

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no.: HC-MD-CRI-APP-CAL-2022/00102

In the matter between:

DARRYL BUSSEL

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Bussel v S* (HC-MD-CRI-APP-CAL-2022/00102) [2023] NAHCMD 468 (4 August 2023)

Coram: SHIVUTE J *et* CHRISTIAAN AJ

Heard: 23 June 2023

Delivered: 4 August 2023

Flynote: Criminal Law – Culpable homicide – Motor vehicle accident – Appellant appealing against conviction and sentence – Appellant’s motor vehicle hitting deceased who was seated against a wall outside a place of entertainment – Appellant contending he was not negligent – Appellant claiming sudden emergency – Test for negligence –

Whether a reasonable person in the same circumstances would have foreseen the possibility that another's death may result from his conduct – Whether the reasonable person would have taken steps to guard against such a possibility – Whether the person's conduct deviated from what the reasonable person would have done in the circumstances – Appellant's motor vehicle exhibiting faulty brakes twice – Appellant proceeding to a place where incident took place – Sudden emergency not applicable – Appellant negligent. Appellant contending – Sentence inappropriate – Induces sense of shock – Court a quo allegedly overemphasised seriousness of crime – Appellate court finding no misdirection on part of court a quo.

Summary: The appellant was convicted of, among others, culpable homicide. His motor vehicle hit the deceased who was seated against the wall outside an entertainment place. The appellant's defence is that he was not negligent and claimed sudden emergency. The test for negligence is objective and the court should consider the following: (a) whether a reasonable person in the same circumstances would have foreseen the possibility that another's death may result from his conduct; (b) whether the reasonable person would have taken steps to guard against such possibility; and (c) whether the appellant's conduct deviated from what a reasonable person would have done in the circumstances. In the present matter, before the appellant went to the place of the incident and bumped the deceased with his vehicle, he noticed on two occasions that the brakes of the vehicle he was driving were not working normally as they were low on fluids. The appellant failed to exercise due diligence and was negligent by proceeding to the place of the incident. This warning negates the proposition that the appellant was met with a sudden emergency. Therefore, the court a quo did not misdirect itself by convicting the appellant and the appeal against conviction is dismissed.

With regard to the appeal against sentence, this court finds that the sentence of three years' imprisonment imposed does not induce a sense of shock and is not startlingly inappropriate. The court a quo appreciated the personal circumstances of the appellant and did not overemphasise the seriousness of the offence, considering that the

deceased lost his precious life. Therefore, there was no misdirection on the part of the learned magistrate. It follows that the appeal against sentence is also to be dismissed.

ORDER

- (1) The appeal against conviction and sentence is dismissed.
- (2) In terms of s 50(1)(a)(i) of the Road Traffic and Transport Act 22 of 1999, the appellant's licence is suspended for a period of six (6) months. The appellant to hand over his licence to the clerk of court Rehoboth Magistrate's Court on 9 August 2023. However, the suspension and the endorsement of the licence will take effect once the appellant has completed serving his sentence.
- (3) The appellant's bail is cancelled and he is to report himself at Rehoboth Magistrate's Court on 9 August 2023 at 09h00 for the court a quo to issue a warrant for committal. Failure by the appellant to report himself to the said court, will result in the issuance of a warrant of arrest by that court.

APPEAL JUDGMENT

SHIVUTE J (CHRISTIAAN AJ concurring):

Introduction

[1] The appellant, an assistant auto-mechanic, was convicted in the Magistrate's Court sitting at Rehoboth on one count of culpable homicide, one count of failing to ascertain injuries sustained in terms of ss 78(1)(b) read with s 1, 86 and 89 of the Road Traffic and Transport Act 22 of 1999 ('the Act'), and one count of failing to report an accident contravening s 78(1)(f) of the same Act. The appellant pleaded not guilty to these charges, and in the end, he was convicted on all counts. Aggrieved by the

conviction and sentencing on the charge of culpable homicide, he appealed to this court.

