



CASE NO.: CR 08/2012

**IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

**(1) SAM SHITANA
(2) SHAMBWANGALA MONIKA**

(HIGH COURT REVIEW CASE NO.: 194/2010)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 16 March 2012

REVIEW JUDGMENT

LIEBENBERG, J.: [1] Accused persons appeared in the Magistrate's Court Outapi on a charge in contravention of s 71 (1)(n) of the Liquor Act, 1998¹ and

¹ Act No 72 of 1998

after evidence was led, both were convicted and sentenced to a fine, wholly suspended on the usual conditions.

[2] The charge is one of selling liquor without a licence according to which “*Tassenbergs; Windhoek lagers; Tafel Lagers and Richeliu*” (sic) were sold without a licence. In evidence, a police officer (rank unknown) by the name Shanyenganga Onesmus, testified that he found second accused inside a bar where “*she was selling, busy supplying beers and other drinks to the customers.*” No evidence was led as to whether the liquor allegedly sold by second accused satisfies the definition of “liquor” as prescribed in s 1 of the Liquor Act which, as far as it concerns spirituous liquor, wine, or beer, *must contain three percent or more by volume of alcohol.* In order to secure a conviction under this charge, it must be proved by the State that the liquor sold by the accused satisfies the definition set out in the Act. The court would neither have been entitled to take judicial notice that the liquor listed in the charge satisfy that requirement.

[3] This Court in *The State v Elizabeth Mbinga; The State v Naemi Mwatile*² at para [7] said:

“From the definition it is clear that the Legislature did not proscribe the selling without a liquor licence of all spirituous liquor, wines and (traditional) beers, but only those which contain three percent or more by volume of alcohol. In my opinion, given the fact that liquor is defined in the Act, the percentage by volume of alcohol forms an element of the offence under consideration which

² Unreported Case No CR 29/2011 delivered on 28.09.2011

therefore, must be contained in the charge; and one that should be admitted by the accused pleading guilty on a charge under section 71 (1)(n) of the Act.”

Where there is no plea of guilty to the charge or an admission made to that effect and the matter goes on trial, obviously, the onus is on the State to prove that the liquor alleged to have been sold by the accused, contain three percent or more by volume of alcohol; and by failing to do so, the charge has not been proved against the accused.

[4] In the present case an essential ingredient of the charge had been omitted making it defective and which was not cured by evidence at the trial proving the matter which should have been averred.³

[5] In the result, the conviction and sentence in respect of both the accused are hereby set aside.

LIEBENBERG, J

I concur.

TOMMASI, J

³ S 88 of the Criminal Procedure Act, 1977