

**REPUBLIC OF NAMIBIA**

REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: CR 70/2013

In the matter between:

**THE STATE**

and

**KAMUKWANYAMA DAMIAN HAIRWA**

**ACCUSED**

**Neutral citation:** *S v Hairwa* (CR 70/2013) [2013] NAHCMD 309 (31 October 2013)

**Coram:** SIBOLEKA J and PARKER AJ

**Delivered:** 31 October 2013

**Fly note:** Criminal Law - The use of a breathalyzer to test the level of alcohol in the blood of a motor vehicle driver has been declared invalid by this court.

**Summary:** The accused was arrested while driving along the Rundu – Nkurenkuru road. A breathalyzer test results showed the level of blood to be 0.47 ml in excess of the legal limit 0.37 milligrams per 1000 millilitres of breath. He was charged, convicted, and sentenced to N\$2 000 or 8 months imprisonment.

Held: The conviction hinges solely on the results of the breathalyzer reading and can therefore not be allowed to stand.

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**ORDER**

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The conviction and sentence are set aside.

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**REVIEW JUDGMENT**

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SIBOLEKA J (PARKER AJ concurring):

[1] On 9 June 2013 the accused was stopped by traffic officials along the Rundu - Nkurenkuru road. He was asked to breath into the breathalyzer resulting in a reading of 0.43 mg exceeding the legal limit of 0.37 milligrams per 1000 millitres of breath. He was charged for driving with an excessive alcohol level, convicted and sentenced to N\$2 000 or eight months imprisonment.

[2] The conviction hinges entirely on the use of the breathalyzer in terms of s 82(5) of the Road Traffic and Transportation Act 22 of 1999 which provisions were declared invalid by this court (see *The State v Raymond Heathcote* Case No. CA 24/2013 delivered on 12 July 2013). The conviction and the resultant sentence can therefore not be allowed to stand.

[3] In the result both conviction and sentence are set aside.

[4] The Magistrate is ordered to see to it that the accused is refunded immediately all monies paid by the accused as court fine, if any, in this matter.

[4.1] If the accused is in goal due to non-payment of the court fine, he should be released from such detention immediately.

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**A M SIBOLEKA**

**Judge**

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**C PARKER**

**Acting Judge**