



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

CR No: 46 /2021

In the matter between:

THE STATE

and

CELLESTINUS MUKUVE

HIGH COURT MAIN DIVISION REVIEW CASE NO 863 /2021

Neutral citation: *S v Mukuve* (CR 46 /2021) [2021] NAHCMD 257 (27 May 2021)

Coram: LIEBENBERG J, et JANUARY J

Delivered: 27 May 2021

Flynote: Criminal Procedure – Criminal Review – Section 304 (2) (a) of the CPA – Adjudicating a matter for review without reasons from the magistrate –

Culpable homicide – Motor vehicle accident – Circumstantial evidence – Hearsay evidence – Magistrate erred in law – Conviction and sentence set aside.

Law of Evidence – Circumstantial evidence – In reasoning by inference there are two cardinal rules of logic which cannot be ignored – Firstly, that the inference sought to be drawn must be consistent with all the proven facts – If it is not, the inference cannot be drawn – Secondly, that the proven facts should be such that they exclude every reasonable inference save from the one sought to be drawn – If they do not exclude other reasonable inferences there must be doubt whether the inference sought to be drawn is correct.

Law of evidence – Hearsay evidence – Found inadmissible – Conviction and sentence set aside.

Summary: The accused appeared in the magistrate's court for the district of Rundu where he pleaded guilty to a charge of operating a motor vehicle without a driver's license, and failure to render assistance to an injured person, which was later changed to a not guilty plea in terms of section 113 of the CPA. He pleaded not guilty to a charge of culpable homicide and the matter proceeded to trial. The state called two witnesses who are police officers. Their testimony is that they received a call to attend to a scene where a dead person was discovered. They found the deceased lying in the road; they took the body and transported it to a mortuary. A report was made to them by a person who claimed to have seen a Toyota Hilux vehicle with the lights switched off, speeding from the same vicinity. A Toyota Hilux was later found stuck in a hole, unlocked with a cellular phone inside. This led to the arrest of the accused.

The testimony of the accused is that on that day he drove the vehicle without the lights on because there was an issue with the alternator, which affected the car battery. He abandoned the vehicle after it got stuck because he was afraid the police might issue him a ticket for operating a vehicle that is not roadworthy, its license disc having expired. He denied having collided with a person that evening. The trial court relied upon hearsay and circumstantial evidence to conclude that the accused, through the negligent manner in which he operated the vehicle with

the lights off, caused the death of the deceased. On review, the Court noted that the identity of the deceased and the cause of death were not proved.

Held that, the hearsay evidence relied upon by the trial court to convict the accused on culpable homicide and the reasoning by inference by the trial court does not satisfy the two cardinal rules of logic established through case law.

Held further, the inference of the trial court is not consistent with the proven facts as there are several other reasonable inferences that can be drawn from the proved facts.

Held further, the conviction on a charge of culpable homicide was unjustified and not in accordance with justice.

Held further, whereas the charge of culpable homicide had not been proved, the charge of failure to render assistance to an injured person equally had not been proved.

ORDER

- a) The conviction and sentence on counts 1 and 3 are set aside.
 - b) The conviction and sentence on count 2 are confirmed.
-

REVIEW JUDGMENT

LIEBENBERG J, (JANUARY J concurring):

Background

[1] This is a review matter which came before me in terms of section 302 (1) and section 303 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2]

[3] This is an instance where I deem it necessary to invoke the powers vested in me by virtue of the *proviso* under section 304 (2) (a) of the CPA which allows a judge not to first obtain a statement from the judicial officer who presided at the trial in circumstances where it is obvious that the conviction is clearly not in accordance with justice and that the person convicted will be prejudiced if the record of the proceedings is not forthwith placed before this court for consideration.

[4] The accused in this instance is likely to be prejudiced if reasons are first requested from the magistrate before the proceedings are reviewed. Hence, reasons from the learned magistrate in terms of section 304 (2) (a) of the CPA are dispensed with.

[5] The accused appeared in the magistrate's court for the district of Rundu where he faced the following charges: Count 1 – Culpable Homicide (Motor vehicle accident); Count 2 – Operating a Motor vehicle without a driver's license; and Count 3 – Failure to render assistance to an injured person, the latter counts in contravention of the relevant provisions of the Road Traffic and Transportation Act 22 of 1999.

[6] The accused pleaded not guilty to the charge of culpable homicide but pleaded guilty to the charge of operating a motor vehicle without a drivers' license and failure to render assistance to an injured person. After questioning, his plea of guilty on the charge of failure to render assistance to an injured person was changed to that of not guilty in terms of section 113 of the CPA. The matter proceeded to trial and he was found guilty on all three counts. He was consequently sentenced as follows:

Count 1 – N\$ 10 000 or 3 years' imprisonment.

Count 2 – N\$ 2000 or 6 months' imprisonment.

Count 3 – N\$ 8000 or 2 years' imprisonment.

