CASE NO.: CA 51/05

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LASARUS TUTU NOWASEB **Appellant**

and

THE STATE **Respondent**

CORAM: PARKER, AJ

Heard on: 2006 July 7

Delivered on: 2006 …

JUDGMENT

PARKER, AJ.:

[1] The appellant appeared in the Windhoek District magistrate‘s court on a charge of driving a motor vehicle recklessly or negligently, resulting in the motor vehicle colliding with another motor vehicle, driven by another person, the complainant, at the intersection of Robert Mugabe Avenue and Sam Nujoma Drive (the intersection). The appellant was charged in terms of s. 80 (1), read with ss. 1 and 80 (2) and (3), of the Road Traffic and Transport Act 1999 (the Act).[1]

[1] Act No. 22 of 1999.

[2] After evidence was lead, the learned magistrate convicted the appellant, and sentenced him to a fine of N$3,000.00 or 12 months imprisonment. The learned magistrate ordered the fine to be paid in eight equal instalments, starting from the date of sentence, i.e. 29 September 2004. The appellant now appeals against the conviction and sentence. I note that the appellant was represented in the court below and in this Court by counsel, Mr. Narib of the Office of the Government Attorney. Ms. Rakow is counsel for the State in this appeal: incidentally, she was not the prosecutor in the court below.

[3] The appellant's counsel, Mr. Narib, filed a notice of appeal the day following the sentence, i.e. 30 September 2004.

[4] It behoves me to sketch the history of this appeal, seeing that although the notice of appeal was filed on 30 September 2004, the appeal was heard by this Court on 7 July 2006, that is after about two years.

[5] After 30 September 2004, nothing happened until 22 February 2005, i.e. after five months, when the appellant's counsel wrote a letter to the Registrar of this Court, with a copy to the Clerk of the criminal court (i.e. the court *a quo*) complaining that he had "not received the record in this matter." The question that arises is this: why did it take the appellant's counsel five months to notice that he had not received the record in the matter, although he was aware – and he is honest about it – that according to Rule 55 (4) of the Rules of Court, the ultimate responsibility for ensuring that all copies of the record are properly before this Court rests on the appellant and his legal practitioner?

[6] In my view, what this rule means is that if an appeal does not take place because the required copies of the record are not properly before this Court, the appellant or his or her legal practitioner must bear the final blame – not all the blame, of course.

[7] Thereafter, the record was prepared by the magistrate's court but a copy was misrouted to legal practitioners who were not seized with the matter. The result was that counsel for the appellant received the record in June 2005. By a letter dated 25 July 2005, counsel informed the Registrar, the learned magistrate and the Prosecutor-General that the record did not reflect accurately the proceedings in the lower court because parts of the record, marked "inaudible", were too numerous. He proposed that all the parties involved should endeavour to reconstruct the record. Thereafter, in September 2005, there were written exchanges between the learned magistrate and the appellant's counsel on the issue of the inadequacy of the record and counsel's preparedness and readiness to assist in reconstructing the record. The learned magistrate, too, said she was prepared to work cooperatively with the other interested parties.

[8] On the 6th of the following month, after having heard both counsel, i.e. Mr. Narib and Ms Rakow, the Court made an Order that by agreement between the parties the appeal was "postponed *sine die* and sent back to the magistrate court for reconstruction of the record." The Registrar sent a copy of the Order to the learned magistrate under cover of a letter dated 6 October 2005 the same day.

[9] Nothing happened after 6 October 2005 until 3 March 2006, i.e. after about five months, when Mr. Narib wrote to the learned magistrate, enquiring whether the record had been reconstructed pursuant to the Order of the Court, and once more offering his assistance in the reconstruction of the record, if it had not been done already. Again, I do not see why it took Mr. Narib about five months to make such a crucial enquiry when he was quite aware that the appeal could not proceed until and unless the record was properly before the Court?

