

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Shooya Elago Shitaleni</i>	<b>Case No.:</b> CR 54/2022 <b>Outapi:</b> 263/2021
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	<b>Delivered on:</b> 30 September 2022
<b>Neutral citation:</b> <i>S v Shitaleni</i> (CR 54/2022) [2022] NAHCNLD 103 (30 September 2022)	
<b>It is hereby ordered that:</b>  1. The conviction and sentence are set aside.	
<b>Reasons for the order:</b>	
KESSLAU AJ (SALIONGA J concurring):  [1] The matter comes before this court in terms of section 304(2) of the Criminal Procedure Act 51 of 1977 as amended, (the CPA).  [2] The accused appeared in the Magistrate Court in the district of Outapi charged	

with the contravention of regulation 7(3) of the State of Emergency - Covid-19 Regulations (as amended) issued in terms of section 29(1) of the Public and Environmental Health Act 1 of 2015: Selling or supplying alcohol to consumers and allowing on-site consumption of such alcohol in that he sold traditional brew on the 13<sup>th</sup> of July 2021. The charge is silent on the time of the incident, the type of licence held, whether the customers were residing at the establishment, the day of the week and the percentage of alcohol contained in the homebrew.

[3] The accused plead guilty to the charge and was convicted in terms of section 112(1)(a) of the CPA. He was sentenced to a fine of N\$ 2000 or six months imprisonment suspended in total for a period of five years 'on condition that accused is not convicted of selling or supply of alcohol to customers during the period of suspension'.

[4] The following query was directed to the magistrate *to wit*:

'1. The accused was charged in terms of Regulation 7(3) (b) of the Public Health Covid-19 General Regulations which contains an exception to wit: 'except where the seller is the holder of an on-consumption licence and the liquor is sold to persons who are residing at the accommodation establishment for an on-consumption at the establishment and the liquor is served with the meals, provided that the seller may not sell liquor after 21:00.' This was not explained to the accused nor was it contained in the charge detail. How did the learned Magistrate satisfy himself of the guilt of the accused without covering this defence?

2. The sentence reads: 'A fine N\$ 2000 or 6 months imprisonment which is wholly suspended for a period of five years on condition that the accused is not convicted of selling or supply of alcohol to customer during the period of suspension.' Is the learned Magistrate satisfied with the formulation of the condition of suspension?'

[5] The magistrate, who's reply was received six months later, answered the first query by stating that 'the accused understood the charge, plead guilty on a charge drawn up by the State and that there is no duty on the magistrate to explain anything that is not depicted on the charge sheet'. Regarding the sentence, the magistrate conceded that the condition of suspension was too vague. In that regard, the following was said in *S v Damon*<sup>1</sup>: ' . . .

<sup>1</sup> *S v Damon* (CR 13/2022) [2022] NAHCMD 132 (24 March 2022).

it is an essential requirement of a suspensive condition that it must be formulated in such a way that it does not cause future unfairness or injustice; neither must it be too wide or vague.’

[6] On 13 July 2021, the alleged date of the offense, the regulations that applied were the 13<sup>th</sup> set of post- state of emergency Covid- 19 regulations as amended. <sup>2</sup> Regulation 7, made in terms of section 29(1) of the Public and Environmental Health Act 1 of 2015, restricted the sale of liquor in the following terms:

‘(1) For the purposes of this regulation, a word or expression defined in the Liquor Act bears

that meaning.

(2) A person may only sell liquor and a person may only purchase liquor if -

(a) the person who sells the liquor holds a liquor licence authorising the sale of liquor, and the

sale of liquor is in accordance with that licence; and

(b) the sale and purchase of liquor are in accordance with subregulation (3).

(3) Despite any contrary condition applicable to any type of liquor licence issued under the Liquor Act, the sale of liquor in terms of a liquor licence and the purchase of liquor may -

(a) where the seller is the holder of an off-sales licence only take place-

(i) starting at the time specified in the liquor licence until 18:00 on a week day; and

(ii) starting at the time specified in the liquor licence until 13:00 on a Saturday;

(b) where the seller is the holder of an on-consumption licence, only take place -

(i) on a take-away basis if the seller is a holder of an off-sales licence; and

(ii) starting from 09:00 until 18:00 on Mondays to Thursday,

except where the seller is the holder of an on-consumption licence and the liquor is sold to persons who are residing at the accommodation establishment for an on-

consumption

at the establishment and the liquor is served with the meals, provided that the seller may

not sell liquor after 21:00; and

(c) not take place on a Friday, Saturday, Sunday or a public holiday, except where the

<sup>2</sup> Issued in terms of GN 91/2021 and published in Government Gazette 7522 dated 30 April 2021 as amended by GN 138/2021 published in Government Gazette dated 30 June 2021. Public Health Covid-19 General Regulations [13<sup>th</sup> set of post-emergency Covid regulations] Government Notice 91 of 2021 (GG 7522) applicable as amended by GN 138/2021 from 00:00 on 1 July 2021 to 24:00 on 15 July 2021 (regulation 2(2), as amended by GN 138/2021)

seller

is the holder of an on-consumption licence and the liquor is sold to a person who is residing

at the accommodation establishment where the liquor is sold, provided that the seller

may

not sell liquor after 21:00.

