CASE NO. CC 07/2002

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

HENDRIK BARNARD

CORAM: GIBSON, J.

Heard on: 2003.02.03, 2003.02.07, 2003.06.16, 2003.11.03-28, 2004.04.5-6, 2004.07.6-7, 2004.09.21-22, 2005, 02.14-15, 2005.04.04

Delivered on: 2005.08.19

JUDGMENT

GIBSON, J.: The accused is charged on three counts under Road Traffic Ordinance no. 30 of 1967. On the first charge he's charged with contravening Section 140(1)(a) as amended and read with Sections 1, 60, 146 among other subsections as set out in the indictment in that he was driving under the influence of intoxicating liquor. In the alternative he is charged with contravening Section 140(2)(a) of the same Ordinance as amended and read together with subsections 1,

60, 145, 147 and the others as set out in the indictment, i.e driving with excess alcohol.

Count 2, the accused is charged with contravening Section 138(1) as amended by Section 160, 138(2) subsection 4 of 138 and section 145, 148 and 180, and others as set out in the indictment on record, namely reckless or negligent driving. The alternative of that account charges the accused with the contravention of section 139 as amended read together with section 160, 147, *inter alia*, that is - inconsiderate driving. In count 3, the accused is charged with contravening section 4 as read with section 4(2), section 149, that is - operating an unlicensed motor vehicle on a public road.

He entered pleas of not guilty to counts 1 and 2 and their alternatives but admitted to contravening the subsection in count 3, namely driving an unlicensed vehicle, while raising a plea that he had no *mens rea.* The accused did not make any further statement apart from that admission and put the State to prove to the accepted standard in the criminal proceedings, ie proof beyond reasonable doubt.

The State's case lay heavily on the shoulders of Superintendent Sipapela, a member of the Windhoek City Council Traffic Department then, but I believe he has since become more the desk person than traffic patrol officer. I will refer to the Superintendent either as Sipalela or the Superintendent. Sipalela says he was driving along Independence Avenue going towards Katutura at about 15:25 on traffic patrol duties when he saw a vehicle ahead of him on the outer lane, swerving from side to side as it approached the junction and traffic lights with Hosea Kutako Road and the Independence Avenue. At the same time the driver

did not indicate a change of direction or lane so he became suspicious and stopped the vehicle. He parked in front of it and walked back towards the car. As he approached, the driver got out and as he did so he supported himself on the top of the roof of the vehicle by getting hold of the doorframe, at the top.

In cross-examination Sipapela said the car did not quite leave its lane of travel but straddled the lanes the car being halfway, just once. In a statement which he made in August 2000 Sipapela said the car was approaching him, and differed from what he had earlier said in the evidence. The Superintendent said the Accused asked him what is the matter? He told him that he suspected him of being drunk and asked if he had any alcohol, he denied it. The Superintendent told him that he wanted to do a breathalyser-test and asked for an alcohol test. He then conducted the test and it proved positive. Sipapela said accused showed signs of drunkenness, his eyes were red, his skin pale, his tongue heavy and he spoke slowly. He was also argumentative and threatened Sipapela that his career would soon end.

Sipapela said he noticed that there was a woman in the car, and she held a half consumed bottle of beer. He took accused to the police station where he collected a blood sample kit. The kit was allocated number 413/1999/08/22. He endorsed that on the kit. He also collected the appropriate forms to be completed by the Doctor on drawing the blood. He said the kit was sealed and inside there was another unused seal and some labels, a needle and a tube. When he got to the hospital he filled in the personal particulars on the form, now Exhibit C in Court on the top left hand and he left the rest for the doctor to fill up. Sipapela said the seal number on the kit was HGA555354, so the inner seal, according to practice

would be the number next following upon that chronologically, ie 555355.

The examination started at 15:55 and was completely at 15:58. The doctor explained every step to the accused as she broke the seal in front of him. She drew his blood and placed the label which she signed on the bottle. He too signed. Sipapela identified his writing on Exhibit C. The kit was sealed again in front of the accused. Sipapela said the accused's sample kit was destroyed after the forensic analyses, so it is not available for whatever further use in these proceedings. He was shown an unused kit to explain the procedure he followed. The boxes were brought to him, they are exhibits in court.

