NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case No. CA 20/2012

In the matter between:

HEROLD KATJOROKERE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Katjorokere v The State* (CA 20-2012) [2013] NAHCMD 90 (5 April 2013)

Coram: VAN NIEKERK J et UEITELE J
Heard: 23 July 2012
Delivered: 23 July 2012
Reasons: 5 April 2013

Flynote: **Criminal law** – Culpable homicide arising from driving of motor vehicle – Duties of driver turning right and following driver set out.

Criminal procedure – Duplication of convictions – In case where two counts involved – Court should not consolidate counts for purposes of conviction – If sufficient evidence Court should convict on one count and acquit on the other.

REASONS FOR JUDGMENT

VAN NIEKERK J (UEITELE J concurring):

[1] On 23 July 2012 after hearing argument in this appeal, we upheld the appeal against conviction and sentence and made an order that the magistrate's conviction on counts 1 and 2 (consolidated) be substituted with verdicts of not guilty. The reasons for this order now follow.

[2] The appellant was charged in the magistrate's court of Karibib on two charges: (i) culpable homicide arising from the alleged negligent driving of a motor vehicle; and (ii) c/section 80(1) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999), as amended (reckless or negligent driving.) After evidence was led the magistrate was of the view that there was a duplication of charges and the two charges were 'consolidated for purpose of conviction'. The magistrate convicted the appellant of culpable homicide and sentenced him to 36 months imprisonment of which 12 months were suspended for three years on condition that the appellant is not convicted of culpable homicide or a c/sec 80(1) of Act 22 of 1999 committed during the period of suspension.

[3] The appellant, who was represented in the court below by Mr Burger, filed a notice of appeal against the conviction and sentence on the same day. The magistrate granted bail pending the outcome of the appeal. Some time later the magistrate left the employ of the State. She had provided reasons for the conviction, but none for the sentence imposed.

[4] Unfortunately parts of the mechanically recorded proceedings could not be properly transcribed as the recording was indistinct in many instances. However, at our suggestion, the appellant and the respondent agreed before us that the summary of the evidence made by Mr Burger in the Court *a quo* should form the evidential basis for the adjudication of the appeal where the transcribed record, read with the magistrates contemporaneous notes, is lacking.

[5] The particulars of the charge in count 1 are that the appellant unlawfully and negligently killed Michael Muukua, a passenger in the appellant's vehicle, on 3 August 2003 when the appellant tried to overtake another vehicle travelling in the same direction, while the driver of that vehicle had indicated that he intended turning right. In the process the appellants hit the other vehicle on the right rear end, which caused the appellant's vehicle to leave the road and overturn several times during which incident the deceased was killed. The appellant pleaded not guilty to the charges.

[6] The evidence presented indicates that the accident occurred on a straight stretch of road between Karibib and Usakos in the direction of Swakopmund. The appellant was travelling in a Mazda bakkie behind a Toyota Condor driven by Mr Talavera, who testified for the State. At a certain place on the right next to the road there is a spot where travelling motorists may stop their vehicles to have a rest. About 1 kilometre from the resting place there is a sign indicating that the resting place is to the right and the distance to the resting place. At about 100-150 metres from the resting place, there is an exit to the right, leading to a gravel track along which the resting place may be reached. At the time of the accident there was no sign to indicate this exit. The resting place is not on the same level as the road, but much lower. There is a second exit to the right, also leading to the resting place, but this is about 60 metres past the resting place. There is no sign indicating the exit, which is about where the accident occurred. On the road surface there were no barrier lines

indicating that overtaking is forbidden when one travels from Karibib towards Usakos, the direction in which the two vehicles were travelling.

[7] Mr Talavera testified that he normally rests at this resting place, although he usually does when he travels in the opposite direction, i.e. from Swakopmund. On this particular day he already put on the vehicle's indicator about 150 metres before the second exit. When he first looked into the rear view mirror he did not notice any vehicle. Near the exit Mr Talavera was slowing down and braking to turn right. He noticed a sedan vehicle behind him about 30 metres way which was also slowing down. It was not safe for any vehicle from the back to maneuver into the space between the sedan and the Condor. He thought it was safe to turn right. While looking into the rear view mirror and travelling at a slow speed, he saw the appellant's vehicle for the first time while he (Mr Travera) was turning to the right. At this stage the appellant was already overtaking his vehicle. He made the deduction that the appellant was busy overtaking both the sedan and the Condor at the same time and insinuated in evidence that the appellant was travelling at quite a speed. He tried to swerve back to the left lane, but the collision occurred, the Mazda hitting his vehicle on the right side at the passenger door.

