



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 10/2019

In the matter between:

THE STATE

v

DAVID EGUMBO

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1791/2018)

THE STATE

v

VAINO IYAMBO

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1792/2018)

Neutral citation: *S v Egumbo* (CR 10/2019) [2019] NAHCMD 11 (24 January 2019)

Coram: USIKU, J and UNENGU, AJ

Delivered: 24 January 2019

Flynote: Criminal Procedure – Plea of guilty – Questioning – Magistrate not covering all elements of offence – Convictions and sentences set aside – matter remitted to properly question the accused.

Summary: The Accused in the two cases were charged with an offence of driving with an excessive breath alcohol level, convicted and each sentenced. As the questioning by the learned magistrate did not cover all elements of the offence, the court set aside the convictions and sentences; and remitted the case to the magistrate to question the accused properly.

ORDER

The conviction and sentence in the above mentioned cases are hereby set aside and the matters remitted to the magistrate's court for the district of Windhoek before the same magistrate to deal with the matters as he suggested and in accordance with the law.

REVIEW JUDGMENT

UNENGU, AJ (USIKU, J concurring):

[1] These two matters were submitted before me for automatic review following the provisions of s 302 of the Criminal Procedure Act¹ (the CPA).

¹ Act 51 of 1977.

[2] In both cases, the accused persons were charged with the offence of driving with an excessive breath alcohol level which is a contravention of s 82(5)(a) read with sections 1, 82(6), 82(7), 86, 89(1) and 89(4) of the Road Transport Act 22 of 1999.

[3] The accused persons pleaded guilty to the charge, questioned in terms of s 112(1)(b) of the CPA, convicted and sentenced. I am referring to Review Cases High Court Ref. No 1791/2018, The State versus David Egumbo and High Court Ref. No. 1792/2018; The State versus Vaino Iyambo.

[4] As I was not satisfied that the proceedings in the matters were in accordance with justice, I queried the learned magistrate and asked him to give reasons for conviction in both matters.

[5] The magistrate duly complied and gave a comprehensive explanation for the conviction. In para 3 of the response he said the following:

‘3. Having had the opportunity of reading My Lord’s Judgment in the case of S v Gaeses (CR 55/2017) [2017] NAHCMD 253 (04 September 2017) where the Honourable Lady Justice Usiku concurred with my Lord, I unequivocally concede that during my questioning in terms of section 112(1)(b) of the CPA 51 of 1977 as amended, I omitted to question the accused on vital elements of the offence. Therefore the conviction and sentence stand(s) to be set aside and matter be remitted (to) back to me in terms of section 304(2)(c)(v) of the CPA to question the accused on the omitted vital elements.’

[6] The concession by the learned magistrate, is correctly made. Both cases will be remitted for the magistrate to question the accused persons properly as he had suggested.

[7] With regard to the issue of the public prosecutors always drafting annexures to the charge sheet, annexures omitting vital elements of offences like in the present two cases, this issue does not exempt the magistrate from his duty to ensure that the annexures to the charge sheet describing the offence allegedly committed by the accused is correctly and carefully drafted and contains all elements of the offence to which the accused is required to plead.

[8] It is trite law that an accused person may object to a charge put to him of which the annexure describing the offence does not contain the correct or all

avermments of the crime/offence he/she is required to plead to². In these present matters though, the accused were unrepresented and were unable to make use of the provisions of s 85.

[9] That being the case and for the reasons stated above, the conviction and sentence in the abovementioned cases are hereby set aside and the matters remitted to the magistrate's court for the district of Windhoek before the same magistrate to deal with the matters as he suggested and in accordance with the law.

[10] In the event of the accused being convicted of the offences, the period of imprisonment served must be taken into account during sentencing.

[11] In the result, the following order is made:

The conviction and sentence in the above mentioned cases are hereby set aside and the matters remitted to the magistrate's court for the district of Windhoek before the same magistrate to deal with the matters as he suggested and in accordance with the law.

E P UNENGU
Acting Judge

D N USIKU
Judge

² S 85 of the CPA. See also S v Katari 1 2006(1) NR 206 (HC).