

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

<b>Case Title:</b>  <i>The State v Karlos Hangula</i>	<b>Case No:</b>  CR 4/2023
<b>High Court MD Review No:</b>  1848/2022	<b>Division of Court:</b>  High Court, Main Division
<b>Coram:</b> Liebenberg J <i>et</i> Claasen J	<b>Delivered:</b>  6 February 2023
<b>Neutral citation:</b> <i>S v Hangula</i> (CR 4/2023) [2023] NAHCMD 32 (6 February 2023)	
<b>ORDER:</b>  1. The conviction and sentence are set aside. 2. The order by which the accused's licence is suspended is set aside. 3. The matter is remitted to the court <i>a quo</i> in terms of s 312 of the Criminal Procedure Act 51 of 1977 with the direction to question the accused in terms of s 112(1) (b) and to bring proceedings to its natural conclusion.	

**REASONS FOR ORDER:**

LIEBENBERG J (CLAASEN J concurring):

[1] The unrepresented accused appeared in the magistrate's court for the district of Otjiwarongo on one count of driving with an excessive breath alcohol level – contravening s 82(5)(a) read with s 1, 82,(6), 82(7), 86, 89(1) and 89(4) of the Road Traffic and Transportation Act 22 of 1999 (the Act).

[2] He pleaded guilty and upon completion of the questioning, the court was satisfied that the accused admitted all the allegations in the charge and convicted him as charged. He was sentenced to pay a fine of N\$ 3000 or to 9 (nine) months imprisonment.

[3] I directed a query to the court *a quo* to the effect that the court failed to establish during the s 112(1)(b) questioning whether the breath alcohol analysis was taken within the prescribed period of two hours.

[4] The court *a quo* conceded that it failed to establish whether the breath alcohol analysis was taken within the prescribed period of two hours.

[5] Section 82 (3) of the Road Traffic and Transportation Act 22 of 1999 provides:

'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. ...

(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.'

[6] When questioning an accused in terms of s 112(1)(b), in respect of an offence of driving a vehicle with excessive blood alcohol level, the learned magistrate must establish whether the blood sample was taken within two hours after the accused was found driving a vehicle. Failure to establish that fact means one vital element of the offence has not been admitted.<sup>1</sup>

[7] In the present matter, the court *a quo* failed to ask the accused whether the breath alcohol analysis was taken within the prescribed period of two hours. The conviction and sentence are accordingly not in order and falls to be set aside.

[8] In the result it is ordered:

1. The conviction and sentence are set aside.
2. The order by which the accused's licence is suspended is set aside.
3. The matter is remitted to the court *a quo* in terms of s 312 of the Criminal Procedure Act 51 of 1977 with the direction to question the accused in terms of s 112(1)(b) and to bring proceedings to its natural conclusion.

**J C LIEBENBERG**  
**JUDGE**

**C CLAASEN**  
**JUDGE**

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<sup>1</sup> *S v Taseb and Others* 2011 (1) NR 326 (HC), *S v Nashapi* 2009(2) NR 803 (HC), *S v Goagoseb* 1995 NR 165 (HC).