[7] This review judgment is concerned with the convictions on counts 1 and 3 as regards those offences the state had to prove against the accused i.e. culpable homicide and failure to render assistance to an injured person. Hence, the evidence considered by the trial court will be reviewed herein below.

Evidence considered by the trial court

[8] In disclosing the basis of his defence, the accused stated that he was not aware of him having committed the offence of culpable homicide. The state only called two police officers who attended to the scene where the deceased was found.

[9] Sergeant Matale testified that on 7 December 2018 he was on standby duty with Sergeant Kapena and whilst driving from Kashipe border post to Ndiyona Police station, they decided to stop their vehicle by the road side at Hoha village for the driver to speak on the phone. It was around 21:15. They saw an approaching vehicle with its lights switched off which turned off, driving in a southerly direction. Four minutes later Sergeant Kapena received a phone call from a certain Mr. David at Kafe village, reporting that he saw a vehicle being driven in darkness which bumped a person.

[10] They then drove to Ndiyona police station to pick up Sergeant Sikuvi and proceeded to the scene. They found people gathered at the scene and the deceased's body was lying in the middle of the road. They transported the deceased's body to Nyangana mortuary where he was pronounced dead by a doctor upon arrival.

[11] They returned to the scene at Hoha village where they saw the vehicle being driven off-road with its head lights off. Although the witness in his main evidence said they followed the tracks of the vehicle up to where they found it stuck in a hole at Katere village and abandoned, it emerged during the court's questioning that they in fact did *not* track the vehicle up to Katere village. Sergeant Sikuvi discovered a cellphone in the vehicle. He described the vehicle to be a blue

Toyota Hilux with registration number W 8969 RU, which they then inspected and found it not to be road worthy because its license disc had expired.

[12] In cross-examination, the accused put it to the witness that he decided to drive off road when he saw the yellow vehicle because he had no driver's license and he decided to keep the lights of the vehicle off because there was an issue with the battery.

[13] Sergeant Cosman is attached to the Criminal Investigation Department at Ndiyona Police Station. He was on standby duty on 7 October 2018¹ when he received a call from Sergeant Matare informing him that an accident at Katere village was reported. He was picked up by Sergeants Matale and Kapena and they proceeded to the scene of the reported incident where they found the body of the person 'bumped'.

[14] Whilst at the scene they were informed by a certain Mr. Shinimbo that he saw a blue Toyota Hilux driving at high speed with its head lights off. People informed them that they heard a 'sound' but found the vehicle gone. Upon learning of the whereabouts of the suspect vehicle, he went there. Upon arrival at the said vehicle he observed that it is a Toyota Hilux. He inspected the vehicle and did not find any damage or indentation on the vehicle. Thereafter, they took the body of the deceased to the hospital. He testified that people who arrived at the scene followed the tracks of the vehicle from the scene to where the stuck vehicle was found, but he could not do so because many other vehicles since passed.

[15] His testimony continues that later Sergeant Kapena (now deceased) called and informed him that he knows the driver of the vehicle they found. This led them to meeting the accused person the next morning. They asked him about the incident. He told them that he does not remember having bumped a person that night. He was then arrested. The witness elaborated on why he believes it was the accused who hit the deceased with his vehicle. This aspect of his evidence has no evidential value and amounts to nothing more than the witness's personal opinion, not based on facts. He further informed the court that they did

¹ The date testified to by this witness is clearly wrong and should be 7 December 2018.

not take pictures of the tracks of the vehicle at the scene and where the stuck vehicle was found. In cross-examination, the witness informed the court that there is more than one road leading to the scene.

[16] The accused testified in his defence and although he admits having driven past Katere village on his way to Hoha village, he denied having collided with a pedestrian on the way. In cross-examination he informed the court that he was the driver of the said Toyota Hilux and explained that the lights were off because the alternator was damaged. The car was not roadworthy because the license disc expired. He informed the court that he abandoned the vehicle unlocked with his cellphone inside because it was stuck in a hole and he feared being issued with a traffic fine ticket by the police.

Findings of the trial court

[17] The learned magistrate found that the evidence before court is hearsay and circumstantial evidence. In considering the circumstantial evidence the court applied the two cardinal rules of logic as established in *R v Blom*.²

[18] After having considered the hearsay evidence and the circumstantial evidence as presented by the state, the learned magistrate found that the only inference to be drawn from the proven facts is that the accused bumped the deceased. The accused did not see it happening as the lights of his vehicle were off. The trial court found that the accused drove the vehicle on a public road in a negligent manner by failing to switch on the lights. The court through inferential reasoning concluded that he bumped the deceased while he was driving in darkness, which a reasonable person would not have done. The court was further satisfied that the victim was 'a living being' before he was bumped and noted that although no death certificate was produced, there was evidence that the deceased was 'a living being' pronounced dead upon arrival at the hospital. Lastly, the learned magistrate concluded that the cumulative evidence and inferences drawn are consistent with the proven facts i.e. that he drove the vehicle in a negligent

² *R v Blom* 1939 AD 188 at 202-203.

manner which caused the death of Ndumba Kanyengo by bumping him with a vehicle, while driving in darkness.