If I may observe, given that there were queries concerning the blood sample by the accused at the time one would have expected that the state would have ensured (indistinct) that the laboratory at the institute would preserve the accused's kit until after the proceedings, or at least before destruction that the accused was consulted to ensure that no further issue would be raised concerning the sample. Thus for instance, the accused's contention in these proceedings is that had the remains of the sample been available DNA test could have been conducted on the remains of the blood sample to establish the identity of the giver of the blood. As it is, that cannot be done. I would like to suggest, if it is not already the practice that such remains after tests and analyses by the laboratory, are preserved until the case is disposed off or the accused person's consent, is obtained before it is destroyed, to give him or her a chance to consider whether there is any point to be made.

Sipapela said on arrival at the police station at 16:10pm he completed another form and gave details of arrest in Exhibit D, an application for scientific

examination which he completed. Sipapela said he entered all the details of the case, the seal number as entered in Exhibit "C" by the Doctor. Later the analysist's certificate was stuck on the back of "C", by whom or when is not clear.

The accused has complained in these proceedings that this was way of producing a piece of vital evidence improperly. There is merit in that criticism. The certificate should have been produced in the usual way by the maker, her self/him self. It was put to Sergeant Sipapela that from the scene of the accident he and accused went straight to hospital where the kit was brought to the superintendent. Sipapela was referred to the investigation diary in which he was asked a direct question on this point by State counsel. The answer noted down as given by him at the time is that he agreed that he took the accused to the hospital directly Sipapela had no meaningful reply. Continuing his evidence in chief Sipapela said he noticed the expired licence disc on the accused's vehicle as he approached it on foot. But in a statement made subsequent to the incident he said he noticed the expired disc much later on after the incident.

Superintendent Sipapela's attention was drawn to the photographs of the blood sample kit of the accused taken on the day. He explained his practice in sealing the kit. He said the box is tied with a string and the seal is placed on the string. Sipapela demonstrated how the accused's blood kit was sealed by himself. His attention was then drawn to the photographs of the accused's kit taken later that day. These show that the label is placed under the string. Sipapela said that this was not the way he left the accused's kit, the position seems to have been reversed. He said Exhibit M1 photo A seems to have been tempered with and said he was not responsible for the alteration. Sipapela said as far as he could remember, he did not put his name on the blood kit.

Mr Sipapela then agreed in cross-examination that meticulous care is demanded when handling the kit, from the beginning to the time it is submitted for analysis. This is necessary he said to ensure an unbroken chain is established through evidence that the blood drawn from the accused is the correct blood sample which is submitted for tests at the forensic laboratory at the Institute. The superintendent agreed that Exhibit 'C, the *proforma* completed by Dr Shiweda after drawing blood from the accused does not show who gave the kit to the doctor. Asked about statements he made, Sipapela said he only made two proforma statements and a statement in August 2000. He agreed that there is no mention of the accused's condition at the time of arrest in any of the statements. The omission of this important piece of evidence is unhelpful.

If I may pause to observe, in this case, mistakes, misinformation, unauthorised, alteration of one witness's statement by another, irregularities such as signing a deposition of one witness by another became common place. Take for example Exhibit E, the statement should have been filled in by the person who took the accused to hospital to give blood, but not so. Instead Constable Katjivena the charge office sergeant signed it and Katjivena swore to its truthfulness under oath, yet he simply had no knowledge of the correct facts.

Another example of this irregular practice is Exhibit 'J'. This document is a replica of Exhibit 'E' above and, Exhibit 'J' was created, evidently to deal with the irregularity of Exhibit 'E' so that the superintendent who deposed to it actually swears to it under oath. Further the creation of Exhibit J was done much later on on, but it purports to have been made and on the day ie the 27/8/99. Thus the

whole document is false from the beginning to the end.

