

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Andreas Meameno</i>	<b>CR:</b> 06/2024
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Lady Justice Salionga J <i>et</i> Honourable Mr Justice Kesslau J	<b>Delivered on:</b> 4 March 2024
<b>Neutral citation:</b> <i>S v Meameno</i> (CR 06/2024) [2024] NAHCNLD 21 (4 March 2024)	
<b>It is hereby ordered that:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence are set aside.</li><li>2. The order made in terms of s 51 of the Road traffic and Transport Act 22 of 1999, suspending the driver's licence of the accused, is set aside.</li><li>3. The matter is referred back to the Magistrate's Court Ondangwa to start the matter <i>de novo</i> and bring it to its natural conclusion.</li><li>4. Should the accused be convicted, the time spent in custody should be considered during sentencing.</li></ol>	
<b>Reasons for the order:</b>	
KESSLAU J (SALIONGA J concurring)	

[1] The matter from the Magistrate's court of Ondangwa is before this court for review in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused was charged with contravening section 82(5)(a) of The Road Traffic and Transport Act 22 of 1999 (the Act) - Driving with an excessive breath alcohol level. He pleaded guilty to the charge and, after questioning by the Magistrate in terms of s 112(1)(b) of the CPA, was convicted and sentenced to a fine of N\$ 10 000 or 24 months' imprisonment. Additionally his drivers' license was suspended in terms of s 51 of the Act for a period of six months.

[3] The following query was sent to the Magistrate:

'1. The accused indicated that he received a call to take his grandmother to hospital implying the defence of necessity however that aspect was not clarified with questioning. Why did the learned Magistrate not invoke s 113 of the CPA to enter a plea of not guilty at that stage of the questioning?

2. The accused plead guilty to the offense however was sentenced to a fine of N\$ 10 000 or 24 months imprisonment which appears excessive in the circumstances in particular where no accident was caused by his driving.

3. The review cover sheet should include details on whether the fine was paid/not paid and if he was released on bail/not released.'

[4] The Magistrate in reply conceded that the accused raised a possible defence of necessity and that she failed to clarify this aspect with questions or alternatively entered a plea of not guilty in terms of s 113 of the CPA. On the query regarding the sentence, the Magistrate equally conceded that the sentence might have been excessive however that the sentence was meant to act as deterrence in an area where the offence is prevalent. Additionally, she found in aggravation that the concentration of alcohol found in the breath of the accused was three times the legal limit. I will return to that aspect later. Finally she indicated that the accused did not pay the fine and is currently serving the term of imprisonment.

[5] The defence of necessity is part of our law and is defined by CR Snyman as follows: 'A person acts in necessity, and her act is therefore lawful, if she acts in protection of her own or somebody else's life, bodily integrity, property or other legally recognised interest

which is endangered by a threat of harm which has commenced or is imminent and which cannot be averted in another way, provided the person is not legally compelled to endure the danger and the interest protected by the protective act is not out of proportion to the interest infringed by the act. It is immaterial whether the threat of harm takes the form of compulsion by a human being or emanates from a non-human agency such as force of circumstance.<sup>1</sup>

[6] The concession by the magistrate is well made. It is settled law that where a defence is disclosed during s 112 (1)(b) of the CPA questioning, a plea of not guilty must be entered in terms of s 113 of the CPA as the primary purpose of questioning the accused in terms of that section following a plea of guilty, is to safeguard the accused against the result of an unjustified plea of guilty.<sup>2</sup> To this end, the accused's answers must establish an unequivocal plea of guilty and where doubt exists, a plea of not guilty should be entered.<sup>3</sup> In this instance the possible defence of necessity has been raised.

[7] Turning to the second part of the query, uniformity of sentencing is an almost impossible task for a presiding officer as in each matter the other element to be considered is the individualisation of the sentence. However when comparing the sentence imposed with similar cases in the rest of the country it appears excessively disproportionate. Even more so in the light of the fact that the accused as a first offender lost the use of his drivers' licence for a period of six months whereas it appears that the accused needed his license to make a living. The magistrate referred to the fact that the accused was over three times the legal limit which prompted a closer inspection of the charge annexure and s 112(1)(b) questioning.

[8] The accused was charged with the contravention of section 82(5)(a) of the Act which states that:

' No person shall on a public road-

- (a) drive a vehicle; or
- (b) occupy the driver's seat of a motor vehicle of which the engine is running,

while the concentration of alcohol in any specimen of breath exhaled by such person exceeds 0,37 milligrams per 1 000 millilitres' (emphasis added).

<sup>1</sup> C R Snyman, *Snyman's Criminal Law*, 7<sup>th</sup> Ed, p 95..

<sup>2</sup> *State v Mangundu* (CR 67/2016) [2016] NAHCMD 316 (17 October 2016).

<sup>3</sup> *S v Combo and Another* 2007 (2) NR 619 (HC).

[9] The charge annexure however alleges that his breath was not less than 0.37 millilitres of breath exhaled, to wit 1,18 grams per 1 000 millilitres. These allegations were thus in contrast to the section and was furthermore not supported by the breath alcohol analysis record<sup>4</sup> which gave the result as milligrams/mg per 1000 ml. The questioning done by the Magistrate was based on incorrect data and an erroneous formulation of the charge and thus the admissions made by the accused based thereon was incorrect and cannot be allowed to stand.

[10] Considering the concession made by the Magistrate, the defective charge sheet and questions that followed thereupon it follows that this court should interfere with the outcome. The matter will be remitted in terms of s 312 of the CPA to start *de novo*.

[11] In the result the following orders are made.

1. The conviction and sentence are set aside.
2. The order made in terms of s 51 of the Road traffic and Transport Act 22 of 1999, suspending the driver's licence of the accused, is set aside.
3. The matter is referred back to the Magistrate's Court Ondangwa to start the matter *de novo* and bring it to its natural conclusion.
4. Should the accused be convicted, the time spent in custody should be considered during sentencing.

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

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<sup>4</sup> Exhibit "A".