

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

“ANNEXURE 11”

PRACTICE DIRECTIVE 61

Case Title: <i>The State v James Poppas</i>	Case No: High Court Ref No. CR 48/2020
	Division of Court: High Court Main Division
Heard before: Honourable Lady Justice Claasen <i>et</i> Honourable Mr Justice Sibeya Acting	Delivered on: 16 July 2020
Neutral citation: <i>S v Poppas</i> (CR 48/2020) [2020] NAHCMD 287 (16 July 2020)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The fine, if paid, to be refunded to the depositor.	

Reasons for order:

[1] This matter was brought to the High Court on automatic review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused was arraigned in the Magistrate's Court held at Otjiwarongo charged with contravening section 140(2)(a) read with section 1, 60, 140(4), 145, 147, 150, 151 and 180 of the Road Traffic Ordinance 30 of 1967 (the Ordinance). The charge reads:

'In that upon or about the 31st day of January 2019 and on a public road, namely Henk Wellem's Street at or near Otjiwarongo in the district of Otjiwarongo the said accused did wrongfully and unlawfully drive a vehicle with registration number FSV043FS while the concentration of alcohol in his/her blood was not less than 0,08 gram per 100 millilitres, to with 0,13 gram per 100 millilitres.'

[3] On 19 November 2019, the accused pleaded guilty to the charge and was questioned in terms of section 112(1)(b) of the CPA. The accused disputed the correctness of the blood specimen results consequently a plea of not guilty was entered in terms section 113 of the CPA. On 31st January 2020, the accused appeared in court and had a change of heart. He admitted to the correctness of the process of drawing his blood for an alcohol test and further admitted the results of his blood specimen which revealed that the concentration of alcohol in his blood was not less than 0.13 grams per 100 millilitres. He was convicted as charged and sentenced to a fine of N\$2 000 or in default of such payment 2 months imprisonment.

[4] When this matter was submitted for review, a query was directed to the presiding magistrate as to whether a charge of contravening section 140(2)(a) of Ordinance 30 of 1967 was competent in law for an offence which is allegedly committed on 31 January 2019. A further query was whether the court was competent, after invoking section 113 of

the CPA, to question the accused presumably under section 112(1)(b).

[5] The magistrate responded as follows to the queries:

‘1. It was an oversight from the court to not have noticed that the correct section to be applied instead is contravening section 82(1)(b) read with section 1, 86, 89(1) and 89(4) of the Road Traffic and Transport Act 22 of 1999 – Driving with excessive blood-alcohol level.

2. I will leave in the hands of the Hon Justice to decide whether it was competent. The magistrate was assisting the unrepresented accused to understand what he wanted to mean when he made the application of admitting to the elements.’

[6] Ordinance 30 of 1967 has long been repealed. In a relatively similar review judgment of *S v Mafudza*,¹ the accused faced a similar charge under the repealed ordinance. This court did not take kindly to that and stated the following:

‘[5] The Road Traffic Ordinance was repealed by the Road Traffic and Transport Act 22 of 1999 which came into operation on 06 April 2001. Eighteen years after the repeal, it is discouraging to realise that the Road Traffic Ordinance refuses to be scrapped from Court proceedings with the assistance of public prosecutors and magistrates.

[6] It is apparent that the Ordinance in terms of which the accused was charged lost its force and effect when it was repealed. The Ordinance could therefore no longer be utilised as the premise for the statutory offence provided in it. It follows that at the time that the accused was charged and convicted, the Ordinance no longer provided for an offence, due to its repeal and consequentially invalid nature.

[7] The magistrate appears to have simply followed the charge as presented by the prosecutor. It should be understood that Prosecutors are essential to the attainment of justice in the criminal justice system. They should thus draft charges with professionalism, precision and where the offence is statutory, the charge should reflect the wording preferred in the statutory provision with

¹ (CR63/2019) [2019] NAHCMD 323 (05 September 2019).

the correct and valid legislation establishing the offence. Magistrates should also carefully examine charges to ensure that such charges are valid and not objectionable in terms of section 85(1)(a) of the CPA. Failure to examine the correctness of the charge may result in incurably defective proceedings.²

[7] Accused persons should be correctly charged. Incorrect charges defeat the whole purpose of the criminal justice system. A question comes to mind, that, what would be the purpose of subjecting an accused person and the costly state functionaries to tedious court proceedings based on a wrong or repealed charge? It is a waste of the valuable time and resources of the court, state functionaries and the accused.

[8] The concession by the magistrate of convicting the accused under a repealed legislation was therefore properly made. A repealed legislation is not only invalid but it is incurably invalid and no charge preferred under such legislation can be resuscitated. As a result, the conviction pronounced by the magistrate falls to be set aside.

[9] With regard to the questioning of the magistrate in order to assist the unrepresented accused as stated, the ideal process should have been to allow evidence to be led. Where the accused elects to make admissions during the trial, courts should not lead the nature or content of such admissions nor ask leading questions. Questions like whether the accused disputes certain averments or not are not desirable at this stage. The accused should be afforded an opportunity to state his admissions in his own words and have same recorded verbatim.

[10] In the premises of the conclusion arrived at as a result of a conviction of the accused under a repealed legislation, the conviction and sentence were not in accordance with justice and cannot be upheld.

²*S v Mafudza* para 5 -7; *S v Mushanga*; *S v Nghishidimbwa* (CR 55/2019) [2019] NAHCMD 295 (20 August 2019) para 15.

[11] In the result, it is ordered that:

1. The conviction and sentence are set aside.
2. The fine, if paid, to be refunded to the depositor.

O S SIBEYA
ACTING JUDGE

C CLAASEN
JUDGE