Yet another example is Exhibit F. In this document the seal no is altered by somebody who does not authenticate it. The times stated are confused and totally misleading. If one looks at the seal number alone the blood sample kit booked out to the superintendent is shown as 555345. This number is altered by an unknown person because it is not authenticated to 55354. There is no indication by date of where and when this was done. In this document Sipapela adds to the confusion by filling in some parts of the statement taken from another witness', a police officer. Given Sipapela's admission that the blood kit in photograph Exhibit 'M' 'A' produced as that of the accused, had had the labelling changed, and that it appeared tampered with, it is not easy to dismiss the changing numbers on the seals in Exhibit F as a mere mistake. The statements, Exhibit K & L were handed in. Both are by Sipapela. Exhibit K was made on the 27/8/99 at 16:20pm. The second, Exhibit 'L', which is a repeat of Exhibit K is dated 3/8/2003. Apart from the fact that 'L' refers for the first time to the expired licence disc which the superintendent claims he noticed much later on, not as he approached the car on arrest, neither statement mentions the condition of the accused at the time of

arrest. Given the detailed grounds listed to back up the superintendent's opinion that accused was drunk, I would expect that the witness could not possibly have remembered that detail without evidence that he wrote it down at the time. It is stretching credulity far too far to accept that Sipapela in his position as traffic officer, even if it had become largely deskwork, would have remembered the details given so long after an event that was so unremarkable. I would tend to believe him if he had said that he can't remember the details. Indeed as he said of the evidence of signing the blood kit sample.

Taking the evidence, chronologically, Constable Morkel, a junior to the Superintendent, took the alcotest to him and confirmed the readings. He said he sent Constable Louw to the station to deliver the accused's car. He recalls making a statement, Exhibit W, on 4/8/2000 at the request of Constable Moller. He said he could not remember a thing at the time but Moller gave him the details which he wrote down. He took the oath on the day, but the commissioner's stamp was placed on it on 11/8/2002. He agreed that this is not correct. He said the time of arrival at the scene shown as 15:40 in the statement, was his own estimation, calculated from the time of the accident as given to him by Constable Moller which was 15:35pm. So he could not have got to the police station at 15:35 as claimed. Morkel denied that he went to Katutura Police station to collect the blood kit with Constable Louw for Sipapela.

It is my opinion, that Morkel is another classic example of the failure to adhere to the rules of evidence, in as much as he swore under oath to the truth of something that he simply does not and did not know anything about, from information supplied to him by officer Moller. This, unfortunately became the norm in this case. It should be ruled out of Court.

Constable Katjivena was the duty sergeant from 4pm till midnight. He referred to the O.B. Book, Exhibit N, as the running record of happenings at the police station. Looking at Exhibit N, he cross referenced to the numbers of blood kits he booked out and booked back in with blood samples when he was on duty. For instance he booked out kit number 2415 out at 16:13pm as serial number HGA 556142. A signature is shown against the entry. This was received back in as 2419

(p541). Entry serial number 2420 was received at 1700, and the suspect was detained by the superintendent, under CR41308/99 and signed by him then.

Sergeant Katjivena explained that above entry 2422 which he wrote, there is a number 2410 which is entered. But he said the serial number above 2410 is not in his writing (p549). Mr Katjivena said he entered both 2419 and 2422 (black eye) on the same day that he got the kits. He explained that he never made entries up to 2470 that day, what appears to be 2470 is 2410.

He said the kits were properly sealed except for the Moller sample, where the string was loose and an opening in the box is evident even in the photograph, Exhibit MB. He said the accused's blood sample kit 2422 had the sticker the box and the string on top (p562 bottom) with the metal seal holding the string together.

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If he is correct then this is contrary to Superintendent Sipapela's evidence and demonstration in Court on Exhibit 1 (the box). It means that in the 50 missing minutes when the kit was submitted and the charge was brought against the accused the sealing of the accused's blood sample kit had been altered. Sipapela had no hesitation in showing how the kit was when he sealed it. He looked at the 'OB' Book and said he recognised the entry by the serial number at the side CR 413/5. In the photograph, accused's sample is "A". He made entries in Exhibit N serial number 2430 at 19:35pm and a reference to the accused being released after he was charged by Sergeant Klukowski. He agreed he entered a cross ref number 2428 above 2430. He checked again and said the writing 2428 was not his (p570).

