REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 55/2017

In the matter between:

THE STATE

And

IVONNE GAESES **ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1149/2017)

Neutral citation: *S v Gaeses* (CR 55 /2017) [2017] NAHCMD 253 (04 September 2017)

Coram: USIKU, J and UNENGU, AJ

Delivered: 04 September 2017

Flynote: Criminal Procedure – Questioning in terms of s 112(1)*(b)* of the CPA – Failure by magistrate to ask questions on some vital elements of the offence of driving with excessive blood alcohol level – conviction and sentence set aside – matter remitted to the magistrate to question the accused on the omitted elements and deal with the matter in accordance with the CPA.

Summary: The accused pleaded guilty to the offence of driving with an excessive blood alcohol level – she was questioned in terms of s 112(1)*(b)* of the CPA, convicted and sentenced. On review, the conviction and sentence were set aside as the magistrate failed to question the accused on some vital elements of the offence and directed the magistrate to question the accused on the omitted elements of the offence and deal with the matter further in accordance with the provisions of the CPA.

ORDER

(i) The conviction and sentence imposed by the learned magistrate on first alternative count to count one, are hereby set aside.

(ii) The matter is remitted to the learned magistrate to question the accused in terms of s 112(1)*(b)* of the CPA properly to cover all elements of the offence of the first alternative count to count one and to conduct the proceedings further in terms of the Criminal Procedure act, 51 of 1977.

(iii) The conviction and sentence on count two are in accordance with justice, therefore confirmed.

(iv) The order made by the learned magistrate in respect of the periods of alternative imprisonment of sentences on the alternative count to count one and count two is set aside.

REVIEW JUDGMENT

UNENGU, AJ (USIKU, J concurring):

[1] The matter was submitted for automatic review in terms of s 302 of the Criminal Procedure Act[1] (herein referred to as the CPA) by the magistrate sitting at the Grootfontein magistrate's court.

[2] The accused in the matter was convicted of the following offences:

(i) Driving with an excessive blood – alcohol level, which is a contravention of s 82(5)*(b)* read with sections 1, 86, 89(1) and 89(4) of the Roads Traffic and Transportation Act, Act 22 of 1999; and

(ii) Driving without a driver's licence in contravention of s 31(1)*(a)* read with s 31(2) of the Roads Traffic and Transportation Act, Act 22 of 1999.

[3] The accused pleaded guilty to the charge of driving with an excessive blood - alcohol level was questioned in terms of s 112(1)*(b)* of the CPA, convicted and sentenced to pay a fine of N$ 3000 or 12 months imprisonment.

[4] Count two, namely driving without a driver's licence was disposed of in terms of s 112(1)*(a)* of the CPA and the accused was sentenced to pay a fine of N$ 1000 or three months imprisonment, where after the learned magistrate ordered the two periods of imprisonment of 12 months and three months to run concurrently.

[5] On review, I addressed the following query to the learned magistrate:

> '1. Gave reasons for your conviction on first alternative to count one – driving with an excessive blood alcohol level.
>
> 2. On what legal basis did the learned magistrate order the imprisonment periods of sentences on counts one and two to run concurrently?
>
> Your urgent response is appreciated.'

[6] The learned magistrate duly complied albeit not kindly, judging from the language used in the first sentence of para. one. I disagree that requiring reasons for a conviction is vague and not clear as to what point must be addressed and replied to by the magistrate. I wanted reasons from the learned magistrate why she

[1] Act 51 of 1977

convicted the accused of the offence charged with because I was not satisfied that the conviction was in accordance with justice.

