

"ANNEXURE 11"

Case Title: <i>The State v Tulyameni Pretorius</i>	Case No: CR 45/2019
High Court MD Review No: 892/2019	Division of Court: Main Division
Heard before: Mr Justice Liebenberg <i>et</i> Mr Justice Sibeya (Acting)	Delivered on: 29 June 2020
Neutral citation: <i>S v Pretorius</i> (CR 45/2019) [2020] NAHCMD 258 (29 June 2020)	
The order: <ul style="list-style-type: none">a. The conviction is set aside.b. In terms of s 312 of the CPA, the accused should henceforth be brought before the trial court and the magistrate is directed to comply with the provisions of s 112 (1) (b) in determining whether the accused admits all the elements contained in s 82 (3) of Act 22 of 1999.c. In the event of a conviction, the magistrate must, in considering an appropriate sentence, have regard to the time the accused has spent in custody.d. Should the accused have paid his fine in the meantime, monies paid towards such fine should be reimbursed to the depositor.	
Reasons for order:	
LIEBENBERG J (concurring SIBEYA AJ) <ul style="list-style-type: none">1. This is a review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).	

2. The accused was convicted in the Windhoek magistrate court for driving a motor-vehicle with an excessive blood alcohol level, in contravention of the provisions of s 82 (2) of the Road Traffic and Transport Act 22 of 1999 (the Act) and sentenced to a fine of N\$5 000 or in default of payment 12 months' imprisonment.
3. Notwithstanding the fact that in terms of s 304(2) of the CPA, a query shall be delivered to the trial magistrate to furnish reasons for convicting or for imposing a certain sentence, if it appears to the judge that the proceedings are not in accordance with justice or doubt thereto exists. This requisite may be dispensed with where the judge concerned is of the opinion that the conviction and sentence is clearly not in accordance with justice and the court is of the opinion that the convicted person may be prejudiced.
4. For reasons that will hereunder follow, the court will dispense with such requirement as, in its view, the proceedings are clearly not in accordance with justice. The court has confirmed that the accused did not pay the fine imposed and is currently serving his sentence. The delay caused in obtaining reasons by the magistrate who dealt with the matter will be futile and certainly cause further prejudiced to the accused.
5. The accused pleaded guilty and was questioned by the magistrate in terms of the provisions of s 112(1) (b) of the CPA.
6. There are a number of issues that appear from the review record, one of which is materially fatal to the conviction. This court will deal not only with the main issue but, in passing, state further irregularities, *albeit* not fatal.

7. It is trite that when an accused pleads guilty to a charge, a court is under a duty to satisfy itself that the accused admits the definitional elements of an offence. The invoking of s 112 (1) (b) of the CPA, following a plea of guilty, acts as a safeguard against the result of an unjustified plea of guilty.¹ The accused's answers must establish an explicit plea of guilty. Moreover, where a court finds any doubt in the answers that an accused gives during s 112 (1) (b) questioning, a plea of not guilty should be entered.² It should further be noted that during this stage of proceedings the court cannot evaluate, decide the truthfulness of, or draw inferences from the accused's answers.³ The court is duty bound to enter a plea of not guilty where the accused's answers suggest a possible defence.⁴

8. The section under which the accused was charged, questioned and convicted by the court reads as follows:

'Driving while under the influence of intoxicating liquor or a drug having a narcotic effect, or with excessive amount of alcohol in blood or breath

82. (1) No person shall on a public road -
drive a vehicle; or

(b) occupy the driver's seat of a motor vehicle of which the engine is running,

while under the influence of intoxicating liquor or a drug having a narcotic effect.

(2) No person shall on a public road -

(a) drive a vehicle; or

(b) occupy the driver's seat of a motor vehicle of which the

¹ *The State v Kandjimi Hiskia Mangundu* (CR 67/2016) [2016] NAHCMD 316 (17 October 2016)).

² *S v Combo and Another* 2007 (2) NR 619 (HC).

³ *S v Kaevarua* 2004 NR 144 (HC).

⁴ *The State v Kandjimi Hiskia Mangunda* at para 4.

engine is running,

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.

(3) Where in any prosecution for an offence under subsection (2), it is proved that the concentration of alcohol in any specimen

of blood taken from any part of the body of the person concerned exceeded 0,079 grams per 100 millilitres at any time within two hours after the alleged offence, it shall be presumed, in the absence of evidence to the contrary, that such concentration exceeded 0,079 grams per 100 millilitres at the time of the alleged offence.....’

