Heard before: Salionga J et Kessler J	Delivered on: 15 April 2024
Neutral citation: <i>S v Johannes</i> (CR 12/2024) [2024] NAHCNLD 37 (15 April 2024)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction and sentence in respect of counts 1 and 3 are confirmed.2. The conviction and sentence in respect of count 2 are set aside.3. The matter is remitted to the court a quo in terms of s 312 of the Criminal Procedure Act 51 of 1977 with the direction to question the accused in respect of count 2 in terms of s 112(1)(b) and to bring proceedings to its natural conclusion.	
Reasons for the order:	
KESSLAU J (SALIONGA J concurring)	
[1] The matter from the Magistrate's court of Opuwo, is before this court for review in terms of s 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA).	
[2] The accused was charged with count 1: Contravening section 80(1) of the Road	

Traffic and Transport Act 22 of 1999 (the Act) - Reckless or negligent driving; Count 2: Contravening section 82(5)(a) of the Act – Driving with an excessive breath alcohol level and; count 3: Contravening section 31(1)(a) of the Act – Driving without a driver's licence.

[3] The accused pleaded guilty and, after the application of s 112(1)(b) of the CPA, was convicted on his pleas of guilty and subsequently sentenced. In respect of count 1, he was rightfully convicted of negligent driving. Equally, the conviction in respect of count 3 appears to be in accordance with justice.

[4] In respect of count 2, the following query was sent to the Magistrate:

'Can the Magistrate explain which question was asked to the accused to satisfy the requirement that the breath alcohol specimen was taken within the prescribed period of two hours?'

[5] The Magistrate gave the following perplexed reply:

'The learned Magistrate apologizes to the Honorable Judge for the mix up. The count 2 accused is charged with is Driving with an excessive alcohol breath level and not driving with an excessive blood alcohol level. Thus, the query by the Honorable judge would be invalid. The learned Magistrate erroneously omitted the correct charge at the sentence order, however as per record and charge annexure, the correct charge is Driving with an excessive breath alcohol level.' (sic)

[6] From the above reply, it appears that the Magistrate is mistakenly of the opinion that the breath alcohol specimen need not be collected within a two hour period. However, the provisions of s 82(6) of the Act provide that:

'If, in any prosecution for a contravention of subsection (5), it is proved that the concentration of alcohol in any specimen of breath of the person concerned exceeded 0,37 milligrams per 1 000 millilitres of breath taken at any time within two hours after the alleged offence, it shall be presumed, in the absence of evidence to the contrary, that such concentration exceeded 0,37 milligrams per 1 000 millilitres at the time of the alleged offence.' (Emphasis added)

[7] The court a quo failed to ask the accused whether the breath specimen was taken within two hours after the incident, an essential element which, by its omission, clearly taints the conviction. Considering that all the elements of count 2 were not admitted, the

conviction and sentence cannot stand.

[8] In the result, the following orders are made:

1. The conviction and sentence in respect of counts 1 and 3 are confirmed.
2. The conviction and sentence in respect of count 2 are set aside.
3. The matter is remitted to the court a quo in terms of s 312 of the Criminal Procedure Act 51 of 1977 with the direction to question the accused in respect of count 2 in terms of s 112(1)(b) and to bring proceedings to its natural conclusion.

Judge(s) signature	Comments:
KESSLAU J:	None
SALIONGA J:	None