[10] In any case, by a letter dated 26 October 2005, the learned magistrate had informed Mr. Narib that she, "my prosecutor who adduced evidence in this case plus our Interpreter tried to reconstruct this case record after you have refused to be part of the team." In that letter the learned magistrate stated that the team had failed to reconstruct certain pages because no one could hear anything from the tapes or recall anything. She, therefore wriggled her hands, and "left it in the hands of the Honourable Appeal Judge to decide."

[11] Mr. Narib states in his confirmatory affidavit filed with the "notice of application" that he never had sight of the 26 October letter until 19 June 2006. This statement might be true because a copy of the 26 October letter is not annexed to the appellant's founding affidavit filed with the "notice of application".

[12] Mr. Narib filed a notice of set down on 8 April 2006, although he was aware that the record was not properly before the Court. The Registrar notified the parties on 13 April 2006 that the appeal was set down to be heard on 7 July 2006. With this hearing date in mind, the appellant's counsel filed a "notice of application" on behalf of the appellant in which he sought an order in the following terms:

1. That the proceedings of the court a quo in Case No. A60/2003: State v Lasarus Tutu Nowaseb be quashed; and

2. That the appellant be released from further prosecution in terms of Article 12 (1) (b) of the Namibian Constitution.

   Alternatively to prayers 1 and 2 above

3. That the state of the appeal record be condoned, and

4. That the appeal be heard and disposed of on the merits.

In any event

5. Further and/or alternative relief.

[13] Both counsel did file helpful heads of argument, and the heads deal with what I consider to be a constitutional issue (i.e. paras. 1 and 2 of the application) and what may be taken as criminal appeal grounds on the merits (i.e. para. 4 of the application).

[14] On her part, Ms Rakow mounted a two-prong response to the appellant's counsel's argument based on the Constitution: one is a preliminary objection based on procedure; the other is on the merits. The procedural objection is that since the matter that this Court is seized with is a criminal appeal, then in terms of rule 67 of the Magistrate's Court Rules, the appellant ought to have included the constitutional issue in the appellant's grounds on which the appeal is based by applying to the Court for leave to amend the grounds that he filed on 30 September 2004. I agree with Ms Rakow: if the appellant wished to raise the constitutional issue he ought to have included the issue in his grounds of appeal. In my opinion, the relief sought by the appellant is in essence a stay of proceedings, which is a form of relief recognized by the common law in both civil and criminal proceedings.[2] The purpose of the appellant's application is to obtain relief against conviction and sentence on the ground that the appeal had not been heard in a reasonable time within the meaning of Article 12 (1) (b) of the Namibian Constitution. That being so, in my view, the application is substantially of a criminal nature,[3] and, therefore, subject to rule 67 of the Rules of the Magistrate's Courts as aforesaid, for it cannot be said that simply

[2] See *S v Strowitzki* 1994 NR 265 at 273C.
[3] *Loc. cit.*

because a fair trial is guaranteed by the Namibian Constitution the present appeal proceedings are "converted from criminal to civil."[4] "It is not the form of the procedure used," it has been said, "which matters so much as the nature and substance of the application itself."[5] The result is that, in my view, Ms Rakow's argument that the application, as it stands, is not properly before the Court and, therefore, must be dismissed is well founded. In the result the appellant's application is dismissed.

[15] I now proceed to deal with the appeal on the merits. I understood both counsel to have submitted that despite the failed attempt to reconstruct the record by filling in all the gaps so as to retrieve parts of the evidence that were not recorded, there was sufficient material before this Court to enable it to deal with the appeal on the merits. Taking the entire record of proceedings together with the learned magistrate's "REASONS FOR JUDGMENT AND SENTENCE" that were compiled when the memory of the learned magistrate was fairly fresh, I did not think any injustice would be occasioned to the State or the appellant if I heard the appeal.[6] I, therefore, decided that in the interest of avoiding further postponement, it was desirable that the appeal was heard because, more important, the record was sufficient, in my opinion, to show the tenor of evidence at the trial.

