

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

“ANNEXURE 11”

Case Title: <i>George Haindongo v The State</i>	Case No: HC-NLD-CRI-APP-CAL-2019/00076
	Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice January J <i>et</i> Honourable Ms. Justice Salionga J	Heard on: 25 June 2020 Delivered on: 25 June 2020 Date of release: 09 July 2020
Neutral citation: <i>Haindongo v S</i> (HC-NLD-CRI-APP-CAL-2019/00076) [2020] NAHCNLD 85 (09 July 2020)	
The order: <ol style="list-style-type: none">1. The Appellant is convicted of contravening section 82(2) (a) of Act 22 of 1999- Driving with an excessive blood-alcohol level;2. The sentence of 18 months is set aside;3. The Appellant is sentenced to N\$ 4000 or 8 months imprisonment;4. The suspension of the Appellant’s driver’s licence is confirmed;5. The sentence is antedated to 11 October 2019;6. The officer in charge of Oluno Correctional Facility is directed to immediately effect the release of the appellant.	
Reasons for the order	
JANUARY J (SALIONGA J concurring):	
[1] The appellant was charged with contravening section 82(2)(a) of Act 22 of 1999- Driving	

with excessive blood alcohol level, alternatively, contravening section 82(1) of Act 22 of 1999- Driving under the influence of intoxicating liquor.

[2] He appeared in person and pleaded guilty.

[3] He was questioned in terms of section 112(1)(b) of Act 51 of 1977 of the Criminal Procedure Act and convicted on the main count of contravening section 82(2)(a) of Act 22 of 1999- Driving with excessive blood alcohol level. He was subsequently sentenced to 18 months imprisonment without the option of a fine.

[4] The appellant filed his notice of appeal and heads of argument on time assisted by Ms Samuel of Samuel & Co. Legal Practitioners, who at the time of hearing this appeal had withdrawn as attorney for the Appellant.

[5] The appeal lies against the sentence only. At the time of hearing, the Appellant had indicated his intention to abandon the appeal but the court requested to be addressed on the concessions the Respondents had made in their heads of arguments.

[6] The respondent, represented by Ms Petrus did not oppose the application, save to say that it is not clear on what specific count the Appellant was being questioned and convicted because the Magistrate had failed to inform him. The record is silent with regard to which charge he was convicted of. It only became clear during sentencing that he had been convicted on the main count.

[7] Magistrates' need to be detailed when questioning an accused that has been charged with more than one count or where an alternative count is also charged. The test in this regard is whether the Appellant has suffered prejudice as a result of this omission and whether in the circumstances this court is competent to correct such an omission.

[8] I find that the Magistrate's questioning, more on the Appellant's alcohol content in his blood and the admissions made are enough to establish that the main count was proven. This court in terms of section 270 of the CPA has the power to confirm the charge which had been proven as the charge of which the Appellant was convicted. It was held in *S v Babiep* 1999 NR 170 (HC) that, 'on review, the charge could be amended

and the conviction and sentence confirmed.' I see no reason why the same principle cannot be extended to cover appeals provided the Appellant does not suffer prejudice, the questioning was exhaustive and proved the offence.

[9] Ms Petrus on behalf of the Respondent conceded that the sentence imposed by the learned Magistrate was startlingly inappropriate, induces a sense of shock in the circumstances thus warranting interference by this court. Further that there is a striking disparity between the sentence imposed by the trial court and other related decided cases. I agree with the Respondent since it is not clear on what basis the Magistrate concluded that a custodial sentence was justified.

[10] The appellant is a first offender. He pleaded guilty as a sign of remorse. He is a family man and a bread winner, husband and a father and guardian to 8 children including a 6 months old baby to support. He has a poor financial background as he is unemployed and only generates income from odd jobs.

[11] I agree with the concession that the sentence is inappropriate and that a fine would have been appropriate. In my considered view, the magistrate overemphasized the seriousness of the offence. The appellant however already served slightly more than 8 months imprisonment.

[12] In the result it is ordered that:

1. The Appellant is convicted of contravening section 82(2) (a) of Act 22 of 1999- Driving with an excessive blood-alcohol level;
2. The sentence of 18 months is set aside;
3. The Appellant is sentenced to N\$ 4000 or 8 months imprisonment;
4. The suspension of the Appellant's driver's licence is confirmed;
5. The sentence is antedated to 11 October 2019;
6. The officer in charge of Oluno Correctional Facility is directed to immediately effect the release of the Appellant.

Judge(s) signature

Comments:

January J	NONE
Saliongga J	NONE
Counsel:	
Appellant	Respondent
In person Of Oluno Correctional Facility	Ms Petrus Of Office of the Prosecutor-General