



CASE NO.: CR 19/2011

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

LUSUI LAZARUS

(HIGH COURT REVIEW CASE NO.: 92/2011)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 13 July 2011

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused was arraigned in the Magistrate's Court Eenhana on a charge of contravening section 82 (1) of the Road Traffic and Transportation Act¹ for driving under the influence of alcohol, to which he

¹ Act 22 of 1999

pleaded guilty. The magistrate questioned the accused pursuant to the provisions of section 112 (1)(b) of the Criminal Procedure Act², hereinafter referred to as 'the Act', and having been satisfied that the accused admits all the elements of the offence, convicted and sentenced him to a fine of N\$2 000 or 12 months imprisonment. The fine was not paid and the matter came on review in terms of section 302 of the Act.

[2] I directed a query to the magistrate enquiring (i) as to whether the single (leading) question put to the accused about his driving skills satisfied the requirement that the accused admitted to committing the offence; and (ii) why the accused's driving licence upon his conviction was not suspended in compliance with section 51 of Act 22 of 1999.

[3] The magistrate in her reply conceded that she should have posed more exploratory questions to the accused in order to satisfy herself of the accused's guilt; furthermore, that she failed to properly apply her mind as regards the suspension of the accused's driving licence.

[4] When a presiding officer questions an accused in terms of section 112 (1) (b) of the Act it should always be borne in mind that (i) the primary purpose is to protect the unrepresented accused against the result of an unjustified plea of guilty; and (ii) the investigation is directed at what the accused alleges and not at the truth thereof. The presiding officer must at all times be conscious of his or her duty to ensure that justice is done and that the accused is given a fair trial; more so, where the presiding officer at this stage is the sole

² Act 51 of 1977

questioner and therefore has to guard against compromising impartiality and objectivity. The court should therefore not ask leading questions especially regarding the accused's guilt and grounds of defence (*S v Gwenya*³).

[5] The accused pleaded guilty to the charge in which it is alleged that he drove a motor vehicle on a public road *“whilst he was under the influence of intoxicating liquor or drug having a narcotic effect.”* Although this allegation forms the basis of the charge against the accused, the court disposed of it in a single leading question framed in the following terms: *“Was your driving ability empared (sic) by the amarura (amarula?) juice you took?”* The question was answered in the affirmative which, in my view, without further exploratory questioning of the accused, could hardly have satisfied the court that an offence was committed and that the accused admitted having driven a motor vehicle whilst under the influence of liquor. This much the magistrate concedes. The court ought to have enquired from the accused why he was of the view that his ability to drive the motor vehicle was impaired; to what extent was it impaired; whether an accident occurred as a result thereof and so forth. This would have given the court some indication what the circumstances were under which the offence was committed and shed more light on the particulars of the charge; whilst at the same time, was valuable information for purposes of sentence. In the absence thereof the trial court could not have been satisfied that the accused admitted to the commission of the offence for which he was charged and the conviction must be set aside.

³ 1995 (2) SACR 522 (EC)

[6] Upon convicting the accused of an offence in contravention of section 82 (1) of Act 22 of 1999, the court was obliged to determine whether the accused was the holder of a valid driving licence and if so, to suspend same in terms of section 51 of the said Act. Section 51 in peremptory terms requires such action and states the following:

“51 Suspension of licence upon conviction of certain offences

- (1) *Where a person who is the holder of a driving licence is convicted by a court of an offence-*
- (a) *under section 78(1)(a), (b) or (c) in the case of an accident which resulted in the death or injury of a person;*
- (b) *under section 80(1) of driving a vehicle recklessly; or*
- (c) *under section 82(1), (2), (5) or (9),*
- the court shall, apart from imposing a sentence and except if the court under section 50(1)(a) issues an order for the cancellation of the licence, issue an order whereby every driving licence held by such person is suspended in accordance with the provisions of subsection (2).*
- (2) *An order of suspension pursuant to subsection (1), shall be made for such period as the court may determine, but which shall not be less than-*
- (a) *three months, in the case of a first conviction;*
- (b) *one year, in the case of a second conviction; and*
- (c) *five years, in the case of a third or subsequent conviction.*
- (3) *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 may be applicable."

(Emphasis provided)

The trial court did not comply with the provisions set out in section 50 and misdirected itself in that regard. The magistrate conceded that it was an oversight on her part.

[7] In the result, the Court makes the following order:

1. The conviction and sentence are set aside.
 2. The matter is remitted to the trial court in terms of section 312 (1) of Act 51 of 1977 and *that* court is directed to comply with the provisions of section 112 (1)(b) or to act in terms of section 113, as the case may be, in compliance with the guidelines set out in the judgment.
 3. In the event of a conviction the court, when sentencing, must have regard to the sentence already served by the accused.
 4. All monies that might have been paid in respect of the fine imposed must be refunded to the accused.
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LIEBENBERG, J

I concur.

TOMMASI, J