

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION WINDHOEK

REVIEW JUDGMENT

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| Case Title: The State v Elton Smoke Heita | Case No: CR 15/2023 |
| High Court MD Review No: 2071/2022 | Division of Court: Main Division |
| Heard before: Liebenberg J et Claasen J | Delivered on: 13 February 2023 |
| Neutral citation: <i>S v Heita</i> (CR 15/2023) [2023] NAHCMD 49 (13 February 2023) | |
| The order: <ol style="list-style-type: none">1. The conviction and sentence in respect of count 2 and count 3 is confirmed.2. The conviction and sentence in respect of count 1 is set aside. | |
| Reasons for order: | |
| CLAASEN J (concurring LIEBENBERG J) [1] This is an automatic review case in terms of s 302(1) of the Criminal Procedure, Act 51 of 1977 (CPA). It emanates from convictions in the Usakos Magistrate Court, in the district of Karibib. | |

[2] Count 1 consists of a main charge of driving under the influence of intoxicating liquor in contravention of s 82(1)(a) of the Road Traffic and Transportation Act, 22 of 1999 (RTTA) and an alternative charge of driving with excessive breath alcohol level in contravention of s 82(5)(a) of the RTTA. The court a quo convicted the accused on the alternative charge. The accused was also convicted of a second and a third charge, but since no issue arose from that, it is not necessary to refer to that.

[3] Upon noticing that there was no single shred of documentary evidence about the equipment presumably used to collect and test a sample of breath, I enquired from the magistrate on what basis the accused was convicted of excessive breath alcohol level in respect of count 1.

[4] Instead of answering with reference to the elements and technical specifications of driving with an excessive breath alcohol level, like the review court requested, the magistrate opted to reply that the use of the breathalyser is invalid as per the decision of *S v Heathcote*.¹

[5] With respect, that technical loophole is no longer available to would be offenders. The position as it was then has changed as the specifications of the evidential breathalyser device was published in Government Notice 280 of 2015. Thus, it cannot be the reason why the conviction in this matter is questionable.

[6] As intimated earlier, the prosecution did not tender the standard documentary evidence to show that the prescribed equipment was used to test the alcohol content of the accused's breath, that the device had been properly set up by the operator, that the device used was adequate for the purpose for which it had been manufactured, that it worked properly at the time the test sample was collected and finally a printout of the test results to show that the accused's breath indeed exceeded the statutory limit.

¹ *S v Heathcote* (CA 24/2013) [2013] NAHCMD 195(12 July 2013).

[7] I turn to what transpired in the court. When asked to plead to the charges, the accused indicated that he pleads guilty to the main and alternative charges. The magistrate started questioning him on the main count. The accused related that he was stopped by traffic officers after he attended a party until sunrise. He was pertinently asked whether he was under the influence of alcohol, and he admitted to have consumed one beer before he drove. However, he denied that his driving skills were impaired and the magistrate entered a plea of not guilty in respect of count 1 and the alternative count.

[8] Whilst it was fine to alter the plea to not guilty on the main count, it was not proper to do so on the alternative count at that juncture. Once it becomes clear that an accused does not admit the allegations in the main count, the court must enter a plea of not guilty and proceed to question the accused on the alternative count. The alternative count remains part of the *lis* between the accused and the State. Thus, the court ought to have questioned the accused on the alternative count before also entering a plea of not guilty on that count. If the accused admits the elements, subject to the State accepting the plea on the alternative charge, the accused could have been convicted thereof. If the prosecutor, who knows what evidence is in the docket, is not prepared to accept a guilty plea on the alternative count, then he or she has to lead evidence in the matter.²

[9] I proceed to give a synopsis of the material oral evidence presented after the s 113 plea was entered to consider if it can sustain the conviction. A traffic officer testified that he stopped the vehicle as part of his inspection duties of vehicles on the road and had the accused pull off the road. As they conversed the officer smelled alcohol in the accused's breath. He enquired about that to which the accused responded that he drank one or two beers. The officer then tested the alcohol level of accused's breath with a 6510 Breathalyser machine and the sample was positive. He then arrested the accused. Thereafter they drove to the Usakos State Hospital to find a registered nurse to draw blood from the accused. This did not materialise because the accused ran away from the officer and managed to climb over the hospital's fence. The accused handed himself over to the police the next day. The second

² *S v Shamwange* (CR 76/2013) [2013] NAHCMD 339 (15 November 2013) para 10.

officer did not add anything material to the stated facts.

[10] As far as the oral evidence is concerned, it did not remedy the problem, as can be deduced from pertinent evidence in this regard:

“ PP This breathalyser, the 6510, that you used to get his breath sample did you record the reading of the Breathalyser?

- No, I cannot record the reading.

PP: But you said it was showing positive?

- - yes.

- PP: When you said it showed positive what exactly did it show you?

- - The Breathalyser is made to test the legal limit which is 0.37, but its reading was over the limit 0.37 that's why we assume it's positive and we proceeded opted for a blood sample.

- PP: So you said he exceeded the legal limit and that is why you proceeded to opt for that blood sample, can you explain to court why if you have his breath sample which is over the legal limit, why do you have to go for this blood sample again?

- In the previous past cases, the Breathalyser did not give the exact amount of alcohol in the body that why we opted to go for that blood sample which is accurate.

- PP: So the reason is the blood sample would be accurate?

- - Yes.' (sic)³

[11] At the end of the day, there was no concrete test result and the traffic officer even attested that this device, which appears to be used only for the preliminary testing, was unable to record test results. He also admitted that the device did not work properly, meaning that the results, if any, could not be trusted. In the absence of proof of the above aspects pertaining to the device, test results and the reliability of the equipment, it remains a mystery why the prosecution decided to charge the accused for driving with an excessive breath alcohol level. Given these shortfalls in the evidence, the court a quo had no basis to rely on when convicting the accused of the said offence. There are numerous review judgments that spell out the elements and practices involved in the said offence⁴, which need not be repeated herein.

³ Page 14 and 15 of typed record.

⁴ *The State v Bernardus Shikongo and others* CR 20/06 delivered 2006/08/11, *The State v Immanuel Muatumbulange* CR 25/2008 delivered 2008/05/27.

[12] As for the main charge, the evidence on that was insufficient as all the traffic officer said about it was that he smelled alcohol on the accused's breath. It was not explored any further.

[13] In the result it is ordered that:

1. The convictions and sentences in respect of counts 2 and count 3 are confirmed.
2. The conviction and sentence in respect of count 1 are set aside.

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| C M CLAASEN JUDGE | J C LIEBENBERG JUDGE |