[8] Mr Claasen testified that he was travelling at about 120 km per hour when the appellant overtook him. The appellant went back to the left lane. About 200 – 250 metres away Mr Claasen observed a vehicle, which later turned out to be the Condor. He saw that the appellant indicated that he wanted to overtake the Condor. He then observed a lot of dust and when he reached the place where the dust was, he observed that an accident had taken place involving the Condor and the appellant's vehicle. At the scene he observed the right indicator of the Condor flashing. He did not observe the indicator earlier.

[9] These were the only two eye witness accounts for the State.

[10] The appellant testified. The relevant part of his evidence for purposes of the appeal is to the effect that at a distance of about 80 metres from the Condor he indicated that he wanted to overtake by putting on the vehicle's right indicator. About 30 metres from the Condor he observed that it was safe to overtake and went into the right hand lane. At this stage the appellant was driving between 120 and 130 km per hour. As he was about in line with the Condor's right rear wheel, the Condor moved into the right hand lane. The appellant was not aware of any exit at that point. He never saw that the Condor's indicator was flashing. He applied brakes, but collided with the Condor. In the witness box he explained that although he saw that the Condor was driving slower than he was, he did not think that it would be turning to the resting place as there was no sign at that place and because they had already passed the resting place. He denied any negligence on his part.

[11] The appeal is based on several grounds. It is not necessary to deal with all of them. The relevant grounds are that the trial magistrate erred in law and/or in fact –

> "5. In finding that the Appellant drove the vehicle negligently or recklessly and that the evidence of State witness Talavera should be accepted, whereas:
>
> 5.1 the evidence of State witness Talavera was contradicted in a material respect by State witness Claasen insofar as it related to the presence and involvement of a third vehicle and the Appellant overtaking two vehicles at once;
>
> 5.2 There is no corroboration in the evidence of the State witness Claasen for the evidence of Talavera that he had his indicator on well in advance of the accident (whereas Claasen observed the indicator of the Appellant at the time that the Appellant took steps to overtake the vehicle driven by Talavera);
>
> 5.3 The evidence is that there were no road traffic signs, road markings or any other sign or indication that it was unsafe to

overtake the vehicle of Talavera, or any evidence that there were barrier lines or road traffic signs prohibiting overtaking and no other evidence that it was unsafe for the Appellant to overtake the vehicle at that particular place on the road.

6. In accepting the evidence of Talavera and the prosecution as satisfactory in all material respects.

7. In rejecting the Accused's evidence as:

7.1 not being reasonably possibly true;
7.2 false beyond reasonable doubt; and
7.3 inherently untrue."

[12] Mr *Botes*, who appeared on behalf of the appellant, submitted that Mr Talavera's evidence is contradicted in material respects by the other State witness, Mr Claasen. Mr Talavera testified that Mr Claasen's vehicle was following him closely and that the appellant, immediately before the collision attempted to overtake both vehicles, whereas Mr Claasen stated that, after the appellant overtook him, there was about 200-300 metres between the appellant's vehicle and that of Mr Talavera. The magistrate merely mentioned this inconsistency, but did not deal with it further, nor did she indicate which version she accepted and why. She also did not deal with Mr Claasen's evidence that he did not observe Mr Talavera indicating his intention to turn right, (he did see the appellant indicating his intention to overtake), whereas Mr Talavera stated that he already did so 150 metres before the exit. If he did so, there was, in my view, no reason for Mr Claasen not to have noticed it. The trial magistrate only referred to the fact that after the collision occurred, Mr Claasen saw the Condor's indicator was 'still' flashing. This fact alone does not mean that Mr Talavera did give timeous indication of his intention to turn right. The magistrate merely accepted Mr Talavera's version of events without properly analysing the evidence. In my view the magistrate erred in her assessment, such as it is, of the evidence presented by the State.