[7] Be it as it may. Here under is the verbatim response of the learned magistrate to the query:

> '**REVIEW CASE NO.: 1149/2017**
>
> **MAGISTRATE'S SERIAL NO.: 21/2017**
>
> **S vs IVONNE GAESES**
>
> ATTENTION: SECRETARY TO HONOURABLE MR JUSTICE UNENGU, ACTING
>
> RE: REPLY TO THE REVIEWING JUDGE
>
> 1. The first point of the remarks of the Honourable acting Judge Unengu, requiring reasons for conviction, is respectfully vague and not clear as to what point must be addressed and replied to by the Magistrate.
>
>   I will however attempt to respond and provide reasons as to why the accused was convicted of the 1st alternative to count 1, driving with an excessive blood alcohol level. The court was satisfied that the accused's blood results were in excess of the authorized limit, there was a concentration of alcohol exceeding 0.08 gram per 100 millilitres, to wit 0.32 gram per 100 millilitre. A certificate of results to the effect was submitted to court and is attached to the record. Furthermore such results were admitted by the accused person hence the conviction and sentence thereof.
>
>   If the above is not issue and not what is being sought, I seek further clarity and guidance from the Honourable Reviewing acting Judge, as to what is in issue and was not addressed.
> 2. The second part of the query was not on what legal basis the magistrate ordered that imprisonment terms run concurrently?
>
>   In terms of Section 280(2) Act 51/1977 as amended, the understanding is that the court has the discretion to order that the period of punishment shall run concurrently. In the present case, the court derived authority from the mentioned Section and was of the view that it was in accordance with the principles of fairness and justice for the period of imprisonment imposed on both 2 counts run concurrently.
>
>   I hope the above is in order.
>
>   Yours Faithfully'.

[8] As already pointed out, the accused pleaded guilty and was questioned by the learned magistrate in terms of s 112(1)*(b)* of which the relevant part of the record is quoted hereunder:

> 'Pp: acc is present on bail, matter for plea and trial, we are ready to proceed
>
> Crt: are you ready to proceed?
>
> Acc: yes
>
> Crt: proceed
>
> Pp: The state wished to abandon some of the charges, count 1 and second alternative to count 1, we are only proceeding on the first alternative to the main count and count 2.
>
> Crt: abandoning them as withdrawing them?
>
> Pp: yes
>
> Crt: count 1, 2nd alternative to count 1 are withdrawn against accused person
>
> Acc: understands
>
> Crt: proceed
>
> Pp: put the charge
>
> Crt: did you understand the charges against you?
>
> Acc: yes
>
> Crt: how do you plead to the 1st alternative to count 1?
>
> Acc: I am guilty
>
> Crt: how do you plead count 2?
>
> Acc: I am guilty
>
> Crt: Section 112(1)(b) Act 51/1977 as amended is explained and applied I.R.O 1st alternative to count 1
>
> Acc: understands
>
> SECTION 112(1)(B) Act 51/1977 as amended proceedings

Crt:

Q: were you forced or influenced to plead guilty?

A: no

Q: on or about the 30th of June 2016, were you at or near Gravel Road at or near Umulunga Primary School in Grootfontein district?

A: yes

Q: tell the court why you pleaded guilty to the 1st alternative to count1?

A: I was asked to go help people load their zincs, while on my way driving at the turn I bumped and I was taken by the Police, they withdrew blood and I was sitting in the holding cells and I was granted bail of 1000.00. I am guilty because I drove a vehicle while drunk

Q: what do you mean by that you were drunk?

A: I was drinking on that day and after a while I was feeling drunk when I helped those people

Q: what were you drinking?

A: beer (black label)

Q: how many bottles?

A: about 4 bottles of 750 ml but we were sharing

Q: do you admit that you drove a vehicle on a public road with registration number N 668 G?

A: yes

Q: do you further admit that the concentration of alcohol in your blood was not less than 0.08 gram per 100 millilitres?

A: yes I admit that

Q: do you further admit that the blood alcohol level was 0.32 gram per 100 millilitres?

A: I admit that. It is correct

Q: did you know that what you were doing was wrong and unlawful?

A: yes

Q: did you know that you were committing an offence and could be punished?

A: yes I knew

Q: why did you do it?

