

**CASE NO.: CR 49/2010**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**versus**

**FRIEDEL BOOIS**

**[HIGH COURT REVIEW CASE NO.: 327/2010]**

**CORAM: NDAUENDAPO, J et SIBOLEKA, J**

**Delivered on: 2010 SEPTEMBER 24**

**REVIEW JUDGMENT**

**SIBOLEKA, J.:**

[1] The 48 year old accused appeared in the District Magistrate Court at Katutura on a charge of driving with an excessive alcohol breath in contravention of section 82(5) of Act 22 of 1999.

[2] When the matter came before me on review I directed the following query to the Magistrate:

"The Reviewing Judge remarks as follows:

How was the accused made aware of his excessive alcohol breath? What about the operators certificate and the calibration certificate? Would it not have been appropriate to find out from the accused whether these certificates were in fact shown to him by the testing officer. No reasons for sentence. How did you arrive at the sentence of N\$2.000,00 or 12 (twelve) months imprisonment; please explain."

[3] The Magistrate has now replied as follows:

"1. On the aspect as to how the accused was made aware of his excessive alcohol breath: I wish to point out that this has simply skipped my mind.

2. With regard to the question of whether it would be appropriate to find out from the accused whether the Calibration and Operators certificates were shown to the accused by the testing officer: The Court did afford the accused the opportunity to examine the Operators certificate and the Calibration certificate; and thereafter the Court enquired from the accused whether he had any objection to these certificates being handed up and to form part of the State's evidence. To which the accused replied he had none.

3. I find it not necessary to enquire from the accused whether he was shown these certificates as the Court has afforded the accused an opportunity to examine them and to satisfy himself before it being handed in as exhibits.

The questioning and answers in terms of Section 112(l)(b), which enjoyed the Court to satisfy itself whether or not an accused is in law guilty extinguished any reasonable doubt and accused said to have admitted all the elements of the offence. **In S v Zulu, 1967(4) page 502 D** it was held that "*the section dealing with automatic review does not require the Judge to certify that the proceedings are in accordance with law but in accordance with Justice.*"

Also in **R v Hamer, 1906 t.s. 50 at page 52**, Innes C.J. said: "*The court has merely to decide whether it can certify that the proceedings are in accordance with real and substantive Justice, not necessarily in accordance with strict law. For it is possible for them to be in accordance with real and substantial Justice, even although a rule of Criminal Procedure may not have been observed*".

4. With regard to the fine of N\$2000,00 of 12 (twelve) months imprisonment:

The Court took into account the accused persons' personal circumstances for the purpose of sentencing; namely that at age 48 he is a first offender. He is a single parent for 2 (two) minor children. He is also a mere mechanic and a taxi driver with an income of between N\$2500,00 - N\$3000,00 per month. Further, I am of the opinion that a fine is not an empty gesture; it is however a device which is designed to keep a convicted person out of prison and yet to punish him/her. If an accused fails to pay a fine, it is anomaly which should be accepted. Even if an accused lacks the means to pay a fine himself, a family-member has come to the aid of the accused person in order to avoid imprisonment. This is a fact that should not be overlooked."

[4] After carefully looking at the questions and answers on the record of proceedings I have observed that although the accused was not asked whether he saw the breath result that was taken from him, he did in fact agree that it was indeed 0.93ml per 1000 millimetres.

[5] He confirmed that his breath sample was taken within two hours as contemplated in section 82(5) and asked about the liquor he had taken as well as the circumstances of the incident.

[6] This Court is of the opinion that relevant questions were indeed put to the accused and therefore the conviction and sentence should be allowed to stand.

[7] In the result:

- (a) The conviction and sentence are confirmed.

**SIBOLEKA, J**

I agree

**NDAUENDAPO, J**

