

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 3/2013

In the matter between:

THE STATE

and

SEMSON TJASEUA

(HIGH COURT MAIN DIVISION REVIEW REF NO 624/2012)

Neutral citation: *S v Tjaseua* (CR 3-2013) [2013] NAHCMD 10 (22 January 2013)

Coram: VAN NIEKERK, J and UEITELE, J

Delivered: 22 January 2013

Flynote: Criminal law – Traffic offences – Contravention of section 82(1) of Road Traffic and Transport Act 22 of 1999 - Driving motor vehicle on public road under influence of liquor – Accused pleading guilty but denying that his driving skills were impaired – Conviction and sentence set aside

Summary: The accused pleaded guilty to a charge of c/section 82(1) of Road Traffic and Transport Act 22 of 1999, namely that he drove a motor vehicle on public

road under the influence of liquor. During the questioning in terms of section 112(1) (b) of the Criminal Procedure Act, 1977 (Act 51 of 1977), he stated that at the time of the incident his driving skills were not impaired and that he drove well. The Court held that the accused did not admit an element of the offence, namely that he had been under the influence of liquor. The conviction and sentence were set aside and the matter remitted to the magistrate in terms of section 312(1) to enter a plea of not guilty in terms of section 113.

ORDER

1. The result is that the conviction and sentence are set aside.
2. In terms of section 312(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977), the matter is remitted to the court *a quo* and the magistrate is ordered to enter a plea of not guilty in terms of section 113.

REVIEW JUDGMENT

VAN NIEKERK, J (UEITELE, J concurring):

[1] The accused stood trial in the magistrate's court of Windhoek on a charge of contravening section 82(1) of the Road Traffic and Transport Act, 1999 (Act 22 of 1999) in that he allegedly drove a motor vehicle on a public road while being under the influence of intoxicating liquor or a drug having a narcotic effect. The accused pleaded guilty to the charge.

[2] During the questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977), the following was *inter alia* recorded (the omissions, insertions and underlining are mine):

'Tell the Court, in detail what did you do wrong on the 12th of December 2011 and at or near Otjomuise in the district of Windhoek? --- Your Worship, I was driving my vehicle coming from Otjomuise on the way home Your Worship, while I was under the influence of alcohol.

Is Otjomuise road a public or private road? --- It is a public road, Your Worship.

And you said you drove under the influence of intoxicating liquor, what did you consume? --- Only beer Your Worship.

How many quantities, how many did you drink? --- Four beers, Your Worship.

What was the registration number of your motor vehicle? --- NKC 77C GP, Your Worship.

Did you know that it is wrong to drive a motor vehicle on a public road while under the intoxicated liquor or [a drug having a] narcotic effect? --- Yes, Your Worship.

Did you also realize that it is wrong to drive on a public road under the influence of intoxicating liquor or [a drug having a] narcotic effect and that upon conviction, you can be punished? --- Yes, (inaudible)

Were your driving skills impaired? --- No, Your Worship, it was (sic) not impaired.

How was (sic) your driving skills? --- Your Worship, I was driving well it is only because there was a road block.

What happened at the road block, when you were stopped? --- Yeas, Your Worship.

And what transpired there? --- Then Your Worship, a breath sample was taken from me, me the driver.

Well so far from the answer[s] given by the Accused person the Court is satisfied that the Accused [has] admitted to all the elements of the offence. And the verdict he is guilty as charged.'

[3] Thereafter the accused was sentenced to a fine of N\$2 000 or 12 months imprisonment.

[4] When the matter was sent for review the transcribed record had certain handwritten changes on it which conveyed that the accused's answers underlined above were to the effect that he did not drive well because his driving skills were impaired. It would seem that the trial magistrate thought that the record was incorrectly transcribed and that he mistakenly sought to correct it. However, when the recording was listened to it was clear that the accused actually stated that his driving skills were not impaired and that he drove well.