A: I was begged by the lady to help her

Crt: the court is satisfied that all allegations as contained in the charge annexure have been admitted to. The court finds accused person guilty as pleaded on the 1st alternative to count 1'

[9] It is clear from the questioning by the learned magistrate that she failed to ask the accused who withdrawn the blood sample from her body and whether the blood sample was taken within two hours after the accused was stopped by the Police and whether the accused was provided with a forensic scientific report compiled by a Forensic Scientist who analysed the blood sample. These facts were never admitted by the accused, therefore, the learned magistrate could not be satisfied that the accused admitted all the allegations of the offence charged with to convict her.

[10] The record of proceedings is silent as to how the affidavit in terms of s 212(4) *(a)* and (8)*(a)* of the CPA (A-9) became part thereof. The affidavit, as it stands, has no evidential value because there is nothing on record stating why and for what purpose the affidavit has been attached to the record.

[11] When questioning in terms of s 112(1)*(b),* in respect of an offence of driving a vehicle with excessive blood alcohol level, the learned magistrate must establish whether blood sample was taken within two hours after the incident. Failure to establish that fact means one vital element of the offence has not been admitted[2].

[12] With regard questioning in terms of s 112(1)*(b)* of the CPA generally, this court has written numerous judgments[3] setting out guidelines on how the accused should be questioned and what must be covered during the questioning.

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[2] *S v Namuhuya* 1994 NR 57 (HC)

[3] See for example *S v Taseb* and Others 2011 (1) NR 326 (HC), *S v Nashapi* 2009(2) NR 803 (HC), *S v Goagoseb* 1995 NR 165 (CH).

[13] In the *State v Namuhuya* above, the magistrate also failed to ask the accused whether the blood sample was taken within two hours after the incident, the conviction and sentence were set aside and the matter was remitted to the magistrate to question the accused in that respect and to conduct the proceedings further in terms of the CPA. In the present review matter, however, the magistrate did not only fail to ask the accused whether the blood sample was taken within two hours after the incident, but also to ask whether a blood sample was taken from his body by an authorized officer. Therefore, two vital elements of the offence were not admitted by the accused. It follows therefore that the conviction and sentence will also be set aside and the matter remitted to the magistrate to question the accused on the omitted elements and the scientific evidence contained in the report of the forensic scientist to be admitted properly.

[14] There is still this issue of the order made by the learned magistrate of the periods of imprisonment of 12 months and three months as alternatives to fines imposed on the first alternative to count one and to count two respectively, should run concurrently.

[15] In response, to the query the learned magistrate indicated that she relied on the provisions of s 280(2) of the CPA to make the order. Sub-section 2 of s 280(2) of the CPA provides as follows:

> '(2) subject to Section 99(2) of the Correctional Service Act, 2012 (Act 9 of 2012) punishments referred to in subsection (1) *when consisting of imprisonment*, commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct unless the court direct that such sentences of imprisonment must run concurrently'. (Emphasis provided)

[16] Having read the judgment of *S v Marisa*[4], I agree with Van Niekerk, J that generally it is competed to make such an order made in the present matter. However, the order made in the present matter can no longer survive as the sentence imposed on the first alternative to count one is set aside.

[17] In the result, the following order is made:

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[4] 2006 (2) NR 586 (HC)

(v) The conviction and sentence imposed by the learned magistrate on first alternative count to count one, are hereby set aside.

(vi) The matter is remitted to the learned magistrate to question the accused in terms of s 112(1)*(b)* of the CPA properly to cover all elements of the offence of the first alternative count to count one and to conduct the proceedings further in terms of the Criminal Procedure act, 51 of 1977.

(vii) The conviction and sentence on count two are in accordance with justice, therefore confirmed.

(viii) The order made by the learned magistrate in respect of the periods of alternative imprisonment of sentences on the alternative count to count one and count two is set aside.

P E UNENGU

Acting Judge

D USIKU

Judge