



CASE NO.: CR 14/2011

“Not Reportable”

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

vs

ROSHIDA STRAUSS

(HIGH COURT REVIEW CASE NO.: 45 / 2011)

CORAM: SHIVUTE, J et UNENGU, AJ

Delivered on: 2011 February 23

REVIEW JUDGMENT

UNENGU, AJ [1] This matter has been submitted for automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977.

[2] Accused 2 who was charged with an offence under the Roads Traffic Regulations, namely falsifying or counterfeiting licence number or licence mark which is a contravention of section 85(1)(a) read with sections 1, 786(sic) 89 and 106 of the Roads Traffic and Transportation Act, Act 22 of 1999 and further read with Regulations 1, 25, 32, 33, 34, 37, 38, 39 and 47 of the Roads Traffic and Transport Regulations as promulgated in Government Notice 53 of 30 March 2001 (GG 2503) as amended, pleaded guilty to the charge, questioned by the Magistrate in terms of section 112(1)(b) of the said Criminal Procedure Act, 51 of 1977, convicted and sentenced to pay a fine of N\$1 000-00 or one (1) year imprisonment.

[3] This happened on 08 March 2010 at the Rehoboth Magistrate's Court. There is no indication on the Review Sheet that the accused has paid the fine. Similarly, no indication on the Review Sheet why the matter was transmitted for review only in January 2011 and not last year already. The record of proceedings also does not indicate that the right of Review and appeal has been explained to the accused.

[4] Be that as it may. The concern in this review is about whether the proceedings were conducted in accordance with justice.

[5] Initially accused 2 was charged with another person, accused 1. However, the State withdrew the charge against accused 1 and proceeded against accused 2 alone.

[6] As previously stated, accused 2 pleaded guilty to the charge and was questioned by the magistrate pursuant to section 112(1)(b) of the Criminal Procedure Act.

[7] The record of proceedings on page 3 of the typed version reflects how the questioning was conducted by the Magistrate and I quote verbatim *in extenso*:

"Plea: Guilty
S112(1)(b) CPA Applied

COURT: QUESTIONING

Q: Were you forced to plea guilty?

A: No.

Q: Did you on the 06/03/2010 and at or near Rehoboth in the district of Rehoboth falsely give a licence mark by inserting and or altering the expiry date of the license disk?

A: No. I didn't falsify it. It was my boyfriend who did it but I was aware of it.

Q: Who is the owner of this motor vehicle?

A: It's mine

Q: Do you know that you are not allowed to have or own a motor vehicle with false license disk?

A: Yes.

Q: Were you aware that it is a crime?

A: Yes.

Q: Did you have any right or permission?

A: No.

Q: Why did you allow to have a motor vehicle with false document/license disk?

A: It is because of financial problem. My license disk expired and I didn't have money to get or renew it. I informed my boyfriend who then engineered this plan.

Q: Did you know that it is wrong and that you can be punished for it.

A: Yes.

Q: Are you aware that you can't driving a motor vehicle on a public road with falsified license disk?

A: Yes.

Q: Did you know that your conduct were wrong and that you can be punished for it?

A: Yes.

Q: Did you realized that you have committed a crime?

A: Yes.

COURT: Is satisfy accused admits all the allegation in the charge of falsifying or counterfeiting license number or license mark.

JUDGEMENT: Guilty"

[8] The accused, when asked, "Q: Did you on the 06/03/2010 and at or near Rehoboth in the district of Rehoboth falsely give a license mark by inserting and or altering the expiry date of the license disk?" She answered as follows:

"A: No, I didn't (sic) falsify it. It was my boyfriend who did it but I was aware of it."

[9] On my query as to whether that statement (answer of the accused) was not a good reason for the learned Magistrate to enter a plea of not guilty in terms of section 113 of the Criminal Procedure Act, 51 of 1977 and then left it for the State to lead evidence on that aspect, the learned Magistrate answered as follows:

**“RE: REVIEW CASE NO. 795/2010
HIGH COURT REF. NO. 45/2011
MAGISTRATE SERIAL NO. 32/2010
STATE AND ROSHIDA STRAUSS**

I agree my Lord that Accused was questioned in terms of S112(1)(b) of the Criminal Procedure Act, 51 of 1977. I further agree that she informed the Court that she didn't falsify it but her boyfriend.

Accused upon questioning informed the Court that she was aware, she knew that she is not allowed to have a motor vehicle with false licence disk, she knew it is a crime that it is wrong punishable by law.

I am of the opinion that she admits all the elements of the offence. However if my Lord is of the different view, your advice is always welcome. I am open to your direction.

I hope my humble explanation will be understood by the Honourable Acting Mr Justice.

Yours faithful”

[10] It is therefore, clear from the answer of the learned Magistrate that he is insisting that the accused admitted all the elements of the offence.

[11] With due respect, I disagree. The accused denied falsifying the license disk as alleged in the charge sheet. In fact, she told the Court that the boyfriend has done it, not accused 2. That notwithstanding, the Magistrate went ahead with his questioning and convicted her as charged, on the premises that she had admitted all the allegations in the charge of falsifying or counterfeiting the license number or the license mark.

[12] In *S v Valedé and Others* 1990 NR 81 at 84 C-D Levy, J said the following:

“It is important to appreciate that a plea of guilty is nothing more than the legal opinion formulated by the accused himself. He draws a conclusion from certain facts that he is guilty. The magistrate’s questioning must be directed at ascertaining those facts for him, the magistrate, to decide whether the conclusion of law or opinion of the accused is justified. The magistrate is fully aware of the elements of the crime with which the accused is charged and these elements must be pertinently put to an accused. The charge itself must not be rephrased by the magistrate and then put to the accused. Consequently, where an accused is charged with theft in that he stole certain goods and has pleaded guilty to such charge, it is purposeless to ask him again ‘Did you steal those goods?’. If the accused answers that question in the affirmative, the magistrate is in no better position in ascertaining whether the accused admits the elements of the crime.”

[13] In fact, the purpose of section 112(1)(b) is that questions put by the Court should be directed at obtaining answers from the accused person to satisfy the Court, not only that the accused admits all the allegations (elements) of the offence but also that the accused is guilty of the offence to which he or she had pleaded guilty. That is, therefore, only if the Court is so satisfied that she admitted the allegations in the charge to which she has pleaded guilty, could the Court then have convicted the accused of the offence. See also *S v Magabi en ‘n ander* 1985(3 SA 818(T); *S v Valedé and Others*, supra; *S v Goeieman* 1993 NR 285; *S v Tobias Mumbuu* (Unreported) Review Case No. 2041/2001 delivered on 05 February 2002 and *S v Samuel Brooks* (Unreported) Review Case NO. 138/2002 delivered on 28 February 2002.

[14] In this matter, in my view, the accused did not admit the allegations of the offence to which she had pleaded guilty. The correct procedure to follow was, in my opinion, to enter a plea of not guilty in terms of section 113 and to direct that a trial should proceed in the normal way.

[15] The failure of the Magistrate to correct the plea in terms of section 113 has a result that the accused was convicted of an offence she did not admit to have committed.

[16] In the result, I make the following order:

1. The conviction and sentence are set aside.
2. The matter is remitted to the Magistrate's Court Rehoboth in terms of section 312(1) of the Criminal Procedure Act, 51 of 1977 for the Magistrate to comply with the provisions of section 113 of the Criminal Procedure Act, 51 of 1977.

UNENGU, AJ

I agree.

SHIVUTE, J