



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 8/2016

In the matter between:

THE STATE

And

WILHELM ERASTUS NGHILIFAVALI

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1556/2015)

Neutral citation: State v Nghilifavali (CR 8 /2016) [2016] NAHCMD 58 (8 March 2016)

Coram: SIBOLEKA J and USIKU J

Delivered: 8 March 2016

Flynote: Criminal Procedure- Sentence- suspended sentence – correct wording of condition of suspension – The condition should be clear and clearly related to the crime accused is convicted of – Accused must know exactly which conduct may lead to his having to serve the suspended sentence – In present case the conditions imposed for having to serve the suspended sentence are wrong – Condition that operation of sentence for count 2 is suspended pending automatic review, not meeting the requirements.

Summary: The accused was convicted in terms of section 112(1) (b) and sentenced as follows: count 1, N\$1000 (one thousand) or one (1) month imprisonment, count 2, N\$3000 (three thousand) or three (3) months imprisonment operation of sentence for count 2 is suspended pending automatic review.

ORDER

- (a) The conviction and sentence are set aside.
- (b) In terms of section 312 (1) of the Criminal Procedure Act, 51 of 1977 the matter is remitted to the trial court with the direction that it complies with the provisions of section 112(1) (b) of that Act, and further to deal with the accused according to law.

REVIEW JUDGMENT

USIKU J, (SIBOLEKA J CONCURRING)

[1] When this matter came up for review I directed the following query to the magistrate “Can the learned magistrate explain what he meant by Operation of Sentence for count 2 is suspended pending automatic review? The learned magistrate responded to the query as follows: “I inadvertently, during the section 112 questioning omitted to cover an essential element of the offence, that of two hours requirement within which the accused blood must be drawn for testing, and the accused didn’t admit that fact. I realised this after pronouncing the sentence. I expected the conviction and sentence to be set aside on review, and though it best to suspend the operation of the sentence to prevent prejudice to the accused in case he fail to pay the fine. The court relied on section 297 (1) (b) and (a) (i) (hh) of the

Criminal Procedure Act when suspending the operation of sentence. The accused was granted bail.

[2] I am of the view that the learned magistrate could not have been satisfied that the accused had admitted guilt to all the allegations if he was not questioned and admitted the essential elements of the offence. Common sense dictates that the accused can admit that he was driving with excess blood alcohol level which falls within his own knowledge. Whether his explanation was satisfactory or not and whether the blood was drawn for testing within two hours falls outside his knowledge. It was the duty of the learned magistrate to establish whether the blood was drawn within the required period before he could satisfy himself that the accused has admitted all the allegations in the charge sheet. The failure by the learned magistrate to question the accused render the conviction on the 2nd count not to be in accordance with justice.

[3] The other issue which remains to be considered is whether the sentence imposed on the second count is a competent sentence. The formulation of the sentence is wrong. Firstly it relates to automatic review instead of the offence with which the accused had been convicted of. The conditions of suspension should only refer to the offence with material connection to nature and circumstances of offence of which an accused has been convicted.

[4] In the result the following order are made:

- (a) The conviction and sentence are set aside.
- (b) In terms of section 312 (1) of the Criminal Procedure Act, 51 of 1977 the matter is remitted to the trial court with the direction that it complies with the provisions of section 112(1) B of that Act, and further to deal with the accused according to law.

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DN USIKU

Judge

A SIBOLEKA

Judge