(4) A person who contravenes or fails to comply with subregulation (2) or (3) commits an offence and is on conviction liable to the penalties specified in section 29(3) of the Act.’

[7] The penalty as provided for in section 29 (3) of Act 1 of 2015 is substantial and allows for a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment. Keeping that in mind, this matter should not have been dealt with in terms of section 112(1)(a) of the CPA.

[8] The duty rest on the prosecutor to ensure that the annexure attached to the charge sheet contains all the essential elements<sup>3</sup> of the offence as it serves to inform the accused of the allegations of the charge he or she has to answer to.<sup>4</sup> If the prosecutor fails in his duty, the presiding magistrate should point out to the prosecutor that the charge is defective and request it to be remedied.<sup>5</sup>

[9] Regulation 7 contained various provisions, exceptions, exemptions and qualifications for instance the type of licence held, hours of business, nature of customers, whether meals were sold, the particular day of the week, the kind of liquor sold and that the liquor sold contained three per cent or more by volume of alcohol<sup>6</sup>. These should have been included in the charge annexure for the accused to be aware of what case he has to meet and to ensure that the guilty plea of an accused is an informed one.<sup>7</sup> The magistrate should equally be aware of the details of the regulation, which contained possible defences to the charge, in order to see that justice is done.

<sup>3</sup> See section 85(1)(b) and 86(1) of the Criminal Procedure Act, 1977

<sup>4</sup> *S v Kapia and Others* 2009 (1) NR 52 (HC) paragraph 15, *S v Nakare* 1992 NR 99 (HC) at 100J-101A and *S v Campbell and Others* 1990 NR 310 (HC) at 313F-H

<sup>5</sup> *S v Absalom* (CR 13/2019) [2019] NAHCNLD 22 (26 February 2019); *The State v Kuhatumwa* (CR 03/2013) [2013] NAHCNLD 11 (07 March 2013)

<sup>6</sup> The Liquor Act 6 of 1998 defines toambo as: ‘ . . . (b) toambo or any other fermented, distilled, spirituous or malted drink, traditional or non-traditional, which contains three percent or more by volume of alcohol’

<sup>7</sup> *S v Katari* 2006(1) NR 205 (HC), *S v Van Rooyen* 1993 NR 235 (HC).

Furthermore the offence is created in regulation 7(4) and not regulation 7 (3) as stated on the charge.

[10] Considering the view of the magistrate that he 'has no duty to explain what was not depicted on the charge sheet', the following was said in *S v Mateus*<sup>8</sup>:

'Similarly, presiding officers who convicts and sentences an accused of an offence based on an inadequate charge must understand that they are not dispensing substantial justice to the undefended accused persons. Therefore, it is crucial when faced with an unrepresented accused that the court ensures that the charge, they are facing is formulated in a manner that appropriately and adequately informs them of the offence alleged against them. Especially if the court considers it an appropriate case for possible finalization in terms of section 112(1) (a) of the CPA. The charge might be a minor one, but the duty to dispense substantial justice<sup>9</sup> should never be considered less important in such cases.'

[11] *In casu* the charge did not comply with the essentials of a charge as it did not include all vital elements that would constitute a crime under the regulations. The accused was severely prejudiced by pleading guilty whilst not properly informed of the allegations.

[12] Consequently the conviction and sentence cannot be said to be in accordance with justice and will be set aside in terms of section 324 (b) read with section 313 of the CPA.

[13] In the result the following order is made:

1. The conviction and sentence are set aside.

Judge(s) signature	Comments:
KESSLAU AJ:	

<sup>8</sup> *S v Mateus* (CR 16/2022) [2022] NAHCNLD 39 (19 April 2022).

<sup>9</sup> Substantial justice according to *S v Van den Berg* 1995 NR 23 (HC) at p 32 to 33 ensures that '...an innocent person is not punished and that a guilty person does not escape punishment.'

SALIONGA J:	
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