Grounds of appeal

[2] The appellant appeals against his conviction and sentence on the following grounds:

'Ad conviction

1. That the learned Magistrate erred and/ or misdirected herself by stating that the driver of the vehicle was considered to have a weapon (the vehicle) with so much force and power compared to the helpless deceased on the road and that it did not matter whether the deceased was killed on or off the road because the appellant failed to keep a proper look-out in order to avoid a collision with the deceased, while the facts are that the accident was caused by a mechanical failure.
2. That the learned Magistrate erred in law and or in fact by finding that because the deceased was bumped against the wall of a house means the appellant was negligent because he should have seen the people sitting against the wall and stopped his vehicle, while the evidence indicate that the people were seated in front of a stationery (parked) vehicle and when appellant saw them and attempted to stop, the brakes of the car failed.
3. That the learned Magistrate further erred and or misdirected herself by finding that appellant testified that he saw three people in front of the vehicle but that he failed to exercise due diligence, while the evidence is that the appellant did not see the three people but when he saw them after he turned the vehicle to park and wanted to stop the vehicle's brakes failed.
4. That the learned Magistrate erred and or misdirected herself by finding that appellant was aware of the temporary brake failure to the vehicle but continued to drive a defective car in public while appellant testified that he detected that there might be something wrong with brakes as it was slightly low.

5. That the learned Magistrate erred in law or fact by finding that because appellant did not drive home straight after he detected the brakes were slightly low he ought to have foreseen, according to the reasonable man test that the car would be a risk to himself and others and that he acted negligently by driving the car with a brake failure which eventually led to the loss of life of the deceased which finding is not in accordance with the evidence adduced in court.
6. That the learned Magistrate erred in law or fact by finding that the discrepancies in the evidence of the two State witnesses were not detrimental to the State's case, while it was indeed material in determining what position and where the three people were to determine their possible visibility from the street.
7. The learned Magistrate erred in law and or fact by finding that although intention cannot be proved there was gross negligence involved, while the evidence shows that it was difficult, if not outright impossible, for appellant to have foreseen that three people would be sitting next to a boundary wall behind another vehicle next to which he would have wanted to park and that when he applied brakes to stop the brakes completely failed, the foreseeability of all these factors being present at once and the opportunity to take steps timeously to prevent the accident from happening.'

'Ad Sentence:

1. That the learned Magistrate erred and or misdirected herself by imposing a sentence of 3 years direct imprisonment, on a first offender on a charge of culpable homicide involving negligent driving, which sentence is inappropriate and induces a sense of shock.
2. That the learned Magistrate erred in law or fact by ignoring, alternatively placing too little weight on the personal circumstances of the appellant, while overemphasising the seriousness of the offence.

3. That the learned Magistrate erred and or misdirected herself by not properly considering the obvious facts and circumstances of this case in order to come to a just and proper conclusion when considering a suitable sentence.
4. That the learned Magistrate erred and or misdirected herself in law and or fact by not even considering the imposition of a fine on appellant as a gainfully employed first offender as was done in other matters of a similar nature and as advised in previous High Court judgments involving negligent driving.'

Factual background of the case

[3] Regarding the culpable homicide charge, the State called two eye witnesses. Both witnesses testified that on the day of the incident, they, together with the deceased, were outside an entertainment place called Zion between 10h30 and 11h30. They were waiting for the place to open so that they could buy some drinks.

[4] The two witnesses further testified that they were seated against a wall, next to where cars normally parked parallel to the side of the road, when a vehicle, a Nissan van driven by the appellant, came driving into the parking area towards them. The vehicle turned from the road to its left side, passing next to a vehicle that was parked parallel to the road. The vehicle driven by the appellant went in straight, but did not stop.

[5] The witnesses further testified that the deceased was seated when the appellant's vehicle drove towards them and the time they saw that the vehicle was not stopping, they jumped out of the way to not get hit, but the deceased remained seated. Both witnesses testified that the distance between the cars and the wall was about one meter.