[16] In considering the appeal, I shall, however, not take cognisance of the contents of the so-called "An Affidavit" by the learned magistrate purported to contain

[4] See, *loc. cit.*
[5] *Strowitzki*, *supra*, at 272 I, and the cases relied on.
[6] See *S v Leslie* 2000 (I) SACR 347 (W).

reconstructed portions of certain parts of the record. My reasons for so deciding are as follows. First, neither Mr. Narib nor the appellant contributed to the reconstruction of the record, albeit their contribution was not only necessary but also crucial.[7] Second, it was highly desirable that the magistrate's court either orally or on affidavit heard evidence from the witness or witnesses whose evidence was inaudible, but this was not done.

[17] The record shows that at the commencement of the trial Mr. Narib raised an objection to the charge. He relied on s. 85 (1) (d) of the Criminal Procedure Act 1977 (the CPA).[8] Mr. Narib and the learned prosecutor at the trial made submissions on the objection. At the close of their submissions, the learned magistrate purported to order an amendment of the charge by the excision of the phrase "or anything to that effect", which appears in the further particulars that the prosecution furnished to the appellant in terms of s. 87 of the CPA: "AD PARAGRAPH 1. The accused was reckless or negligent hence he drove through a red robot and as a result collided with a motor vehicle with registration No. N71933W or anything to that effect, and or he bumped or hit a pedestrian or anything to that effect." I agree with Mr. Narib that the phrase tends to obfuscate the issue; or, at best, it is meaningless. But, contrary to the learned magistrate's view, the court's order to expunge the phrase from the further particulars can hardly be taken as having amended the charge: the confusing phrase does not even appear in the "particulars of charge" in the summons.

[7] See *Leslie*, *supra*
[8] Act No. 51 of 1977.

[18] The learned magistrate might have been confused by certain words in the appellant's counsel's notice in terms of s. 85 (1) of the CPA, namely, "Accused further objects to the charge as supplemented by the further particulars …" With the greatest respect, further particulars do not amend charges: the purpose of further particulars is to enable the accused to know the case that is proposed to be made against him or her and thus enable him or her to prepare his or her defence.[9]

[19] Thus, of the view which I take of the excision of the phrase "or anything to that effect" contained in the further particulars and the decision of the learned magistrate related thereto, I have come to the conclusion that the charge remained as it was formulated in the "SUMMONS IN CRIMINAL CASE", which forms part of the record in this matter, and which I have paraphrased at the beginning of this judgment. And as the learned magistrate stated, what remained to be done was for the prosecution to prove that the appellant was negligent or reckless when he allegedly drove his vehicle through the intersection whereby the vehicle collided with the vehicle driven by the complainant. The further particulars only explained, or gave particulars, as to why the State alleges that the appellant drove negligently or recklessly within the meaning of s. 80 of the Act. I will return to the further particulars in due course.

[20] The case of the State, as I see it, is briefly as follows. The complainant, who was the second prosecution witness at the trial, testified that when he was entering the intersection the traffic lights facing him were red, and so he stopped on the stop line and only drove off in an easterly direction after the traffic lights had turned green in his favour. According to him his vehicle was the only one travelling in the easterly direction towards Klein Windhoek at the time. He testified further that the appellant who was driving northwards from the south drove past a vehicle that had stopped at the stop line at the intersection because traffic, of which the appellant's vehicle was a

[9] *The State v Heinz Dresselhaus, Ettienne Johan Weakley and James William Camm* Case No. CC 12/2005 pp 10-11 (Unreported); *S v Cooper and others* 1976 (2) SA 875 at 885 H – 886 A.

part, travelling in that line was facing the red traffic lights. Thus, according to the complainant, the appellent drove through the intersection although the green traffic lights were not in his favour. The complainant's vehicle suffered a slight damage to its left headlight and the left side of the frontal grill, and the appellant's a slight scratch around the left rear mudguard and the left end of the rear bumper.

