



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no.: CR 60/2018

THE STATE

v

PIET HANSEN

(HIGH COURT MAIN DIVISION REVIEW REF NO. 292/2018)
(MAGISTRATE'S SERIAL NUMBER: 13/2018)

Neutral citation: *S v Hansen* (CR 60/2018) [2018] NAHCMD 241 (14 August 2018)

Coram: Liebenberg J et Shivute J

Delivered: 14 August 2018

Flynote: Incompetent sentence invoked by magistrate – Magistrate must have regard to s 106(7) – Road Traffic and Transportation Act – Magistrate to sentence accused separately on each count – Not taking together both counts for purposes of sentencing -

Section 51(3) of Act 22 of 1999 – Obligatory suspension of licence upon conviction of certain offences – Accused convicted for contravening s 82 (5)(a) of the Road Traffic and Transportation Act 22 of 1999 for driving with an excessive breath alcohol

level on count one and for contravening s 31(1)(a) read with sections 31(2) driving without a driver's licence - Magistrate failing to invoke provisions of s 51 (3) – Such failure amounts to a misdirection.

ORDER

- a) The sentence imposed is set aside.
 - b) The matter is remitted to the magistrate in terms of section 312 of the Criminal Procedure Act 51 of 1977 for the magistrate to sentence the accused afresh and to invoke the provisions of s 51(3) of the Road and Transportation Act 22 of 1999.
 - c) When sentencing the accused the court should take into account, the sentence already served by the accused. Furthermore, the magistrate must provide the accused with the opportunity to state why he should not be disqualified from obtaining a driving licence.
-

REVIEW JUDGMENT

Shivute J, (Liebenberg J concurring)

[1] The accused was convicted for contravening s 82 (5)(a) read with sections 1, 82(6),82(7),86, 89(1) and 89(4) driving with an excessive breath alcohol level on count one and for contravening s 31(1)(a) read with sections 31(2) of the Road Traffic and Transportation Act 22 of 1999 for driving without a driver's licence on the second count.

[2] He was sentenced to pay a fine of N\$8000 (eight thousand Namibia dollars) alternatively in default of payment 12 months' imprisonment. The magistrate in imposing her sentence taking together both counts for purposes of sentencing.

[3] The matter was referred to me for purposes of review. After perusing the review record I queried the learned magistrate as to whether the sentence imposed

was a competent one and why she did not invoke the provisions of section 51(3) of the Act in respect of the second count.

[4] The learned magistrate conceded and stated that it was an oversight on her part and similarly requested that the sentence in its entirety be set aside and for the matter to be referred back for the accused to be sentenced afresh.

[5] In respect of the sentence imposed by the learned magistrate, it is important to have regard to section 106(2) of the Road Traffic and Transportation Act which deals with the offences and penalties to be imposed which reads:

‘(2) Any person convicted of an offence by virtue of the provisions of section 19(2), 82(1), (2), (5) or (9), 83(2), (3) or (4), 85 or 99(2)(a) or (b) shall be liable to a fine not exceeding N\$ 20 000 or to imprisonment not exceeding five years.’

In turn section 106(7) reads: ‘Any person convicted of an offence by virtue of any other provision of this Act shall be liable to a fine not exceeding N\$ 2000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.’

[6] For the purposes of sentencing the learned magistrate must have had regard to the above mentioned sections and must have sentenced the accused separately on each count as opposed to taking both counts together for purposes of sentencing. The magistrate by taking the two counts together has imposed an incompetent sentence.

[7] Section 51(3) provides that where a person who is the holder of a driving licence is convicted by a court -

‘(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.’

[8] The provisions of s 51 are obligatory and they must be adhered to without any exception in relation to the provisions of s 82 (5)(a).

[9] I have no problem with the conviction however the sentence imposed cannot be allowed to stand. Furthermore, the learned magistrate failed to invoke the

provisions of s 51(3) and his failure to invoke the provisions of s 51 (3) amounts to a misdirection.

[10] In the result I make the following order:

- a) The sentence imposed is set aside.
- b) The matter is remitted to the magistrate in terms of section 312 of the Criminal Procedure Act 51 of 1977 for the magistrate to sentence the accused afresh and to invoke the provisions of s 51(3) of the Road Traffic and Transportation Act 22 of 1999.
- c) When sentencing the accused the court should take into account, the sentence already served by the accused. Furthermore, the magistrate must provide the accused with the opportunity to state why he should not be disqualified from obtaining a driving licence.

NN SHIVUTE

Judge

JC LIEBENBERG

Judge