Several matters are of concern in this evidence. Sergeant Katjivena's

contemporaneous note entered in the OB Book, Exhibit "N", is in place where Moller signed for booking out of the blood kit entered as 2415. There is no evidence of a signature against that of Superintendent Sipapela in the OB Book Exhibit N - booking out of the accused's kit. The signature is missing. Secondly if Sipapela got back to the station at 16:10pm with the blood sample, and the accused; this was before Moller booked out his kit and left for the hospital at 16:13. But why was the blood sample of the accused, entered as 4222 received at the station at 5pm. Where was the sample in these 50 minutes, why was it not formally handed in on arrival to ensure its safety. More importantly can one credit that meticulous care was rendered during the custody of the accused's blood sample. If you also add the alterations of the serial numbers in Exhibit E & F, the confusion about the link in the chain perceptibly is increased.

The hallmark of Constable Katjivena is his inability to adhere to correct procedures. He agreed he made additions in two affidavits deposed to by other persons, ie Exhibit E 85 F.

Constable Tjikeama said he was the charge office sergeant from 8am-4pm on 27/8/002. He recalls booking only one (blood sample) kit at 15:35. He entered it in Exhibit N, booked out to Sipapela, as serial number 2410. Tjikeama looked at Exhibit F (statement of charge office sergeant) but said though this was in his name he only partly filled it namely the top part.

Tjikema gave numerous examples of other irregularities in the keeping of records, ie Exhibit N, where alterations are made and not acknowledged and sometimes by someone else who had nothing to do with the initial entry. This irregular practice

extended to affidavits which are all on record whether or when he swore under oath to his statement Exhibit F is not clear.

The State asked to hand Exhibit N & V which statements were made by Tjikeama. These were of no value evidentially, and compounded the confusion; the details are on record.

Constable Moller said he was on duty on 27/8/99 and dealt with a drunk driving charge. He booked out the blood kit and signed for it at 16:13pm. On returning, he handed the blood sample to the sergeant on duty and saw accused sitting down. An argument with Constable Lifasi and Uupindi arose because the kit was not properly sealed. He referred to Exhibit 'M'. In 'B' the string was a little loose. According to Exhibit N Constable Moller said his sample was booked back in at 16:50pm.

Constable Gaseb said he was approached by Constable Moller i.e. a year after the events to correct an error in the blood sample. He consulted Exhibit N to do the correction because he had no recollection of it. He said apart from that correction in Exhibit F, none of his writing appears in Exhibit F.

Lifasi was on duty at the same time as Uupindi, and was present when Moller brought the blood kit. He made statements (Exhibit JJ and KK) and never referred to the condition of the accused (KK are statements of Lifasi). Exhibit J J and KK are those of Lifasi, the correct labelling is on record. Four years later however in this court he purported to deal with this subject with full memory. This too was another example, in my view, of irregularities being committed whether innocently or otherwise in regard to affidavits and record keeping at this police

station. This needs serious attention by those in authority. There's very little value for the State in the witness's evidence.

The accused elected to give evidence on oath and followed what he'd earlier put to witnesses. Although State Counsel argued that the accused never deposed to his version and never put his case to the witnesses, this is not correct according to my reading of the record. If you examine the record pages 325, it is clear that the accused put his case to the witnesses.

It is the State's contention that the accused's case changed from time to time, claiming maliciousness on the part of various individuals representing the State which are not substantiated. In our adversarial system, cross-examination can be severe, probing, and a party is duty bound to explore the evidence being given and to test to their best ability.

If I may comment, in this case it is regrettable in any event that, a lot of time was spent on both sides I would say, in pursuing issues which were non issues in this case. Unfortunately on both sides a certain lack of objectivity prevailed. It may have been wiser and better if the case for instance on the part of the State, had been handled at this stage by another officer than Ms Verhoef in view of her close affinity to the decision maker or the officer who was then responsible and in charge of prosecutions at the time. No more need be said on the subject.