[21] The complainant testified further that the appellant's vehicle was travelling faster than 50 kph that was why after the vehicle had bumped his vehicle, the appellant's vehicle only came to a stop after it had mounted a pavement and hit a wall, that was some meters away from the point of impact. It is, therefore, part of the prosecution's case that the appellant's vehicle only came to stop some 50 meters away from close to the northern stop line on Robert Mugabe Avenue at the intersection after it had mounted a pavement, broken through some steel railings and hit a wall to which the steel railings were affixed because the complainant was driving at some considerable speed.

[22] The appellant's defence was also essentially the following. He was driving in the first lane, travelling from the south in a northern direction as he approached the intersection. According to his testimony, the traffic lights were green in his favour so he proceeded through the intersection. As he exited the intersection, he heard "a bang on his vehicle," which at first he mistook to be the noise of a tyre burst. He tried to control his vehicle, which was swerving to his right. In doing so, his vehicle hit a pedestrian slightly and ended hitting a wall after mounting a pavement and breaking through steel railings affixed to the wall. In his evidence-in-chief, the appellant sought to show that it was the complainant's vehicle that bumped into his vehicle as he exited the intersection. I will return to this evidence in due course. The appellant testified further that his vehicle, which was a Namibia Police vehicle, was written off as a result of hitting the wall.

[23] Thus, in my respectful view, what the prosecution had to prove beyond reasonable doubt in the court below was this: did the appellant drive his motor vehicle (Registration Number POL 4386) recklessly or negligently at the intersection, and thereby collide with another motor vehicle (Registration Number N71933W, driven by Martin Ndakaloko, the complainant) in contravention of s. 80 (1), as read with ss. 1 and 80 (2) and (3), of the Act? As I have shown previously, that was also the view of the learned magistrate. And as far as the court below was concerned, the prosecution had proved its case.

[24] What is before this Court is an appeal launched by the appellant, and, therefore,

the burden is solely the appellant's to persuade the Court to quash the conviction and set aside the sentence based on the grounds that he has filed. In *Willy Harold Hendricks* and *Thadeus A. Mutota Sheweda v The State*,[10] I had this to say concerning an appellate court's power to interfere with the factual findings and findings on credibility of the trial court:

> It has been held that an appellate court's power to interfere with the factual findings and findings on credibility of the trial court are limited [*Rex v Dhlumayo and another 1948 (2) SA 677 at 696; S v Gey van Pittius and another 1990 NR 35 at 40.*] O'Linn, J put the principle succinctly thus in S v Slinger: "Where no irregularities or misdirections are proved or apparent from the record, the Court of Appeal will normally not reject findings of credibility by the trial court and will usually proceed on the factual basis as found by the trial court." [*1994 NR 9 at 10E*] The learned Judge proceeded, "It is trite law that the function to decide on acceptance or rejection of evidence, falls primarily within the domain of the trial court." [*Slinger, supra, loc. cit.*]

That is the manner in which I approach this appeal.

[25] In his submission, Mr. Narib argued *ad nauseum* that the issue in the case is not a question of speed but that the appellant drove through the intersection when the traffic lights facing him were red and, therefore, against vehicles, including the appellant's, travelling from the east to the west at that intersection. This argument sought to counter the prosecution's averment that the appellant drove through the intersection, even when he did not have the right of way, at such high speed (i.e. over 50 kph) that after his vehicle had collided with the complainant's he drove for some 50 meters, unable to bring his vehicle to a stop, until it was stopped by a wall, and only after the vehicle had mounted a pavement and broken through steel railings affixed to

[10] *Supra*.

the wall.

[26] I do not think the prosecution's contention about the speed at which the appellant drove is meant to change or embellish the charge or to deflect the issue to be decided by this Court. The prosecution's contention is based on facts – facts, which, in my respectful opinion, cannot be controverted and, therefore, this Court cannot close its eyes to because they form part of the *res gestae*, and, therefore, relevant.[11] The relevance of the contention looms large if regard is had to the following facts, which are apparent on the record: The complainant's vehicle was travelling at a very low speed, almost coming to a standstill at the point of impact of the two vehicles. The reason is that the complainant's vehicle had just moved from the western stop line on Sam Nujoma Drive at the intersection and had only travelled a distance equivalent to the width of the first lane of Robert Mugabe Avenue (see photo 1). The complainant applied his brakes slightly, going by the slight brake marks his vehicle made on the road below the point of impact, and the appellant's vehicle "went pass it", sustaining only a superficial abrasion to the left mudguard and the left end of the rear bumper. The appellant was unable – tried as he did – to control his vehicle after being bumped slightly by the complainant's car, as aforesaid. The appellant's testimony that he was travelling around 50 kph cannot reasonably possibly be true. From the foregoing, I find that the respondent drove through the intersection at some considerable speed.

