

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Kleinhas Rudolf</i>	Case No: CR 2/2022 Ruacana 59/2021
	Division of Court: Northern Local Division
Heard before: Honourable Mr Justice Munsu, AJ et Honourable Mr Justice Kesslau AJ	Delivered on: 15 February 2022
Neutral citation: <i>S v Rudolf</i> (CR 2/2022) [2022] NAHCNLD 9 (15 February 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction on count 1 is confirmed;2. The sentence on count 1 is amended to read: Accused is sentenced to a fine of N\$ 4 000 or twelve (12) months imprisonment of which N\$ 2 000 or six (6) months imprisonment is suspended for a period of five (5) years on condition that the accused is not convicted of contravening section 82(1) of the Road Traffic and Transport Act 22 of 1999: Driving whilst under the influence of intoxicating liquor, committed during the period of suspension;3. The matter is remitted back to the Periodical Court of Ruacana in order to re-summon the accused and for the Magistrate to comply with the provisions of section 51(3) of the Road Traffic and Transport Act 22 of 1999 in reference to	

count 1;

4. The conviction and sentence on count 2 are confirmed.

Reasons for the order:

KESSLAU AJ (concurring MUNSU AJ):

[1] The matter comes before this court in terms of section 304(2) of the Criminal Procedure Act 51 of 1977 as amended, (hereinafter referred to as the CPA).

[2] The accused appeared in the Periodical Court Ruacana in the district of Outapi charged with the offenses of count 1: The Contravention of Section 82(1) (a) of the Road Traffic and Transport Act 22 of 1999: Driving a motor bike under the influence of intoxicating liquor; Count 2: The contravention of section 31(1) (a) of the Road Traffic and Transport Act 22 of 1999: Driving motor bike without a driver's licence.

[3] The accused was convicted on both counts and sentenced as follows:
Count 1: A fine of N\$ 4 000 or 12 months imprisonment of which N\$ 2 000 or 6 months imprisonment is suspended for a period of 5 years on condition accused is not convicted of Contravening Section 82(1) (a) of Act 22 of 1999-Driving a motor bike whilst under the influence of Intoxicating Liquor committed during the period of suspension (sic).
Count 2: A fine of N\$ 1 000 or 3 months imprisonment.

[4] Upon perusal of the record, the reviewing Judge, Small AJ, directed the following query to the magistrate: 'After accused's conviction and sentence of contravening section 82(1) of the Road Traffic and Transport Act 22 of 1999 should the court not have issued an order under section 51 of the aforesaid Act?'

[5] The magistrate responded as follows: 'The accused person in this case does not have a driving license for a motor bike at all. the Learned Magistrate noted that the whole record does not have any part of the proceedings where the court was supposed to ensure if accused had a driving license or not (sic)'

[6] The reply from the magistrate does not answer the question. Section 51(3) of the act¹ states: '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 a period as the court may determine, but not less than the minimum period contemplated in paragraph (a), (b) or (c) of subsection (2), as may be applicable.' (my underlining)

[7] It is apparent from the record and in particular count 2, that the accused had no driver's licence and thus the appropriate avenue in this matter was for the magistrate to apply Section 51(3) of Act 22 of 1999². The said provision is peremptory and must be complied with. It is well established by our courts that the accused and the State should be given an opportunity to address the court before the section is applied.³

[8] Furthermore, the inclusion in the heading to the charge, of the type of vehicle used in the commission of the offence is unnecessary. The details of the annexure to the charge sheet will contain such information. The formulation of the charges in this manner, in particular regarding count 1, led to the bizarre condition of suspension that '.....accused is not convicted of contravening section 82(1)(a) of Act 22 of 1999-Driving a motor bike whilst under the influence of intoxicating liquor.....' If the accused is convicted in future on a similar charge involving a different vehicle, the suspended sentence cannot be put into operation because he did not use a motor bike. The purpose of imposing a suspended sentence is to act as a deterrent measure and to remind an accused to refrain from committing similar offences. In its current form the condition of suspension is missing the mark.

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

1. The conviction on count 1 is confirmed;
2. The sentence on count 1 is amended to read: Accused is sentenced to a fine of N\$ 4 000 or twelve (12) months imprisonment of which N\$ 2 000 or six (6)

¹ Road Traffic and Transport Act 22 of 1999.

² See *S v Chinyemba* (CR 29/2021) [2021] NAHCMD 185 (23 April 2021); *S v Haixuna* (CR 48/2017) [2017] NAHCMD 219 (11 August 2017).

³ *The State v Tjipeuja* (CR 2/2017) [2017] NAHCMD 4 (20 January 2017).

months imprisonment is suspended for a period of five (5) years on condition that the accused is not convicted of contravening section 82(1) of the Road Traffic and Transport Act 22 of 1999: Driving whilst under the influence of intoxicating liquor, committed during the period of suspension;

3. The matter is remitted back to the Periodical Court of Ruacana in order to re-summon the accused and for the Magistrate to comply with the provisions of section 51(3) of the Road Traffic and Transport Act 22 of 1999 in reference to count 1;
4. The conviction and sentence on count 2 are confirmed.

Judge(s) signature	Comments:
KESLAU AJ:	
MUNSU AJ:	