The defendant's case was that he entered Independence Avenue from the south into Hosea Kutako Road, that he was in the middle lane and wanted to turn right, so he moved and indicated turning right towards Okahandja. He said he then noticed the patrol car pulling out alongside him. He was instructed to pull off

the road, he put his left indicator and went back, and pulled off the road. He rolled down his window and asked what was the problem? The officer asked him to get out and he did so. Then Constable Morkel and Louw arrived and he was breathalysed and he was taken to the hospital by Superintendent Sipapela. He said he noticed the kit was delivered to the Superintendent at the hospital. The doctor opened the kit in front of him and explained the procedure involved then Superintendent Sipapela packed the kit, placed his name on it and they proceeded back to the police station. He sat and waited at the desk and heard Uupindi and Lifasi and Moller discussing about the sample. He said he never interfered as it was claimed or stood up and staggered as claimed by Lifasi and Uupindi.

He maintained that he is not guilty but admitted to the contravention of the Ordinance in count 3 but without *mens rea.* This is irrelevant. That is so much for the evidence in the case.

Regarding count 1 of the indictment, ie contravening section 140(l)(a) driving under the influence of intoxicating liquor, there is a well establish proposition of law that the burden of proof lies on the State, to prove beyond reasonable doubt that the accused's inability to drive was caused by a consumption of alcohol or a narcotic drug. In this case the State's allegation is that the accused was under the influence of alcohol. I'm satisfied that the accused had consumed alcohol.

To prove the case, the State has relied on the evidence of laymen as opposed to medical opinion following upon an examination. It is trite that the opinion of a laymen is admissible and may be sufficient to prove the charge, but this is only so if such opinion is backed by facts: *State v Hardley* 1970 (2) SA (NPD) 223 at 226, *State v Mutora* 1968 (2) SA 773 (O), the head note, *State v Adams* 1983 (2) SA

577, again I had a look at the head note only.

The expression 'under the influence of, has been held to mean that the driving efficiency of the motorist must have been impaired by dulling his vision, blinding his judgment or by making his musk given reactions to communications from his brain slavish: See *R v Spicer* 1945 AD 432 at 436, also *Tatihen v Rex* 1938 NPD 387.

The question here is whether the State has proved the criteria essential to be proved to show that the accused's driving was impaired by the alcohol consumed? The State's case on this aspect rests entirely on the evidence of Superintendent Sipapela, who is a single witness. But there is qualified support for the claim by Sipapela. This is from the evidence of Constable Katjivena who only noted that the accused's breath smelt of alcohol at the time he was brought to the police station, and that he was leaning on the desk or against the desk. Whether that is the only inference that could be drawn from leaning or resting on the desk is debatable, but, be that as it may Katjivena said he did not otherwise observe the accused because he was very busy. If Lifasi and Uupindi must be believed, a close examination of the accused would not have been necessary to determine the state of his condition or the state of his drunkenness if indeed he had been staggering about. The observations of Katjivena puts further doubt on the opinions of the two officers.

Besides this lack of support from the other witnesses, the other weakness in the State case is that Sipapela did not mention the grounds upon which he made the claim of drunkenness may of his statements. It is in evidence that Sipapela made a number of statements at the time or nearer the events, and that in none of those

statements did he ever refer to the condition of the accused at the time. In spite of the obvious importance to the State's case, of which he was aware of, that there is nowhere mentioned the accused's condition that can be verified objectively is an added weakness. That not even in the statement he made almost three years later in August 2000 puts an obvious doubt. Apart from this carelessness in the evidence of Superintendent Sipapela, there are a number of other weaknesses in his evidence, which are too numerous to list. To do so, in this judgment, would make the judgment inordinately lengthy. Suffice to say that at the end of the day no reliability or credibility can justly and properly be attached to any sufficient degree to the witness's account, concerning the events on Independence Avenue that day.

The grounds that Sipapela gave to support his opinion are listed, and are on record. Even the claim that the accused swerved from side to side later got qualified in cross-examination when he explained that there was one swerving from one lane to the other, which only resulted in a straddling over the line, rather than leaving the lane completely.

