CASE NO.: CR 42/2011 (High Court)

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

and

DEON KOOPER

CORAM: **LIEBENBERG J & TOMMASI J**

High Court Review Case No. 1242/2009 (High Court -Windhoek)

Delivered on: 18 May 2011

REVIEW JUDGEMENT

TOMMASI J: [1] The accused was convicted of reckless or negligent driving (contravening section 80(1) of Act 22 of 1999); failing to stop at an accident immediately after the accident occurred, (contravening section 78(1)(a)); and driving under the influence of intoxicating liquor (contravening section 82(1)(a). The accused was sentence to a fine N1500.00 or 12

months imprisonment on the first two counts and N$3000.00 or 12 months imprisonment on the third count.

[2] When the matter came before me I directed several queries to the judicial officer relating to *inter alia*; the issue of relying on inadmissible hearsay evidence, whether the court was satisfied that it was proven that the accused was under the influence of alcohol at the time he drove the vehicle; the possibility that the conviction of negligent driving and driving under influence of alcohol amounted to a duplication of charges; and whether the court considered a discharge in terms of section 174 of the Criminal Procedure Act, 51 of 1977. It was furthermore not clear whether the accused was convicted of reckless or negligent driving or both.

[3] The accused, who was unrepresented, pleaded not guilty to all three counts. The incident that led to these charges was a hit-and-run accident. A police officer on patrol came upon a scene where an accident allegedly occurred. The police officer, who attended the scene, testified that the victim's friend informed him that his friend was injured by a motor vehicle which did not stop. He further testified that the victim's friend gave him a description and registration of the vehicle which caused the accident. The victim was taken to the hospital. This victim did not testify and neither did his friend.

[4] Another officer testified that, on 15 May 2009; at approximately 16H00 he received a call that an accident occurred. No evidence was led as to the time when or the place where the accident occurred.

[5] According to the police, the accused reported to the charge office. No evidence was led as to the time the accused arrived at the charge office. The accused was interviewed by the police officer who visited the scene and he admitted that he was the driver of the vehicle. The officer observed that the accused was smelling of alcohol and was staggering.

[6] The investigating officer testified that he interviewed the owner of the vehicle who informed him that he saw the accused driving his vehicle and that he did not give the accused the right to drive the vehicle. The owner of the vehicle was not called to testify.

[7] A breathalyzer test was done and it confirmed that the accused had consumed alcohol. The accused was taken to be tested for the blood alcohol level. The result of this test was not available. The investigating officer merely testified that "*… it was just unfortunate that we could not get a blood sample.*" No reason was advanced why it was not possible to get a blood sample. The police officers however testified that the accused was reeking

of alcohol and was staggering when they observed him in the charge-office. No evidence was led as to the time the tests were done.

[8] One of the police officers testified that he observed blood spatters in the charge office and a cut on the accused's head. He concluded that the accused hit his head on the wall because he was drunk and staggering.

[9] The accused testified under oath that his nephew was the owner of the vehicle and that they lived together in one house. He was at home and so was a vehicle fitting the description given by the eyewitness. He went to the charge office on the instructions of the owner. He averred that he was assaulted at the charge office. He denied that he was drunk and furthermore denied that he made the statement admitting that he was the driver. He however did not challenge the witness who made this statement.

[10] The evidence by the police that they were informed by an eye witness that the victim sustained injuries as a result of a hit-and-run accident, was inadmissible hearsay evidence. The same applies to the evidence that they were informed by the owner that the accused was driving his vehicle. This should have been excluded as inadmissible hearsay evidence. Without this evidence there was no evidence that the victim sustained injuries as a result

of a driver who drove recklessly or negligently and that the accused was the driver at the time.

[11] The only evidence which implicated the accused was an admission to the police that he was the driver of the vehicle. This was whilst the accused was, according to the police officer, "*drunk and staggering*". Section 219A of the Criminal Procedure Act 51 of 1977 reads, *inter alia*, as follows:

> (1) *Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that...."*

In *R v MOILOA 1956 (4) SA 824 (A)* the court held that the fact that the appellant was drunk was not a valid objection to the admissibility of the admission but that the court has to determine what weight to attach to the admission. Given the state of the accused as described, very little weight can be attached to this admission. A further aspect which relates to the admissibility of this admission is the fact that the police officer did not testify that he had cautioned the accused according to the judge's rules before putting questions to him. The judicial officer however, not only relied on this admission, but also added that the accused admitted that he drove the vehicle which "*was involved in the accident."* This was not the testimony of the police officer. He merely asked the accused whether it was him who

drove the car to which the accused answered in the affirmative. This admission does not go far enough for the purposes of proving that the accused was the driver of the vehicle at the time the accident occurred.

[12] The cardinal issue was whether the State had succeeded at the close of its case to prove the material elements of the respective offences. Even if the court accepted that the accused admitted that he was the driver of the vehicle and that he was under the influence of intoxicating liquor at the time he was observed in the charge office, the State still had to prove that: the accused was the driver of the vehicle at the time the accident occurred; and that he was under influence of intoxicating liquor or driving with an excess blood alcohol level at the time or within two hours of the commission of the offence. This the State failed to do. In respect of the first count, the failure of the eye witness to testify was fatal as there was no evidence given that the driver of the vehicle was driving recklessly or negligently. An essential element common to all three counts, was that the offences were committed on a public road. There was no evidence placed before the court to this effect at the close of the State's case.

[13] The judicial officer in response conceded that: "*there was not sufficient evidence placed before the court to prove beyond reasonable doubt that it was in fact the accused who had driven the vehicle alleged in*

the charge and consequently that all other charges would obviously fall away."

[14] In *S v NAKALE AND OTHERS 2006 (2) NR 455 (HC*) the Court held that that a court can *mero motu*, and in the case of an unrepresented accused ought to, consider whether to discharge at the end of the State case. It is quite evident that the judicial officer did not consider this aspect at all. This happened because the judicial officer erroneously accepted and relied on hearsay evidence. By doing so the accused was prejudiced to the extent that it cannot be said that he had a fair trial. The accused should have been discharged at the end of the State's case for failure by the State to prove the essential elements of the statutory offences with which he was charged with. I thus find that the procedure was not in accordance with justice.

[15] In the result the conviction and sentence on all three counts are set aside.

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TOMMASI J

I concur

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LIEBENBERG J