



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT**

Case no: CR 41/2020

In the matter between:

THE STATE

and

KEVIN CLOETE

ACCUSED

**(HIGH COURT MAIN DIVISION REVIEW REF NO. 126/2020)
(MAGISTRATE'S SERIAL NO. 01/2020)**

Neutral citation: *S v Cloete* (CR 41 /2020) [2020] NAHCMD 240 (22 June 2020)

Coram: SHIVUTE J *et* CLAASEN J

Delivered: 22 June 2020

Flynote: Criminal procedure – accused charged under wrong section – charge may be corrected on review – error not fatal where particulars of offense correctly described in charge sheet.

Criminal Procedure – Questioning in terms of s 112(1) (b) of the CPA – Omission by magistrate to ask questions on vital elements of the offence of driving with excessive blood alcohol level – conviction and sentence set aside

Criminal law – Suspension of accused's driver's license – Mandatory period for suspension of driver's licence specified by statute – driver's license suspended for lesser period than that which is prescribed

Summary: The accused pleaded guilty to the offence of driving with an excessive blood alcohol level. He was questioned in terms of s 112(1) (b) of the Criminal Procedure Act, convicted and sentenced. His drivers license was suspended for a period of one month in terms of section 51(2) (a) of the Road Traffic and Transportation Act. On review, the court found that the accused was charged with the wrong section however, error was not fatal as the offense was correctly described in the charge sheet and the accused will not suffer any prejudice as a result of the omission. The conviction and sentence is set aside due to the magistrate's failure to question the accused as to whether his blood samples were taken within two hours after the incident and whether such blood samples were taken by an authorized officer. The order to suspend accused's driver's license for a lesser period than that which is prescribed by statute is not in accordance with the law. Even if it was, such order cannot be allowed to stand because the accused was improperly convicted.

ORDER

- a) The conviction and sentence is set aside, if the accused had paid an amount of money in respect of the sentence, such amount should be refunded to him.
 - b) The order suspending the accused person's drivers licence in terms of the provisions of section 51 of the Road Traffic and Transportation Act 22 of 1999 is set aside.
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REVIEW JUDGMENT

SHIVUTE J, (CLAASEN J concurring)

[1] The matter came before me on special review.

[2] The accused in the matter was charged with driving with an excessive blood – alcohol level, in contravention of s 82(1) (b) read with sections 1, 86, 89(1) and 89(4) of the Roads Traffic and Transportation Act, Act 22 of 1999.

[3] He pleaded guilty to the charge and was questioned in terms of s 112(1) (b) of the Criminal Procedure Act 51 of 1977 (CPA). He was convicted as charged and sentenced to pay a fine of N\$ 4000 (four thousand) or 6 (Six) months' imprisonment. The court further ordered that the accused's driver's license be suspended for a period of 1 month.

[4] The principal magistrate, who is the internal head of the office, referred the matter to me on special review and indicated that he came across the record during his inspections and observed the following issues;

1. The questioning in terms of section 112(1) (b) CPA left much to be desired, no question was asked if blood was drawn from the accused person.

2. No question was asked about the time between when accused was stopped and when the blood was drawn from him. No indication about what prompted the police to arrest the accused.

3. The suspension of the driver's license was not made in accordance with the law. The licence was suspended for a period of one month without any justification. The law provides that the licence suspension period should not be less than three months.

I therefore, humbly request your good office to place the record before the honourable reviewing Judge for review and take the correctional measure on the case. '(sic)

[5] I addressed a query to the trial magistrate, directing him to comment on the three observations made by the principal magistrate.

[6] The trial magistrate replied as follows to the abovementioned query:

'1. The question whether blood was drawn from the accused was omitted by oversight.

2. This question was also omitted by oversight.

3. The court took into account that the accused pleaded guilty and that he might lose his employment and reasoned this to be a compelling factor for a shorter period, but overlooked the fact that the provisions are mandatory.'

[7] From the onset, this court notes that the accused was charged under the wrong section in the Road Traffic and Transportation Act, Act 22 of 1999. The accused was charged with driving with an excessive blood – alcohol level, in contravention of s 82(1) (b) of the Act, however, section 82(1) (b), deals with the offense of occupying the driver's seat of a motor vehicle of which the engine is running whilst under the influence of intoxicating liquor or a drug having a narcotic effect.

[8] The accused should have been charged under section 82(2) (a) of the Act which deals with the offence of driving a motor vehicle while the concentration of alcohol in any specimen of blood taken from any part of his or her body exceeds 0,079 grams per 100 millilitres.