Taking the evidence as a whole on this count, noting the deficiencies from a number of witnesses including the main witness that I've described in this aspect of the case, and weighing all of them together with the accused's adamant denial of Sipapela's claim of what he observed, I feel that the State's evidence is not as water light as the witness claimed. This aspect is not satisfactory at all in numerous respects save for the fact that the accused did admit ultimately to consuming some alcohol beforehand. Even then I am not satisfied beyond reasonable that there is truth in all the evidence deposed to in this matter that there

was any impairment to the driving by the accused as claimed by the one witness in the State's evidence. It is noteworthy that Superintendent Sipapela had sought to rely, and hoped to rely on Constable Morkel to support him. But observation of Morkel as recorded is that he never paid any attention, he never noticed anything particularly about the accused's condition. In reference to the evidence of Constable Morkel, concerning his observation of the condition of the accused, the Spicer case, which I have quoted above is instructive. In that case the Court gave examples of the typical behaviour of a drunken driver and said, ... The driver on probably intoxicating liquor has induced an exuberant or over optimistic frame of mind which causes him to take risks e.g. to drive at an excessive speed or assume that others will give him the right of way which he would not have taken apart for the liquor he had consumed", taken from page 436 of the report.

If one tests the evidence herein against the typical behaviour what is of note is a total lack of exuberance on the part of the accused. The evidence of the Superintendent was that the accused was driving at a normal speed of 50 - 60 kilometres an hour, which is permitted on that part of the road, that at that time of the day at 15:25pm the traffic was moderate, and when he flagged him down to pull off the road, the accused promptly obliged and pulled off. The action following upon the driving described would appear to be very much at variance to the criteria, pointed out in the Spicer case, in the passage I have just quoted. That is all I need say on the evidence, on count 1.

As I pointed out I am not satisfied that truth has been proved beyond reasonable doubt or that it has been established that the accused's driving was influenced by intoxicating liquor. As regards the alternative count to count 1, I will leave that for

the time being, and return to it later.

I turn to consider count 2, and its alternative, ie reckless or negligent driving and alternatively, inconsiderate driving.

Cooper on South African Motor Law, at page 548 says, "The test as to whether an accused is guilty of recklessness or negligence is the same in criminal law as well as civil cases. The question to be answered being, did the accused exercise that standard of care and skill which would be observed by the reasonable man? *In R v Meiring* 1927 AD 41 at page 46, *Rex v Swanepoel* 1945 AD 444 at 448, followed in the *State vs Wells*, the reference of which I shall supply shortly.

The State's contention is that the accused's swerving remained unexplained, that there is no reasonable explanation for it, that accordingly the accused's swerve amounted to negligent driving. And in the result the accused failed to drive with the degree of care and skill expected of motorists. On the facts of this case the question I would like to pose is, would a reasonable driver in the position of the accused have foreseen that swerving from one lane to another lane without putting the indicators on, would have resulted in harm or a collision with another vehicle or pedestrian? Given the time of day as 15:25 pm at the time, which was said to have moderate traffic. The answer is in the negative.

In the case of *Regina v Wells*, I referred before, reported in 1949 (3) SA 83, at page 88 the Court put the test, thus

> *"Factually the question is whether in any given circumstances a reasonable man would have foreseen the possibility of harm and governed his conduct*

accordingly. The decision varies from case to case and is dependent on a consideration of all the circumstances."

In my view weighing Sipapela's own claims, I do not consider that it could be said that the accused was guilty of driving without the reasonable care and attention even in his condition, which is that he had consumed some alcohol. Besides, the accused denied the alleged straying from one lane to another. His evidence is that he actually put on his indicators to turn right at the time, which he then changed to turn left when the officer flagged him down. This explanation cannot be dismissed as being unreasonable or impossibly true. I therefore find him not guilty. I will not dwell further on the alternative count to that charge. In my view it follows that there's no question on this evidence of any inconsiderate driving. He is found not guilty on that count also.

I turn then to the alternative charge to count 1, which I put aside earlier, that is a contravention of Section 140(2) of Ordinance 30 of 1967, ie driving with an excessive blood alcohol level. Subsection (2) of Section 140 provides as follows:

If in any prosecution for a contravention of the provision of subsection (2) it is proved that the concentration of alcohol in any quantity of blood taken from any part of the body on the person concerned was not less than 0.08 grams per 100 millilitres of blood at any time within two hours after the alleged offence, it shall be presumed, unless the contrary is proved that such concentration was not less than 0.08 grams per 100 millilitres at the time of the alleged offence.