[27] In this connection, with the greatest respect, I fail to see the relevance of the

[11] See Hoffmann and Zeffertt, *The South African Law of Evidence*, 4th ed: pp 154, 155 – 157.

principle of sudden emergency relied on by Mr. Narib; neither do I see on what basis the principle applies to the facts of this case. In any case, the appellant, in my view, created the emergency and he cannot, therefore, be allowed to rely on the principle of sudden emergency to escape the direct and reasonable consequences of his actions. I am fortified in this view by the following succinct statements by Cooper. In his authoritative work *Delictual Liability in Motor Law* he states, "… an emergency due to a driver's own negligence cannot avail him."[12] And in his *Motor Law*, he writes: "Driving is an operation which requires care, skill and courage, and a driver cannot be excused if his judgment or courage without justification fails him at the very moment when these qualities are most required to avert accident or disaster."[13]

[28] I now turn to deal with a central issue in this matter, namely, of the two drivers, i.e. the appellant and the complainant, who had the right of way at the intersection, that is in whose favour were the green traffic lights? As mentioned above, the appellant testified that the green traffic lights were in his favour; the complainant testified contrariwise. It is significant to note that in her judgment, the learned magistrate was very much alive to the fact that the two accounts were mutually destructive to each other, and, therefore, had to proceed with caution. On this point it was said in *S v Singh*:

> The proper approach in a case such as this is for the Court to apply its mind not only to the merits and demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been

[12] P 275.
[13] Vol. 1, p 521.

established beyond all reasonable doubt.[14]

And in *S v Ipeleng*, Mahomed, J (as he then was) said, "What still needs to be examined is whether there is a reasonable possibility that the evidence of the appellant might be true."[15] This Court in *S v Appelgrein*,[16] *S v Engelbrecht*[17] and *S v Petrus* approved these principles.[18]

[29] The golden thread that appears clearly visible in the fabric of these cases is this: where in evidence a court is presented with two versions that are mutually destructive to each other, the court must have a good reason for rejecting one and accepting the other by applying its mind to the intrinsic merits and demerits of each version and the probabilities of the case.

[30] In *Appelgrein, supra*, having found that the evidence of both the appellant and complainant was not fairly and adequately put before the court *a quo* for that court to reach a proper assessment of the credibility of the complainant and the appellant, this Court concluded that the learned magistrate had committed an irregularity. That is not the situation in the present case; for in the present case, the evidence of both the complainant and the appellant was adequately and not only fairly, but also reasonably, put before the court. The record supports the correctness of this view. *A fortiori*, unlike in *Appelgrein, in casu*, counsel, as I mentioned previously, represented the appellant in the court below. Then in *Engelbrecht*, this Court found that there were not sufficient grounds to enable the learned magistrate to hold that the complainant's version was true and that of the accused false. That is also not the situation in the present case. And

[14] 1975 (1) SA 227 (N) at 228 E-G.
[15] 1993 (2) SACR 185 (T).
[16] 1995 NR 118.
[17] 2001 NR 224.
[18] 1995 NR 105.

in *Petrus* the Court stated that the magistrate's court ought to have had good reason to be satisfied that complainant's account was the true one. This Court did not see any good reason and so set aside the conviction and sentence. In the present case, unlike in *Petrus*, the learned magistrate found – and I have no good reason to reject the factual findings there were good reasons to accept the complainant's account as true.