[13] Mr *Botes* submitted that Mr Talavera did not, before he executed the right hand turn, establish whether it was safe and opportune to do so and that he failed to keep a proper lookout. I agree entirely. From his own version it was clear that when he looked in his rear view mirror just before and while executing the turn, he saw the appellant's vehicle (and Mr Claasen's vehicle, for that matter) for the first time. By then it was already too late. In my view he was negligent.

[14] In this regard the following statement in *Mabaso v Marine & Trade Insurance Co. Ltd* 1963 (3) SA 439 (D) at 440H-441A, although stated in the context of an allegation that the overtaking driver should have hooted, remains apposite:

> 'Anyone who has travelled on modern highways must appreciate that faster cars will seize the opportunity to overtake and pass slower cars when the road is clear ahead and the drivers of slow moving cars have long since learned to expect to be passed without warning in these circumstances. If every fast moving vehicle was obliged to hoot before overtaking the cacophony of sound coming from busy national roads would be so continuous and deafening that the warning given by sounding a hooter in a genuine emergency would be lost in the general din. The passing motorist is entitled to assume that the slower traffic being overtaken will continue in its course on the left of the road, and the hooter should only be used to warn such a driver if he manifests an intention to stray from his proper course. Unless some emergency, making it necessary to give a specific warning arises, the overtaking car should remain mute. In the present case an emergency only arose when the Opel started to move to its right. At that stage a warning hoot could not have prevented an accident.'

[15] In *Keunin, NO v London and Scottish Assurance Corporation Ltd* 1963 (3) SA 609 (N) the Court stated the following (at 612E-G) in regard to the applicable legal principles where one vehicle follows another:

> ‘It seems to me that any change of direction or a reduction of the speed of a vehicle in traffic must disturb the regularity of the flow of that traffic, and, considering first the situation of the leading vehicle, it is consequently essential that the driver of it intending so to change his direction or to reduce his speed should ensure that the condition of the traffic allows this; he must select an opportune moment for doing so and carry out his manoeuvre in a reasonable manner. A signal of his intention is an indication, therefore, that he will carry it out only at an opportune moment and in a reasonable manner. This postulates that he informs himself of the state of the traffic, not only to ensure that he does not inopportunely and unreasonably cross the path of a following vehicle, but also that he does not incommode it by a reduction in the speed of his vehicle which may require the following vehicle suddenly to reduce speed or stop or to change course to right or to left.’

[16] In *R v Miller* 1957 (3) SA 44 (T) Dowling J stated the following in regard to the same situation (at 50A-E):

> ‘……[G]enerally speaking, the motorist may not assume that his signal for a right-hand turn has been observed simply because he has given an adequate signal. In my opinion this is correct in principle. The motorist must make sure that he can execute a right-hand turn without endangering either oncoming or following traffic. Generally speaking he can only do this by properly satisfying himself that such traffic has observed and is responding to his signal, or that it is sufficiently far away or slow-moving not to be endangered …….
> ……..[I]t is in my opinion quite practicable for a motorist by the use of a properly adjusted rear-view mirror to notice whether a following car was close behind and travelling at such a speed that it may be endangered by a right-hand turn and whether it was responding to a signal either by moving to the left or by decelerating, while at the same time keeping a safe look-out in respect of oncoming and other traffic. If this cannot be done in particular circumstances, the turn should not be executed at all. It is a manoeuvre inherently dangerous in its nature unless executed with scrupulous care.’

[17] Ms *Husselman,* who opposed the appeal on behalf of the respondent, submitted that, even if Mr Talavera were negligent, one must not lose sight of the fact that Mr Talavera's guilt or innocence is not at stake in the appeal. In this respect she is, of course, correct. However, the fact that he may or may not have been negligent is relevant, as it has a bearing on his credibility, i.e. does he have reason to give a version favourable to himself while laying the responsibility for the collision and the death of the deceased on the appellant? Furthermore, the fact and degree of Mr Talavera's negligence is relevant in assessing the appellant's negligence, if any, and his degree of blameworthiness.