In this case no issue is raised concerning whether or not the accused or rather the blood sample put forward as that of the accused was over the limit and, there is no

issue as to the time of taking of the blood sample, whether it was taken within the time limits, except insofar as there is criticism of the numerous alterations, I will attend to question of reliability of the explanations put forward later. The major question, that is whether the blood sample contained in kit box HG/555/355 was that of the accused? The question is whether the kit box containing the blood drawn from the accused was or was not tempered with? And whether the contents drawn by Doctor Shiwedha from the accused were still the same sample that was submitted to the Forensic Science Laboratory by Constable Coetzee who had taken it from the safe at the police station? In laymen's language, has the chain been proved to have been meticulously safeguarded between the drawing of the accused's blood sample and the submission of the accused's blood sample to the Forensic Laboratory at the Institute?

The evidence of the taking of the blood sample from the accused is that a kit contained a white polythene box is drawn from the police station safe, that outside, the box is tied cross ways with a string that is knotted and sealed with a metal seal, with a seal number. Inside the box itself, is a tube with a needle, with which the blood is drawn from a suspect, a label, seal number which is sequentially linked to the number on the outside. So-what it means is that HGA555/3554 being the seal number outside would be followed sequentially by the seal number HGA555/3555. There is no question here that reportedly the seal number HGA/555/3554 and the seal number HGA/555/ 3555 were evident and present when the kit was produced at the Laboratory, therefore there is no issue there. The question, apart from the various alterations and interference with the entry in the records, is not whether the number is HGA/555/35554 or HGA/555/3555, the issue is whether the contents contained in the bottle inside the

kit box had not been tempered with?

It seems to be the State's evidence as much as that of the defence that the original, sealing of the box by Superintendent Sipapela, according to Sipapela, as well, was interfered with, that therefore the seal was removed and subsequently replaced in the manner in which it is shown in the photograph and which Sipapela said had not been the way he left it. That seems common evidence with Sipapela. If you compare exhibit 1 upon which Sipapela illustrated how he had parcelled the blood sample against the photograph of the box in Exhibit Ml (A) which he did not acknowledge as his, there is no match and, the evidence speaks for itself. There is no doubt that the two are very different. The question is, when was that alteration done, and by whom and to what purpose? At the end of the day, I ask, can the Court say that the State has proved beyond reasonable doubt that the sample drawn by Doctor Shiwedha was the same sample that was tested and taken from the bottle at the Laboratory/Institute by Ms Namundjebo? Anyway, concerning the practice, the sample is resealed by placing it inside the box after the blood is drawn, and the inside seal label is placed outside with the sequential seal number which should then be on the label, following upon the one that was previously on the outside of the box and returned to the officer.

It is common cause, and agreed by all State witnesses that every step must be taken, and it is of great importance, to ensure that the seal is not, cannot be tampered with, that it is essential in this sort of case to establish an unbroken chain linking the contents drawn to the contents submitted for test at the Laboratory.

Doctor Shiwedha's evidence was not, as I've pointed out, what one would have expected from an experienced medical doctor. She admitted that she never entered the particulars of the occurrence, she couldn't remember who handed her the blood

kit. She couldn't remember whether she repacked it herself or gave it to somebody else to repack it. It is interesting to note according to Doctor Shiwedha, that there were more than one traffic officer at the time this blood sample was tested, whereas Sipapela and the State's case is that there was just Sipapela and the accused. The doctor is vague unhelpful on a very important part of the evidence, that is intended, to prevent tampering with the sample. The doctor must be aware of the need to eliminate the temptation to interfere with the original blood sample. Yet she gave her evidence as if it did not matter much. Besides that the doctor did not even complete the form itself, in full, part of that was completed by the Superintendent.

In serious matters of this nature it is unforgivable to allow for laxity to impinge upon the proper and correct procedures. Given the state of the evidence, it is difficult to conclude that the identity of the blood sample was adequately secured to eliminate interference.

In addition to this doubt about the identity of the sample, Sipapela himself does not appear to have signed for the blood kit when he first drew the kit and is verified by entries in Exhibit N, in contrast with what Constable Moller did about the same time or shortly thereafter in following the correct procedures when drawing the kit. Whereas on his return Sipapela appears to have actually signed for the surrender of the blood sample or handing over, albeit some 50 minutes after it first arrived at the police station.