[5] Based on the actual answers given the magistrate was asked to explain on what basis the accused was convicted. The magistrate's response is that there is no way that the court could have been satisfied that the accused admitted all the elements of the offence in question. I agree entirely.

[6] In *S v Cloete* 1994 NR 190 HC at 191G-192C) this Court stated:

'The elements of this offence are: that the accused (i) drove (ii) a vehicle (iii) on a public road (iv) while under the influence of liquor (v) *mens rea*.

The accused admitted elements (i), (ii), (iii) and (v). In respect of element (iv) the accused denied that his driving skill was impaired as a result of the alcohol consumed by him and he further stated that he drove in a normal way but disobeyed a stop sign. In this regard it was stated in *R v Lloyd* 1929 EDL 270 at 274 that an accused may be considered to be under the influence of intoxicating liquor if it is proved that

'the skill and judgment normally required in the manipulation of a motor car is obviously diminished or impaired as a direct result of the consumption of alcohol'.

(See also *S v Grobler* 1972 (4) SA 559 (O) at 561D-E.)

The accused's admission that he disobeyed a stop sign is, in the context of this denial that his driving skills were not impaired, of little significance. The fact that a person disobeys a traffic sign is not per se proof that his driving skills are impaired by the intake of alcohol. This offence is frequently committed by people who did not take a drop of alcohol. The further admission by the accused that he knows that it is wrong to drive a vehicle on a public road whilst drunk was, in the light of his previous denials, no more than a general statement of fact and not an admission that he was drunk at the time when he drove the vehicle. It must also be pointed out that, although a person who is drunk will obviously contravene the section, it is not necessary for the State to prove that the accused was drunk in order to secure a conviction. It is enough if the State proves or, for that matter the accused admits, that his driving skill and judgment were impaired by the intake of alcohol.'

[7] In *S v Jansen* 2006 (1) NR 337 HC 339E-J Mainga J (as he then was) expressed the same position thus:

'To prove a contravention of s 82(1) it is not sufficient for the State to prove mere consumption of intoxicating liquor (*Cooper Motor Law* vol 1 at 554); the State must prove something more than that the driver has had a few drinks or that his breath smells of liquor. *R v Donian* 1935 TPD 5 at 9; *R v Tathiah* 1938 NPD 387 at 392; *R v Lloyd* 1929 EDL 270 at 274; *R v Magula* 1939 EDL 207 at 211..... 'The onus is on the prosecution, on a charge of driving under the influence, to establish the impairment in the driver's ability to drive, if there was any, was caused by the consumption of alcohol.' (*S v Piccione* 1967 (2) SA 334 (N) at 336.) The elements of the offence of driving under the influence are that the accused (i) drove (ii) a vehicle (iii) on a public road (iv) while under the influence of liquor or drugs (v) *mens rea* (*Milton South African Criminal Law and Procedure* vol III Statutory Offences G3-61).

An accused may be considered to be under the influence of intoxicating liquor, if it is established that 'the skill and judgment normally required in the manipulation of a motor car is obviously diminished or impaired as a direct result of the consumption of alcohol' (*R v Spicer* 1945 AD 433 at 435-6; *S v Grobler* 1972 (4) SA 559 (O) at 561D-E; Milton *South African Criminal Law and Procedure (supra)* at G3-63 and all the cases the learned author refers to in fn 14; *S v Engelbrecht* 2001 (2) SACR 38 (C) at 44i, 46a-d, 47d; *Cooper Motor Law* vol 1 at 554).'

[8] In this case the accused, although he at first appeared to admit the fourth element of the offence, namely that he was under the influence, in fact denied it when he stated that he drove well and that his driving skills were not impaired. He should therefore not have been convicted.

[9] The result is that the conviction and sentence are set aside. In terms of section 312(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977), the matter is remitted to the court *a quo* and the magistrate is ordered to enter a plea of not guilty in terms of section 113.

K van Niekerk
Judge

S F I Ueitele
Judge