[9] In *S v Goagoseb*,¹ the court dealt with the issue of attaching a wrong label to a charge where, it was held that:

'... if the body of the charge is clear and unambiguous in its description of the act alleged against the accused ... the attaching of a wrong label to the offence or an error made in quoting the charge, the statute or statutory regulation alleged to have been contravened, may be corrected on review if the court is satisfied that the conviction is in accordance with justice, or, on appeal, if it is satisfied that no failure of justice has, in fact, resulted therefrom.'

[10] It follows that although the accused was convicted of the wrong charge, this court is of the opinion that such error is not fatal because the body of the charge is

¹*S v Goagoseb* (CR 64/2018) [2018] NAHCMD 256 (23 August 2018).

clear and unambiguous in its description of the act alleged against the accused and that the attaching of a wrong label to the offence will not result in the failure of justice or prejudice the accused.

[11] Having established the above, I now turn to the proceedings in terms of section 112(1) (b). The relevant part of the record is quoted hereunder:

'Crt: How do you plea to the charge?

Acc: guilty

S. 212(4) is stating blood analysis handed by agreement, Exh A

Crt: What do you plead guilty for?

Acc: I was under the influence of alcohol and I was under the teering (sic)

Crt: Steering of what?

Acc: I was driving a vehicle

Crt: Where was thid? (sic)

Acc: Opposite KFC in town

Crt: Was it in a public road

Acc: Yes

Crt: What about your blood alcohol level?

Acc: It was 0.28/g per 100 ml

Crt: How do you know that?

Acc: The lady informed me just now

Crt: Where did she get it?

Acc: Evidence from blood analysis

Crt: When was that?

Pp: 29 March 2019

Crt: Any defence to offer

Acc: No defence

Crt: the court is satisfied that the accused admits all allegations contained in the charge

Accused found guilty as charged'

[12] In *S v Kapia*² at para 11, the court cited with approval the case of *S v Moffat*³, where it was held that the material elements which the State has to prove in respect of the offence of drinking under excessive blood alcohol level are:

'(i) that the accused drove a vehicle on a public road;

(ii) that a specimen of blood was taken from the accused's body within 2 hours after the alleged offense;

(iii) that a scientifically reliable analysis for the presence of alcohol performed on the specimen of not less than 0.08 g per 100ml;

(iv) that precautions were taken in obtaining the specimen and in handling and preserving it which ensured that the specimen was not contaminated or affected in a manner which might influence the result of the analysis. '

[13] In this case, the learned magistrate not only failed to ask the accused whether the blood sample was taken within two hours after the incident, but also whether such blood sample was taken by an authorized officer, thereby omitting proof of two vital elements of the offence of driving under excessive blood alcohol level.

[14] Given the above, the court a quo could not have been satisfied that all the elements of the offense were admitted by the accused. The omission by the learned magistrate vitiates the entire proceedings, which proceedings cannot be allowed to stand.

² *S v Kapia* (CR 30/2020) [2020] NAHCMD 171 (13 May 2020).

³ *S v Moffat* 1992 NR 193 HC.

[15] Notwithstanding the above, the accused person had already served his sentence and this judgment is for academic purposes only. Therefore, I deem it fit to not remit the matter to the learned magistrate in terms of s 312 of the Criminal Procedure Act to question the accused person on the omitted elements of the offence.

[16] The remaining issue for determination is the suspension of the accused's driver's licence for a period of 1 month.

[17] The provisions for the suspension of a driver's license states the following:

'51 Suspension of license upon conviction of certain offences

(1) Where a person who is the holder of a driving license is convicted by a Court of an offence –

(a) ...

(b) ...

(c) ... issue an order whereby every driving license held by such person is suspended in accordance with the provisions of subsection (2)

(2) An order of suspension pursuant to subsection (1), shall be made for such a period as the Court may determine, but which shall not be less than -

(a) Three months, in the case of a first conviction;⁴

[18] The word 'shall' in section 51(2)(a) of the Act makes it mandatory for the court to suspend a first offender's drivers license for a period not less than three months. In this case, the accused's drivers license was suspended for a period shorter than the prescribed limit, which is impermissible. In any event, since the accused was improperly convicted, such order stands to be set aside.

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

a) The conviction and sentence is set aside, if the accused had paid an amount of money in respect of the sentence, such amount should be refunded to him.

⁴ Section 51 of the Road Traffic and Transport Act 22 of 1999.

- b) The order suspending the accused person's drivers licence in terms of the provisions of section 51 of the Road Traffic and Transportation Act 22 of 1999 is set aside.

NN SHIVUTE
Judge

CM CLAASEN
Judge