

REPUBLIC OF NAMIBIA

NOT REPORTABLE



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

CR No: 45/2017

In the matter between

THE STATE

and

STEPHANUS JAHS

HIGH COURT MD REVIEW CASE NO: 350/2017

Neutral citation: S v Jahn (CR 45/2017) [2017] NAHCMD 213 (07 August 2017)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 07 August 2017

ORDER

1. The conviction and sentence are set aside.
2. The registrar is directed to bring this judgment to the attention of the Prosecutor-General and the Chief Magistrate respectively.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was convicted on his plea of guilty of contravening s 140 (1)(a) of the Road Traffic Ordinance, 1967 (Ordinance 30 of 1967) – Driving under the influence of intoxicating liquor, and sentenced to a fine of N\$2 000 or 4 months' imprisonment.

[2] A disquieting feature of this case is that the accused was charged and convicted in terms of legislation that had been repealed by the Road Traffic and Transport Act 22 of 1999 which came into operation as far back as 06 April 2001. It seems inconceivable that the State still prosecutes under legislation that has been repealed more than 16 years ago as this should never have happened. Be that as it may, in view of the outcome of these proceedings there is no need to address the issue any further.

[3] When the matter came on review I directed a query to the magistrate to the effect that the court during its questioning in terms of s 112 (1)(b) of the Criminal Procedure Act 51 of 1977, failed to establish whether the alcohol the accused had been drinking had any effect on him, and whether he was under the influence when driving a vehicle

on a public road, as alleged in the charge. Section 82 of the Road Traffic and Transport Act states:

'82 Driving while under the influence of intoxicating liquor or a drug having a narcotic effect, or with excessive amount of alcohol in blood or breath

(1) 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 under the influence of intoxicating liquor or a drug having a narcotic effect.'

(Emphasis provided)

[4] In response to the query the magistrate concedes the oversight, hence the court could not have been satisfied that the accused was guilty of committing the offence of driving while under the influence of intoxicating liquor. The concession is properly made and the conviction and sentence fall to be set aside.

[5] Despite the matter having been finalised on 22 September 2016, the record was only sent on review and received by the registrar of this court on 25 July 2017, more than 10 months later. Neither was any reason furnished that could explain the delay in submitting the proceedings for review and, in the absence thereof, it appears to be a dereliction of duty on the part of the presiding magistrate who ultimately remains the responsible officer to give effect to the provisions of s 302 of Act 51 of 1977 which section regulates the submission of cases for review by a judge. As a result of the delay in submitting the matter for review, the outcome of these proceedings is purely academic.

[6] Whereas the review court is compelled to remit proceedings to the trial court in terms of s 312 (1) of Act 51 of 1977 with appropriate directions, it would not be in the interest of justice to do so in the present instance as the accused has already served the sentence imposed. I accordingly decline to make such order.

[7] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. The registrar is directed to bring this judgment to the attention of the Prosecutor-General and the Chief Magistrate respectively.

J C LIEBENBERG

JUDGE

**N N SHIVUTE
JUDGE**