



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no: CR 05/2013

In the matter between:

THE STATE

and

JEIPO HILONGWA

ACCUSED

High Court NLD review case ref no: 159/2012)

Neutral citation: *The State v Hilongwa* (CR 05/2013) [2013] NAHCNLD 15 (27 March 2013)

Coram: TOMMASI J and LIEBENBERG J

Delivered: 27 March 2013

Flynote: Review - criminal Law – contravening s82(6) of Road Transportation Act, 22 of 1999 – court to be satisfied that State proved breath specimen was taken within two hours after alleged offence – State failed to prove this element –conviction and sentence set aside

Summary: The accused admitted that he was driving a motor vehicle under the influence of alcohol on a public road. During questioning in terms of section 112(1)(b) he disputed the accuracy of the device which showed that the concentration of alcohol in the specimen of his breath exceeded the legal limit. A plea of not guilty was recorded in terms of section 113 (1). The State led evidence to prove that the

device was accurate but failed to prove that the test was done within two hours after the alleged offence. The conviction and sentence are set aside on review.

ORDER

1. The conviction, sentence and order of suspension are set aside;
2. Where the fine has been paid, the accused is to be refunded;
3. The clerk of the court is directed to cancel the endorsement imprinted on the licence and to notify the record keeping authority of the setting aside of the conviction, sentence and order of suspension.

REVIEW JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] The accused was convicted of having contravened section 82(5) read with sections 1, 82(6),(7), 86, 89 and 106 of the Road Traffic and Transportation Act, 22 of 1999, in that he was found to have driven a motor vehicle on a public road with an access alcohol breath level. The accused was sentenced to pay a fine of N\$4000 or in default of payment, 12 months imprisonment. The driver's licence of the accused was suspended with effect from 25 July 2012 to 25 October 2012.

[2] The matter came before me on automatic review. The accused initially pleaded guilty and when questioned in terms of section 112(1)(b), admitted that he drove a motor vehicle on 4 March 2012 on a public road whilst the alcohol concentration in his breath was not less than .37ml of breath exhaled . He however disputed that the device which was used to detect the level of alcohol was accurate and a plea of not guilty was entered in terms of section 113 of the Criminal Procedure Act, 51 of 1977.

[3] The State called the police officer who conducted the test. He testified that he was qualified to conduct the test and that the device was properly calibrated on the said date. Certificates were handed in as exhibits in support of his evidence. He handed into evidence the result of the test he conducted which reflects that the test was conducted at 22H55 and that the breath specimen of the accused had a concentration of alcohol which exceeded the limits prescribed by s82(6) of the Act. The accused essentially did not dispute this evidence during cross-examination.

[4] The accused testified that he drove the vehicle from his office at 16H00 and at the time of his arrest he did not know he was intoxicated while he was driving.

[5] When the matter came before me on automatic review I directed a query to the magistrate to ascertain whether she was satisfied that the State had proven that the concentration of alcohol in the specimen of breath of the accused was taken at any time within two hours after the alleged offence. The magistrate conceded that the State did not prove this but she was of the view that the specimen was taken within two hours.

[6] The evidence of the accused was that he left his office at 16H00 and the test was conducted at 20H55. No evidence was led in respect of the time the accused was arrested. The evidence adduced does not justify a conclusion that the breath specimen of the accused was taken within two hours, of the commission of the alleged offence.

[7] The court could only have convicted the accused of having contravened s82(6) if it was proven that the concentration of alcohol in his specimen of breath exceeded 0,37 milligrams per 1 000 millilitres of breath if taken within two hours after he was found on a public road driving or occupying the driver's seat of a motor vehicle of which the engine is running. The court would then have been entitled to rely on the presumption, in the absence of evidence to the contrary, that such

concentration exceeded 0,37 milligrams per 1 000 milliliters at the time of the alleged offence.

[8] The conviction under these circumstances is not in accordance with justice. The conviction, sentence and order of suspension therefore should be set aside.

[9] The period for which the licence of the accused was suspended already expired on 25 October 2012. However in terms of the provisions of s 50(2) of the Road Traffic and Transportation Act, 22 of 1922 the clerk of court is required to endorse the particulars of the conviction, sentence and the order of suspension on the licence of the accused. The endorsement would remain imprinted on the licence for a period of three years from the date on which the suspension ceased¹. The endorsement imprinted on the licence should be cancelled. The clerk of court is further required in terms of the provisions of s52(1) to notify the record keeping authority of the conviction, sentence and order of suspension. Under these circumstances, the record keeping authority should be notified that the conviction, sentence and order of suspension have been set aside.

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

1. The conviction, sentence and order of suspension are set aside
2. Where the fine has been paid, the accused is to be refunded;
3. The clerk of the court is directed to cancel the endorsement imprinted on the licence and to notify the record keeping authority of the setting aside of the conviction, sentence and order of suspension.

MA Tommasi
Judge

¹ In terms of section 43

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JC Liebenberg
Judge