[18] In considering the seventh ground of appeal I can do no better than quoting from Mr Botes's heads of argument where he stated in support of the submission that the magistrate erred in not finding that the appellant's version is reasonably possibly true (the insertions and omissions are mine):

> '28.1 There were no road traffic signs, nor road marking[s] or any other sign or indication that it was unsafe to overtake the vehicle of Talavera.
>
> 28.2 There were no barrier lines or road traffic signs prohibiting overtaking on that stretch of road.
>
> 28.3 There was no other acceptable evidence that it was unsafe for the appellant to overtake the vehicle of Talavera, at that particular place on the road.
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> 28.4 The collision occurred ……. on an open stretch of road where …. Talavera had a clear view of the road behind him.
>
> 28.5 On the evidence of the appellant, corroborated by the evidence of the State witness, Claasen, appellant, after overtaking Claasen's vehicle, gradually pulled away from Claasen's vehicle and travelled for a distance of approximately 250 to 300 meters behind the vehicle of ….. Talavera.

28.6 Appellant, in approaching the vehicle of …… Talavera, indicated his intention to pass on the right hand side by the use of his indicator and by moving to the right hand lane. In doing so, appellant did everything that any reasonable driver should have done when such a drier intends to overtake a slower moving vehicle on our national roads.

28.7 The sole cause of the collision was the failure of …. Talavera to keep a proper lookout for oncoming traffic and/or passing traffic before he executed a right hand turn at, to say the least, an inopportune moment. If ….. Talavera …had exercised his duty of care, he would have noticed the approaching vehicle of the appellant, would have notice the right hand side indicator of the said vehicle and would have refrained from turning right into the path of appellant's vehicle.'

[19] Ms *Husselman* submitted that the appellant should at least have slowed down behind Mr Talavera's vehicle and first have attempted to ascertain why the vehicle was travelling slowly and what its intentions are. In this regard the *Keuning* case, *supra,* states (at 613F-G) [the insertions and omissions are mine]:

> 'In relation to the following vehicle, *Premier Milling Co. Ltd v Bezuidenhout* [1954 (4) SA 625 (T)] ……. states that the duty of the driver of it is to pay regard to the signals or indications that the leading vehicle is about to turn; this clearly postulates that he must keep a look-out in the expectation of the possibility of such a signal or indication being made or given; failure in these duties is negligence on his part, as is also the act of overtaking the leading vehicle in unreasonable disregard of the fact that its driver has shown that he is about to turn, as he is entitled to do, subject to the safeguards I have stated.'

[20] The safeguards to which the learned judge refers at the end of the quotation are those quoted in paras. [15] and [16] *supra* in relation to a driver intending to turn right.

[21] Bearing the duties of the following driver in mind, it is my view that the only way in which Mr Talavera could have indicated his intention, was by putting on the right indicator or using a hand sign. On the version of the appellant and Mr Claasen there is doubt that he did so until perhaps the very last moment when it was too late. The appellant said that they had already passed the resting place and there was no indication that there was a road exiting and leading towards the resting place at that part of the road. He did not think that the Condor was about to turn right. Taking all the facts into consideration, his version is reasonably possibly true. On his version he acted reasonably in the circumstances.

[22] The result is, then, that the appeal against the conviction should be upheld on the basis of the grounds set out in paragraph 5 of the notice of appeal.

[23] If the State had proved its case, there would have been a duplication of convictions. The magistrate should then not have 'consolidated' the two counts as she did, but have convicted the appellant on count 1 and acquitted him on count 2 to avoid a duplication of convictions. It is therefore not sufficient to merely set aside the conviction, but the Court should make an appropriate order in respect of count 2 as well.

[24] In the result we made the following order:

1. The appeal against conviction and sentence succeeds.
2. The magistrate's conviction on count 1 and 2 (consolidated) is substituted with verdicts of not guilty on count 1 and count 2.

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K van Niekerk

Judge

I agree.

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S F I Ueitele

Judge

APPEARANCE

For the appellant: Adv L C Botes

Instr. by Kinghorn Associates

For the respondent: Ms I O Husselmann

Office of the Prosecutor-General