[31] I have given considerable thought to the learned magistrate's judgment and the reasons therefor. Having done so, I have come to the irrefragable conclusion that she did apply her mind to the essential merits and demerits of the evidence of the complainant and that of the appellant and the probabilities of the case before accepting the evidence of the appellant.

[32] From the record I find that if the traffic lights at the intersection were green in favour of the appellant, the other vehicle on Robert Mugabe Avenue, like the appellant's, would not have stopped at the stop line to give way to traffic passing on Sam Nujoma Drive. In this connection, there is sufficient and credible evidence that the appellant recklessly drove past that vehicle that was waiting at the stop line on Robert Mugabe Avenue because that vehicle, like the appellant's, was facing the red traffic lights. The appellant's vehicle thereafter mounted a pavement and broke through steel railings affixed to a wall, and was only stopped by this wall, which stands at about 50 metres from the point of impact of the two vehicles.

[33] In my opinion, the following evidence is also significant and crucial; it has probative value, for it goes to support in a material way the truth of the complainant's account. According to the complainant, after the collision, he alighted from his vehicle, approached the appellant and asked him, "…why he drove through the red traffic light." The appellant's response was that he "did not drive through a red light." Thereafter, the record reads: "I (i.e. the complainant) then informed him that if he did not drive through red traffic lights, then the accident wouldn't have occurred." The appellant had no reply to this forthright accusation. The complainant continued, "He was just arguing there and with the victim who was bumped." Incidentally, before the appellant's vehicle broke through the steel railings as aforementioned, it bumped a pedestrian on the shoulder of Robert Mugabe Avenue.

[34] In the light of the totality of evidence, I cannot fault the facts found by the magistrate and her rejection of the appellant's account. In my opinion, the appellant's account cannot reasonably possibly be true. I am satisfied that the appellant's version was proved to be false beyond reasonable doubt: the totality of evidence supports this view. It, therefore, follows as a matter of inexorable logic that Mr. Narib's rearguard submission that there was no evidence that the traffic lights were synchronized at the

material time is without substance.

[35] But Mr. Narib submitted that the learned magistrate ought to have approached "the evidence of the complainant with the necessary caution." As I see it, Mr. Narib's submission is based on two grounds. The first is that the complainant was evasive, argumentative and at times gave unsolicited lectures on rules of the road. In support of his argument, counsel referred the Court to *Ray Goba v The State*.[19] With the greatest respect, I do not see how *Ray Goba* assists the appellant's case. The learned magistrate did not find that the complainant behaved in a similar manner described in *Ray Goba*; neither do I from the record. Mr. Narib's argument is, therefore, with respect, baseless.

[36] The second reason is that, according to Mr. Narib, the complainant was also previously charged with the same offence arising from the same incident and was aware of the danger of being recharged, if it should be found that he was the one who was reckless or negligent. He conceded that the charges against the complainant were not pursued by the Prosecutor-General, but, according to him, it was clear particularly from the evidence of the investigating officer, Ms Nakashona (the first State witness) that the procedure in terms of s. 204 of the CPA was not followed in respect of the complainant, i.e. he had "not been discharged from further prosecution."

[37] It is illogical for Mr. Narib to concede in one breadth that the Prosecutor-General did not pursue the so-called charges and argue in another breadth that the complainant had not been discharged from "further prosecution". There cannot be a further prosecution if there had not been any prosecution at all in the first place. With the very greatest deference, this argument does not even begin to get off the starting-blocks because there is nothing in the record to show that the prosecutor informed the Court *a quo* that the complainant who was called as a witness for the State would be required by the prosecution to answer questions that might incriminate him with

[19] Delivered on 2004/06/29 (Unreported)

regard to an offence specified by the prosecutor. That being the case, the other provisions of the s. 204 following the *chapeu* of that section could not come into play. I, therefore, totally fail to see the purpose and relevance of this argument, which I must also be rejected: the argument is clearly without substance.