(Emphasis added)

9. What is clear from the above quoted sections is that the definitional elements comprise of not only whether the accused drove a motor vehicle on a public road while under the influence of intoxicating liquor or a drug having a narcotic effect; or 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, but that in the event there is a prosecution an offence under subsection (2), it must be proved that the concentration of alcohol in any specimen of blood taken from the accused was within *two hours*.

10. The magistrate in this regard omitted to deal with an essential element namely the time period between when the accused was stopped and the drawing of the specimen of his blood. It therefore goes without saying that the exclusion of such question deprived the court of knowing whether the accused admits or denies a crucial element of the offence. The questions and answers must at least cover all the essential elements of the offence which the state in the absence of a plea of guilty would have been required to prove.⁵ This omission is therefore fatal as regards the conviction and subsequent sentence imposed.

⁵ *S v Mhkize* 1978 (1) SA 264 (N) 267.

11. In addition to the above irregularity, the court notes that the record reflects the accused is convicted under s 82 (1) (b) of the Act, whereas in truth, the offence is captured under s 82 (2). The relevant part of the record reads as follows:

‘Accused upon your own admission of guilt, you have now been found guilty of contravening Section 81 (1) b read with sections 1,86,89 (1) and 89 (4) of the Road Traffic and Transport Act 22/1999, driving with an excessive blood alcohol level.’⁶

(Emphasis added)

12. What is further of concern is that the heading of the charge annexure reads the same. On this score, it should be noted that, not only is the state under a duty to verify that the correct charge displays the correct section allegedly contravened in relation to the statutory offences, the ultimate duty rests on the magistrate, more so when the accused is unrepresented.

13. The views expressed by Henochsberg J in *R v Ngcobo; R v Sibega*⁷ at 381B-D has been endorsed with approval in our jurisdiction where the court stated:

‘(The) principle is that, if the body of the charge is clear and unambiguous in its description of the act alleged against the accused, e.g. where the offence is a statutory and not a common law offence and the offence is correctly described in the actual terms of the statute, 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.’

⁶ Page 7 of the Transcript.

⁷ *R v Ngcobo; R v Sibega* 1957(1) SA 377 (N).

14. This court has perused the body of the charge annexure and the line of questioning by the magistrate and can safely accept that the body of the charge is correct and that the fallacy only lies in the label of the charge, therefore not materially prejudicing the accused. This notwithstanding, such occurrences, should be avoided.

15. This court further takes issue with the manner in which the accused pleaded to the charges preferred by the state. From the charge annexure it appears that there is a main and alternative charge. The record of proceedings reflect the following:

'COURT: And what is your plea? Now which did you proceed with, is it both charges or?

MS HENDRICKS: No Your Worship we only proceeding with the alternative count, that is driving with an excessive blood alcohol level.

COURT: The first count to be withdrawn maybe later.

MS HENDRICKS: Yes, Your Worship. As it pleases you.

COURT: Yes, the State withdrawn count no.1 that is the main charge of driving under the influence of intoxicating liquor and they are only going to proceed with the alternative which is driving with an excessive blood alcohol level...'⁸ (sic)

16. Clearly, there exists between the magistrate and prosecutor a misunderstanding on the plea procedure when it relates to a main and alternative charge. From the above extract, the court allowed the main charge to be withdrawn and proceeded on the alternative. However if the state withdrew the main count, its alternative would suffer the same fate, unless the state places the alternative charge as a main count, which from the record and charge annexure attached, did not happen. If there is main and alternative charges, as they appear on the current charge

⁸ Page 3 of the transcript.

annexure, the accused is required to plead to both the main and alternative charges. In this instance, the court ought to have ordered the state to place the alternative charge as a main count after

the former main count had been withdrawn. Though irregular to proceed to let the accused plead on the alternative and subsequent conviction where there is no plea to the main count or, same being withdrawn, the irregularity did not cause the accused material prejudice.

17. Though the two latter irregularities did not cause prejudice to the accused, the same cannot be said for the former. Consequently, we are not satisfied that the accused admitted all the elements of the offence under s 82 (2) of the Act. Therefore, the conviction cannot be allowed to stand.

18. In the result, the following order is made:

1. The conviction is set aside.
2. In terms of s 312 of the CPA, the accused should henceforth be brought before the trial court and the magistrate is directed to comply with the provisions of s 112 (1) (b) in determining whether the accused admits all the elements contained in s 82 (3) of Act 22 of 1999.
3. In the event of a conviction, the magistrate must, in considering an appropriate sentence, have regard to the time the accused has spent in custody.
4. Should the accused have paid his fine in the meantime, monies paid towards such fine should be reimbursed to the depositor.

J C LIEBENBERG JUDGE	O SIBEYA ACTING JUDGE

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