

REPUBLIC OF NAMIBIA
HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: CR 28/2013

In the matter between:

THE STATE

and

MICHAEL SOBUSO

(HIGH COURT MAIN DIVISION REVIEW REF NO. 365/2013)

Neutral citation: *S v Sobuso* (CR 28-2013) [2013] NAHCMD 104 [17 April 2013]

Coram: SHIVUTE, J and UNENGU, AJ

Delivered: 17 April 2013

Flynote: Criminal Procedure – conviction of driving with an excessive blood alcohol level – set aside – Criminal Procedure – magistrate relying on the affidavit in terms of section 212(4)(a)(8)(a) of the Criminal Procedure Act 51 of 1977 – Affidavit not signed by the deponent – nor signed by the Commissioner of Oaths.

Summary: The magistrate convicted the accused person of driving with an excessive blood alcohol level whilst relying on an unsigned affidavit by both the deponent thereof and the Commissioner of Oaths – Conviction and sentence set aside – Affidavit relied on by the magistrate does not comply with the requirements of an affidavit.

ORDER

In the result, I make the following order:

- (i) The conviction and sentence are hereby set aside.
- (ii) The accused be refunded any money paid in the matter, as a fine or as a part fine.
- (ii) The order by the learned magistrate to suspend the driver's licence for a period of three (3) months is set aside and is of no force and effect from the date it was made.

REVIEW JUDGMENT

UNENGU, AJ (SHIVUTE, J concurring):

[1] This is a review matter in terms of section 302 of the Criminal Procedure Act¹ (The CPA). The accused was convicted of contravening section 82(1) read with sections 1, 86, 89(1) and 89(4) of the Road traffic and Transport Act² (The Act), namely driving with an excessive blood alcohol level, and sentenced to pay a fine of five thousand Namibia dollars (N\$5000.00) or twelve months imprisonment. In addition, his driver's licence was suspended for 3 months.

[2] I directed the following query to the learned magistrate:

'1. Did the learned magistrate rely on the affidavit in terms of section 212 (4)(a) and (8)(a) of the Criminal Procedure Act, No 51 of 1977 deposed to by Christine Simbara Kamukwanyama to convict the accused on the alternative count of driving with an excessive blood alcohol level?

2. If the answer is yes, give reasons why the learned magistrate accepted and admitted such an affidavit into record as evidence.

3. Your urgent rely is appreciated.'

[3] In his reply, the learned magistrate discussed the requirements set out in section 212(4) of the CPA and concluded as follows:

¹ Act 51 of 1977

² Act 22 of 1999

- 'The affidavit in terms of section 212(4)(1) and (8)(a) is **admissible and it's a public document**.
- Accused received the blood results prior to the plea being taken, therefore the affidavit could be produced as **probative material** to court by the prosecutor.
- The mere production of the affidavit to court constituted **prima facie proof** of the facts established.
- Accused **did not object** to the affidavit being accepted by court and it was marked EXHIBIT "A". Since accused did not object to the affidavit being submitted into court, it was admitted as evidence in the proceedings.
- The conviction and sentence **are in order and should not be set aside.**'

[4] However, what the learned magistrate did not know is, that exhibit "A" does not comply with the requirements of an affidavit and is not the original of the document purporting to be an affidavit. Exhibit "A" is not signed by the deponent not is it signed by the Commissioner of Oaths. An affidavit not signed by a Commissioner of Oaths is not an affidavit; it has to comply with the requirements of the Amendment Act³, brought into operation by Proclamation⁴ on 21 July 1972.

[5] That being so and also the fact that exhibit "A" is the only document upon which the learned magistrate relied to convict the accused of an offence of driving with an excessive blood alcohol level, the conviction and sentence cannot be allowed to stand.

[6] In the result, I make the following order:

- (i) The conviction and sentence are hereby set aside.
- (ii) The accused be refunded any money paid in the matter, as a fine or as a part fine.
- (ii) The order by the learned magistrate to suspend the driver's licence for a period of three (3) months is set aside and is of no force and effect from the date it was made.

³ Act 55 of 1970

⁴ No 168 of 1972

E P Unengu
Acting Judge

N N Shivute
Judge