[38] That is not the end of the appellant's attacks on the complainant's evidence. Mr. Narib submitted that the learned magistrate erred in fact and in law in accepting the evidence of a single witness, without applying the cautionary rule, and referred me to a number of authorities, namely, *S v Hlapezuka and others*;[20] *R v Mokoena*;[21] and *S v Shaanika*.[22] Ms Rakow submitted in the apposite way to Mr. Narib's. She also referred me to a number of authorities: *Shaanika, supra*, which is also on the list of Mr. Narib; *S v Esterhuizen and another*,[23] and *S v Weber*.[24]

[39] I respectfully agree with Ms Rakow that in terms of our law the uncorroborated evidence of a single witness is sufficient for a conviction.[25] On this point, in *R v Mokoena*[26] Fagan, JA approved the following proposition by De Villiers, JP in *Rex v Mokoena*:

> In my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness

[20] 1965 (4) SA 439.
[21] 1956 …
[22] 1999 NR 247 (HC).
[23] 1990 NR 283 (HC)
[24] 1971 (3) SA 574.
[25] In terms of s. 208 of the CPA.
[26] 1956 (3) SA 81 at 85 H.

> has an interest or bias adverse to the accused, where he had made a previous inconsistent statement, where he contradicts himself in the witness box, where he had been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc.[27]

Reacting to the criticism of the first sentence in the above-quoted passage by Broome, JP in *R v Abdoorham*[28] to the effect that it was doubtful whether, as a proposition of law, it was correct, Fagan, JA said, "The criticism of Broome, J.P., would be justified if the sentence in the 1932 judgment had to be read as laying down a requirement of law that must be strictly complied with. It is improbable, however, that DE VILLIERS, J.P., intended it to be read that way."[29] Indeed, in *R v Ditshego*,[30] where a magistrate had also convicted on the evidence of a single witness, De Villiers, JP expressed himself in words different from those he had used in *Rex v Mokoena*, *supra*. He stated:

> I must bear in mind that the Act 31 of 1917 (sec. 284) permits a conviction on the evidence of a single credible witness, but in the present case not only is the evidence of the single witness somewhat vague, and somewhat liable to be misunderstood, but the single witness was by no means uninterested. On the contrary he had a motive for giving untrue evidence against the accused, for it appears clearly that he was himself liable to prosecution … and that it would be to his advantage … to shift the blame …[31]

Indeed, in the end, what is important is that in *Rex v Mokoena*, *supra*, the Court set out helpful factors to which a court should direct its mind when weighing the cogency of the evidence of a single witness. This Court in *Shaanika*, *supra*, also approved the

[27] 1932 OPD 79 at 80
[28] 1954 (3) SA 163 at 165.
[29] *R v Mokoena*, *supra*, at 86 A-B.
[30] 1932 OPD 164.
[31] *R v Ditshego*, *supra*, at 166.

proposition in *Rex v Mokoena*.[32]

[40] I find that it is not apparent on the record that the complainant had an interest or bias adverse to the accused, or he had made a previous inconsistent statement, or had contradicted himself in the witness box in any material respect, or he had been found guilty of an offence involving dishonesty. I cannot, therefore, interfere with the learned magistrate's decision to accept his account.

[41] On the same question of the applicability of s. 208 of CPA, this Court, in *S v Esterhuizen and another*,[33] approved the following statement in the headnote of *S v Weber* that "it is essential to approach the evidence of a single witness with caution and to weigh up the good qualities of such witness against all the factors which may dismiss the credibility of the witness."[34] The Court then proceeded to cite with approval the following passage from *S v Sauls and others:*

> There is no rule of thumb test or formula to apply when it comes to a consideration o the credibility of the single witness … The trial Judge will weight his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite he fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told … but it does not mean
>
> "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"[35]

[42] Having applied these principles to the present case, and from the evidence of the prosecution witnesses accepted by this Court, I have come to the inescapable conclusion that Mr. Narib's argument on this point must also fail.

