

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Sacky Maevinduijani Tjambiru</i>	Case No.: CR 36/2022 Opuwo: OPU-CRM-547/2021
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 06 September 2022
Neutral citation: <i>S v Tjambiru</i> (CR 36/2022) [2022] NAHCNLD 81 (06 September 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction and sentence are confirmed.2. The matter is remitted to the magistrate to comply with section 51 of the Road Traffic and Transport Act 22 of 1999.	
Reasons for the order:	
KESSLAU AJ (SALIONGA J concurring): [1] The matter comes before this court on automatic review in terms of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA). [2] The accused was charged in the Magistrates Court of Opuwo with the	

contravention of section 82(5) (a) of the Road Traffic and Transport Act 22 of 1999 (the Act): Driving with an excessive breath alcohol level. The accused plead guilty to the charge and the magistrate, unsatisfied with his replies, entered a plea of not guilty in terms of Section 113 of the CPA. The trial proceeded before a different magistrate who then convicted the accused after evidence was presented. The accused was thereafter sentenced to a wholly suspended sentence.

[3] My query to the magistrate was the following:

- '1. Why was the reason for the unavailability of the Magistrate who noted the plea not addressed on record in terms of Section 118 of the Criminal Procedure Act 51 of 1977?
2. Why did the learned Magistrate not apply the provisions of Section 51(3) of the Road Traffic and Transport Act 22 of 1999?'

[4] The magistrate in reply conceded that she failed to note on record the reason for the unavailability of the initial magistrate and furthermore due to an oversight did not apply section 51(3) of the Act.

[5] Section 118 allows for a different magistrate to proceed with trial after a plea of not guilty, if the initial magistrate is no longer available. The duty is however on the State to put the reason for the unavailability of such magistrate on record and for the magistrate to note same as part of the record. A failure to comply amounts to irregular proceedings however whether such irregularity vitiates the proceedings depends on the circumstances of the particular case.¹ *In casu* the accused did not suffer prejudice and thus this court is satisfied that the irregularity does not vitiate the entire proceedings.

[6] The accused indicated during proceedings that he does not possess a driver's licence thus section 51(3) of the Act applies which in no uncertain terms states that: 'If a person convicted of an offence mentioned in subsection (1) is not the holder of a driving licence, the court, apart from imposing a sentence, shall declare such person to be disqualified from obtaining a learner's licence or driving licence for such period as the court may determine, but not being less than the minimum period contemplated in paragraph (a), (b) or (c) of subsection (2), as

¹ *S v Mwalyombu* (CR 58/2017) [2017] NAHCMD 271 (25 September 2017)

may be applicable.’

[7] Referring to the doctrines of natural justice the court had the following to say in *S v Willem*²: ‘Accordingly, when a trial court is compelled to invoke the provisions of s 51 of the Road Traffic Act upon the conviction of an accused person in terms of the applicable offences in terms of the Road Traffic Act, it must after conviction but before mitigation of sentence, read and explain the import of the provisions of section 51 of the Road Traffic Act to the accused person and invite his/her comment or representation thereon.’ The accused thus needs to be given the opportunity to address the court before an order in terms of section 51(3) is made.

[8] The proceedings, as far as conviction and sentence, appear to be in accordance with justice and will be confirmed however the magistrate needs to comply with the provisions of section 51 of the Act.

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

1. The conviction and sentence are confirmed.
2. The matter is remitted to the magistrate to comply with section 51 of the Road Traffic and Transport Act 22 of 1999.

Judge(s) signature	Comments:
KESSLAU AJ	None
SALIONGA J	None

² *S v Willem* (CR 57/2014) [2017] NAHCMD 264 (11 September 2017) para 5