When the sergeant who was on duty at the charge office was asked about this omission to sign for the kit, he simply said he might have forgotten to ask the

Superintendent to sign or it just didn't happen. So there is no knowing for certain who collected the blood kit from the police station. The accused's account that they proceeded to the hospital directly with Superintendent Sipapela and the kit was brought to them there cannot be dismissed lightly, it seems to be in accord with what Exhibit N shows. Why else did the person not sign if it was Superintendent Sipapela who collected it he was particularly experienced and should have known? If you look at that evidence together with the evidence of Doctor Shiwedha, that she saw two traffic officers about the time she was dealing with the blood sample of the accused, you cannot dismiss the accused's evidence as entirely false or impossibly true?

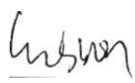
Now with regard to the authenticity of the blood sample after its arrival at the police station, when an investigation is mounted in the evidence one enters a world of sheer of confusion. The most material aspect seems to be so riddled with question marks the question whether the correct blood sample was eventually lodged is open to debate. The blood sample arrived at the police station at 04:10 and was not lodged with the sergeant on duty until 05:00pm but did not enter the register, Exhibit N until 05:10, the question where was the blood sample in the missing 50 minutes remains unanswered? There is no explanation for its detention elsewhere, than in the charge office? There is no explanation. There is on record in the proceedings a complaint made by the accused on the day and the time to Sergeant Klukowski at the time he was charged, that complaint should have alerted those in charge, because it was as a result of that complaint that Sergeant Klukowski ordered the photographs to be taken including those of the kits of Moller. So there is objective evidence that contrasts the packing at the hospital as shown on exhibit 1, and the packing shown in the photograph, Exhibit M.

Arguing, as State Counsel did, that the correct seal numbers on the kit established the unbroken chain, is not really enough. It doesn't answer the question because the question was whether the blood sample in the box was still the same as that which was withdrawn from the accused by Doctor Shiwedha? Given the changes in the arrangement of the seal the label and the string on the blood sample kit. It cannot be said that the accused's claim about tempering is fanciful and ought to be dismissed as not reasonably possibly true?

Constable Oosthuizen when asked whether she remembered what the kit looked like, how it was sealed, said that the sealing was as shown in exhibit M, photo A. This only added to the contradiction, and doesn't help. Somebody who should have been an outsider in dealing with the blood sample only served to further compound the pervading confusion in the conduct of these proceedings. If that confusion is taken together with the contradictions, the irregularities, which are admitted, and which are objectively established, in documents the numerous affidavits, the *pu-forma* statements the approach in this case should not happen in criminal proceedings. The fictitious nature of some of the documents adds to doubt. It not as if this evidence was compiled by inexperienced officers. The officers who gave evidence are officers with some experience.

In my opinion, and in conclusion at the end of the day is that it is impossible to say with any degree of certainty that the blood sample analysed by the Forensic Scientist has been established beyond reasonable doubt to be that of the accused, the essential chain in these proceedings of the custody and movement of the blood sample kit has not been proved to be unbroken. Accordingly I find the accused not guilty of this count of driving with excess alcohol in his blood.

I turn then finally to count 3, that is operating an unlicensed vehicle on a public road. The accused admitted this at the outset. He told the Court that he paid the licence fee and paid the penalty in terms of the law. The question of *mens rea* does not arise as the requirement is strict. Either you pay according to the time or you pay the licence and the penalty as the law stipulates. The fact that the accused had paid the fine and whatever penalties does not prevent the prosecution being brought subsequently. There is no irregularity on the part of the State in any way in bringing that charge. Therefore I must find you guilty of count 3. But while I find you guilty of count 3 on your admission as well as the State's evidence I will not punish you further for the commission of that offence. What I would consider doing unless I hear otherwise from the State's submission before I sentence you, I will simply give you a warning not to repeat the offence in future. As the State has nothing to say and the defence also, the accused is acquitted on counts 1 and 2 and their alternatives. He is found guilty on count 3, and warned not to repeat the offence in future.



GIBSON, J.

ON BEHALF OF THE STATE **Ms Verhoef**

Instructed by: **Office of the Prosecutor-General**

ON BEHALF OF ACCUSED **In Person**