[6] The first State witness initially testified that the vehicle was driven by the appellant 'fast and roughly', however later conceded that the car did not move fast. The second State witness testified that the car moved slowly. Both State witnesses, in the end, testified that when they realised the vehicle was not stopping, the distance was too

short for the deceased to have an opportunity to jump out of the way. Furthermore, the second State witness testified that apart from not stopping the vehicle, the appellant did not attempt to swerve away to avoid bumping the deceased.

[7] The appellant pleaded not guilty and explained that he experienced a sudden emergency caused by a mechanical failure, and therefore, did not act negligently in the circumstances.

[8] In essence, the appellant's version of events did not differ materially from that of the two State witnesses. He testified that he had driven the vehicle from the farm on the day of the incident. He was driving on the gravel road and eventually got onto the B1 road in Rehoboth and when he got into Rehoboth and on his way to the place of the incident, ('Zion') he noticed a change in the braking system of the vehicle at a four - way stop and again near Hummers Property. The braking system was low in fluid and not normal.

[9] He further testified that he proceeded to Zion, an entertainment place. When the appellant arrived at Zion, he intended to park the vehicle next to another vehicle. He passed this vehicle which at the time, obstructed his view to the extent that he did not see the deceased and other people seated against the wall proximate to where he intended to park.

[10] The appellant further testified that when he turned to park, he noticed the people sitting close to the wall, he applied his brakes twice to avoid bumping them, but his brakes failed, and the vehicle did not stop. He observed that two out of the three men jumped up and one remained seated. The next thing he reversed and observed that the man who was seated by the wall was now lying next to it.

[11] He also testified that he did not do anything else other than stopping the vehicle by applying the brakes and that there was a time span of about two to three seconds from the time that he noticed the three people seated by the wall and him trying to stop

the vehicle. During cross examination, he testified that he did not pull the handbrake, which is a mechanism intended to bring a vehicle to an immediate halt, because by the time he attempted to apply the handbrake, it was too late. He further testified that seeing the person lying against the wall left him shocked, and he drove away from the scene immediately.

[12] The defence called a second witness, who testified that he had 26 years' experience as an auto-mechanic. He further testified that the appellant's parents requested him to inspect the brake system of the vehicle driven by the appellant after the incident took place, which he did.

[13] This witness further testified that upon inspection, he observed that one of the brake pipes had a hole from where the vehicle leaked brake fluid, which caused the brakes to fail. He also testified that when brake fluid is low, the brakes can still function. However, if one brakes hard and suddenly, the pedal will go through and the vehicle will not stop. Regarding the application of the handbrake, the witness testified that it could take a few meters because the vehicle does not rely on the handbrake.

Arguments by counsel

[14] The appellant's counsel argued that it was a serious misdirection on the part of the court to hold that the vehicle was a dangerous weapon, and that the court should keep in mind that the appellant was parking, and therefore, was moving at a slow pace.

[15] Counsel further argued that the appellant did what a reasonable person in his position at the time would have done, and which was the only thing the appellant could do, namely, applying the brakes of the vehicle. However, the brakes were defective, and in that very moment, the brakes of the vehicle failed. Counsel further argued that the distance between the vehicle and the deceased was very short, one meter. Therefore, there was nothing much the appellant could do apart from pressing the brakes and pulling the handbrake.

[16] Counsel again argued that the expert witness testified that the car would still move forward when the handbrake is applied and would not stop immediately. Counsel for the appellant asserted that the deceased, like the other two persons he was with, should have jumped out of the way of the vehicle when he saw that the vehicle was headed towards them without stopping. Counsel argued that it was an overall dangerous situation created by the deceased, in failing to move out of the way coupled with the failure of the brakes. Counsel concluded that what happened was a pure accident and there was no gross negligence on the part of the appellant. Hence, warranting success of the appeal against conviction.

[17] As regards the appeal against sentence, counsel for the appellant argued that a direct imprisonment without the option of a fine was harsh and disproportionate to the offence. The appellant, according to counsel, was at best negligent, not grossly negligent, although, this point remains disputed. As a first-time offender, a suspended term of imprisonment coupled with a fine would be most appropriate, so counsel submitted.

[18] Counsel for the appellant prays for the conviction to be set aside, alternatively, that if the conviction is confirmed by this court, that the sentence be replaced with a wholly suspended sentence, coupled with an appropriate fine.