Evaluation of evidence on review

[19] The evidence placed before the trial court by the two police officers is hearsay as correctly found by the magistrate in so far as it relates to reports made to the witnesses by members of the public and which reports implicate the accused. The two police officers who testified only came to the scene after the report was received about the dead person discovered. They could not testify on behalf of the people they mentioned who told them that they saw the vehicle within the vicinity of the alleged incident or heard the bumping sound.

[20] Regarding the admissibility of hearsay evidence, the Supreme Court in *Munuma and Others v S*³ recited with approval principles from sources as follows:

[73] According to *Phipson on Evidence* (1982) 16-02: "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted." (See also *Cross on Evidence* 6 ed (1985) 38.)

[74] As was stated by Watermeyer JA in *R v Miller & another* 1939 AD 106 at 119: "Statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (ie as evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends upon the credit of the asserter which can be tested only by his appearance in the witness box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if what they are tendered to prove is relevant to the inquiry." (Also see *S v Brumpton* 1976 (3) SA 236 (T); *S v De Conceicao & another* 1978 (4) SA 186 (T).)

[21] Taking into consideration the principles recited above, the police officers in the present matter presented evidence of statements made by 'people' and a certain Mr Shinimbo who were not called as witnesses for the state. The truth of

³ *Munuma and Others v S* (SA-2010/10) [2013] NASC 10 (15 July 2013).

the content of these reports and the veracity of the observations said to have been made by these persons were not testified to by the persons themselves; neither could it be tested by way of cross-examination. Such evidence is therefore inadmissible because it is evident that those statements were tendered for their testimonial value. That evidence being inadmissible, there is no other evidence remaining before court to prove that the Toyota Hilux vehicle driven by the accused was involved in an accident at the scene which caused the death of the deceased, as alleged.

[22] The evidence before court is circumstantial. In *R v Blom (supra)* it was held that in reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn; (2) The proved facts should be such that they exclude every (other) reasonable inference, save from the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.

[23] The learned magistrate found that the only inference that could be drawn from the proven facts is that the accused, through the negligent manner in which he operated his vehicle, caused the death of Ndumba Kanyengo when hitting him with his vehicle. This conclusion was reached despite the fact that no death certificate or postmortem report was produced in evidence to confirm the identity of the deceased and the alleged cause of death. Neither did anyone present evidence in that regard, making the conclusion by the trial court on the cause of death to be inconsistent with the proven facts.

[24] The evidence of the two police officers is that they collected the body from the scene and took it to Nyangana mortuary where, upon arrival, the deceased was pronounced dead by a medical doctor. There is no description of the injuries sustained by the deceased placed before court. The name of the deceased is only mentioned in the charge and the identity of the body had not been established. For all intents and purposes, the person alleged to have died may still be alive. Therefore, the conclusion by the trial court that the death of Ndumba Kanyengo was caused by the negligent operating of a motor vehicle by the accused is not

consistent with the proven facts. Consequently, the inferential reasoning by the trial court is flawed; failing the first cardinal rule of logic for reason that the inference drawn, is not consistent with the proven facts.

[25] The second rule of logic is that the proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. In the absence of evidence to prove the identity of the deceased and the cause of death, as well as the absence of credible and admissible evidence linking the accused's vehicle to the killing of the deceased, there are several other inferences that could be drawn from the established facts. For example, the deceased may have died of natural causes and by coincidence was found in the road. He may have been murdered and his body placed on the road to stage an accident. If one would accept that the accused drove on the said road at the relevant time, it may be by coincidence that he passed by shortly before the body was discovered. In view of these possibilities that should create doubt in the mind of the trier of fact, the findings of the magistrate have equally failed the second cardinal rule of logic in reasoning by inference.

Conclusion

[26] In light of the foregoing, the learned magistrate erred by finding that the only inference that can be drawn from the proven facts is that the accused negligently caused the death of the deceased. This finding was made in the absence of credible evidence linking the accused or his driving to the death of the deceased. Whereas the state failed to furnish proof beyond reasonable doubt, the conviction of the accused on culpable homicide was unjustified and not in accordance with justice. Consequentially, it will be set aside.

[27] In the circumstances where the conviction on a charge of culpable homicide is not justified, the conviction on the charge of failure to render assistance to an injured person (the deceased) is equally unjustified where the accused cannot be linked to the alleged accident.

[28] In the result, it is ordered:

- (a) The conviction and sentence on counts 1 and 3 are set aside.
- (b) The conviction and sentence on count 2 are confirmed.

JC LIEBENBERG
JUDGE

HC JANUARY
JUDGE