[43] In this connection I have considered *Hlapezula*, *supra*, which Mr. Narib relied on. With all due respect, I do not find *Hlapezula* of any real assistance on the point

[32] Supra, at 251 G-H.
[33] 1990 NR 283 at 287 I.
[34] At 287 I-J.
[35] *Ibid*. 288 A-B.

under consideration. The *ratio* of that case is that where corroborative evidence implicating the accused in the commission of the crime is given by another accomplice, the latter's evidence, if regarded as reliable, may, depending on the circumstances, satisfactorily reduce the risk of a wrong conviction.[36] In such a case the court must bear in mind the cautionary rule in relation to the corroborating accomplice. In the present case, there is nothing apparent on the record or proved to show that the complainant was an accomplice witness.

[44] From the aforegoing I have come to the conclusion that no irregularities or misdirections have been proved or are apparent on the record. I, therefore, do not see any good reason to interfere with the factual findings and findings on credibility of the trial court.

[45] In the result the appeal against conviction fails.

[46] I pass to deal with the appeal against sentence. Mr. Narib submitted that the learned magistrate either did not take into account, or failed to give adequate consideration to, the following, namely that the appellant was a first offender, that he was the sole breadwinner of the family and that he "was subjected to a long trial period, which resulted in a lot of expenses for the appellant."

[47] The last item must be dismissed immediately without much ado. The appellant was represented by State counsel in the lower court and in this Court, and it has not been said that he contributed any amount to his defence in the court below or in this appeal. In any case, when giving reasons for her judgment, the learned magistrate found that the delay could not be placed at the door of any party alone. I agree. From the record it is clear that evidence-in-chief, cross-examination, re-examination and oral submissions were unnecessarily long, considering that the issue involved fell within a very short and narrow compass, and only four witnesses gave evidence. In the reasons for her judgment learned magistrate states also that she took into account the rest of the factors mentioned by Mr. Narib. I have no good reason to hold otherwise.

[48] Ms Rakow, on the other hand, urged the Court not to interfere with the sentence imposed by the court below. She referred me to a number of cases on this point,

[36] See *Hlapezula*, *supra*, at 440 H.

including *S v Tjiho*[37] where this Court gave guidelines as to the circumstances under which an appellate court is entitled to interfere with the sentence imposed by a trial court. I have consulted all the other cases; I cannot do better than to repeat what I said in *Willy Harold Hendricks v Thadeus A Mutota Sheweda*, which is a distillation of the principles enunciated in the cases:

> It is a settled rule of practice that punishment falls within the ambit of the discretion of the trial court, and the discretion may be not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection. [See *S v Ndikwetepo and other* 1993 NR 319 at 322 G.] Another test applied by an appellate court is whether the sentence is so manifestly excessive that it induces a sense of shock in the mind of the appellate court. [See *S v Giammoulis* 1975 (4) SA 867 at 868; *Ndikwetepo*, *supra*, at 322 J – 323 C.] And in deciding whether a sentence is manifestly excessive, this Court ought to be guided mainly by the sentence sanctioned by statute, if applicable, or sentences imposed by this Court in similar cases; of course, due regard being had to factual differences.

[49] In the present case, I think the court below was guided by the sentence sanctioned by the Act. The appellant was convicted of driving recklessly and the sentence sanctioned by the Act is contained in s. 106 (6) (a), namely, a fine not exceeding N$8,000.00 or imprisonment for a period not exceeding two years or both. As I said previously, the learned magistrate ordered the fine to be paid not in a lump sum but in eight equal instalments, starting from the date of the sentence. In the circumstances, I am satisfied that the sentence is not vitiated by misdirection or an irregularity; neither does it induce in my mind a sense of shock. I, therefore, do not have any good reason to interfere with the sentence imposed by the learned magistrate.

[50] In the result, the appeal by the appellant against conviction and sentence is dismissed.

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Parker, AJ

[37] 1991 NR 361 at 366.

ON BEHALF OF THE APPELLANT:	Mr G. Narib
Instructed by:	**Office of the Government Attorney**
ON BEHALF OF THE STATE:	**Adv. E. Rakow**
Instructed by:	Office of the Prosecutor-General