

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
REVIEW JUDGMENT
PRACTICE DIRECTIVE 61



NAMIBIA MAIN DIVISION,

Case Title: <i>The State</i> v <i>Salmon Sylvester Saal</i>	CR 128/2023
	Division of Court: Main Division
Heard before: Liebenberg J et Christiaan AJ	Delivered on: 16 November 2023
Neutral citation: <i>S v Saal</i> (CR128/2023) [2023] NAHCMD 745 (16 November 2023)	
The order: The conviction and sentence are confirmed.	
Reasons for order:	
CHRISTIAAN AJ (LIEBENBERG J concurring): [1] The accused appeared in the magistrate's court in the district of Mariental on a charge of a contravention of s 82(5)(a) of the Road Traffic and Transportation Act 22 of 1999, driving with an excessive breath alcohol level. The accused was convicted of the offence charged and sentenced as follows; 'A fine of N\$2000 (Two thousand Namibian Dollars) in default to 6 (six) months imprisonment.'	

[2] The accused person was correctly convicted. The problem lies with the order suspending the accused's driver's license for a period of three months.

[3] When this matter came before me on automatic review, a query was directed to the trial court requesting the magistrate to explain why the provisions of s 51 of the Road Traffic and Transportation Act were applied without the effect and import thereof being explained to the accused person with the consequence that the accused was not invited to make representations before the decision to suspend the drivers license was made?

[4] The magistrate's response was that she explained the provisions of s 51 to the accused before questioning him in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977, but conceded that she failed to keep record of the procedural rights' explanation.

[5] As stated earlier, the magistrate did not record the explanations of the procedural rights in the record. The rights were merely recorded as: 'Section 51 of Act 22 of 1999 applied.'

[6] A magistrate has a duty to keep an unrepresented accused informed of procedural rights and to keep record thereof.¹ The Namibian Supreme Court endorsed the principle in *S v Kau*² and it was stated at 11H – 12A with reference to the explanations and the recording thereof by the magistrate that:

'He should have recorded the nature of the explanation given to the appellants. All that he told them about cross-examination should have been written down. It is difficult for an appellate court to accept that the magistrate explained fully to the appellants the import of cross-examination. The terse statements entered in the record do not suggest what it was that the magistrate told the appellant. In this case it is difficult to believe that the magistrate explained fully what cross-examination was all about, because the record reveals that appellants did not understand what they were expected to do during cross-examination.'

[7] Simply put, the details of the explanations should appear *ex facie* the record.³ In

¹ Section 4(1) of Magistrates Court Act 32 of 1944 as amended provides that every court is a court of record.

² *S v Kau* 1995 NR 1 SC.

³ *S v Daniels* 1983 (3) SA 275 A.

this matter it was not properly done, which amounts to an irregularity. However, it is clear from the record of proceedings that the accused addressed the court and provided reasons why his driver's license should not be suspended and it reads:

'I will need the license as I am self- employed and have to travel, I am asking the court not to be suspended'.

[8] Clearly, the sentence proceedings were tainted by an irregularity of a serious nature which vitiates the suspension order of the accused's driver's license.

[9] Regrettably, by the time the query was answered, the three (3) month period the accused's license was suspended had lapsed, and it will not be fair to remit the matter. Suffice it to say, the delay in answering the query directed to the magistrate of almost four months, deprived the accused of the protection that the urgent review mechanism was designed for. Instead, the review of this matter has become a mere academic exercise. Therefore, measures should be put in place to ensure that magistrates treat the answering of review queries as urgent and that instances, such as the present, are not repeated.

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

The conviction and sentence are confirmed.

P CHRISTIAAN	JC LIEBENBERG
Acting Judge	Judge