



CASE NO. CR 47/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

**WILLEM NEHEMIA KANDONGA
ACCUSED**

HIGH COURT REVIEW CASE NO. 695/2011

CORAM: MULLER, J *et* SWANEPOEL, J

Delivered on: 27 May 2011

REVIEW JUDGMENT

SWANEPOEL, J.: [1] The accused was convicted of contravening section 82(5)(a) and section 82(1)(b) of the Road Traffic and Transportation Act, Act 22 of 1999 – driving a motor vehicle on a public road whilst the concentration of alcohol in a specimen of breath taken from him exceeded 0.037 grams per 1000ml and sentenced to a fine of N\$4000.00 or 8 months imprisonment. (The charge sheet incorrectly alleged a contravention of section 82(2)(b) of Act 22/1999).

[2] I directed the following query to the learned magistrate:

“What is the effect of the fact that there was no evidence that the breathalyser test on the accused was taken within 2 hours of the driving of the vehicle by the accused?”

The learned magistrate confirmed that there was no such evidence produced (and/or admitted by the accused during the questioning in terms of section 112(1)(b) of Act 51/1977) and concluded in his reply that the proceedings *“were indeed not in accordance with justice”* and requested that the proceedings be set aside.

[3] I am in agreement with the above request and in the circumstances the conviction and sentence are hereby set aside. The accused is entitled to a refund of N\$4000.00 if he had paid the fine.

Compare: *S v Jansen* 2006(1) NR 337 at 341 D-F.

SWANEPOEL, J

I agree

MULLER, J