[19] On the other hand, regarding the court a quo's finding that the driver of the vehicle was considered to have a weapon (vehicle) with so much force and power, counsel for the respondent argued that this was stated in the context of the position of the deceased. The court a quo meant that, it did not matter where the deceased was positioned, be it on the road or off the road, the vehicle would and can still have lethal consequences on the deceased or any other person.

[20] Counsel further argued that the appellant's argument of a person sitting where they should not, does not entitle the driver to run over such person and that negligence

cannot be apportioned to the deceased, because it was the driver's duty to keep a proper look-out. Counsel for the respondent further argued that concerning the appellant's assertion of contributory negligence, in that the deceased is partly to blame for the incident, it still did not absolve the appellant's negligence. It was argued that if the appellant kept a proper look-out, he would have seen the deceased, and the appellant's assertion that he saw the deceased only while one meter away from him also further points to negligence.

[21] Counsel again argued that before the appellant struck the deceased with the vehicle, he became aware and noticed on two occasions that the brakes were low on fluid and therefore not normal, but he continued to drive the vehicle, which he should not have done. His conduct in this regard, counsel for the respondent argued, amounted to negligence.

[22] Regarding the sentence, counsel for the respondent submitted that even the cases cited by the appellant make provision for direct imprisonment upon a conviction of culpable homicide, on an average of three years, and therefore, there was no misdirection by the court a quo, as the sentence is not harsh.

[23] The court had the parties address it on the mandatory cancelling of the appellant's driver's licence, should the conviction be confirmed, which issue was not dealt with by the court a quo. Counsel for the appellant confirmed that the appellant's licence had not been suspended or cancelled. However, if the conviction is confirmed, the cancellation of the licence for a period of not less than three months is mandatory.

The applicable law

[24] In considering an appeal against conviction, the court must be satisfied that there was a misdirection on the facts or the law on the part of the court a quo in arriving at its decision.

[25] Culpable homicide is the unlawful, negligent causing of the death of another human being.¹ The test for negligence is objective. In determining negligence, the court asks itself; (a) whether a reasonable person in the same circumstances would have foreseen the possibility that another's death may result from his conduct, (b) whether the reasonable person would have taken steps to guard against such a possibility, and (c) whether the person's conduct deviated from what the reasonable person would have done in the circumstances.²

[26] Regarding culpable homicide as a result of negligent driving, negligent driving may be defined as the failure to exercise reasonable care in the driving of the motor vehicle³ and ' . . . as proof of the circumstances of which the driver was or should have been aware, ie his state of mind at the time of the occurrence is essential to the guilt of reckless or negligent driving . . . '⁴ This court endorses these principles.

[27] On the first ground of appeal against conviction, the court finds that the court a quo's reference to a motor vehicle as a 'weapon' did not lead to its finding of negligence, but instead, emphasised the reason as to why drivers have a duty to keep a proper look-out. The court agrees that handling the vehicle without keeping a proper look-out may result in lethal consequences because of the power a vehicle holds. In that context, a vehicle can indeed be a lethal weapon if not handled with due care.

[28] As regards grounds two and three, the appellant's assertion that he saw the three persons seated only while he was manoeuvring into the parking area and therefore saw them at a short distance and could not stop the vehicle, shows that the appellant did not keep a proper look-out. If he had, he would have noticed the persons seated before deciding to park in the area the person was seated. The appellant's testimony was that his view was obstructed. Therefore, he was required to act with more diligence in parking in a space which he did not have clear sight of. This court thus

¹ CR Snyman. 2008. *Criminal Law*. Fifth ed. Durban: LexisNexis, at 451.

² *Ibid*, at 452:

³ W E Cooper. 1982. *Motor Law*. Vol. 1. Cape Town: Juta & Co Ltd, at 515.

⁴ *Ibid*, at 516:

finds that there was no misdirection on the part of the court a quo when it found that the appellant failed to keep a proper look-out.

The defence of sudden emergency/mechanical failure

[29] The doctrine of sudden emergency postulates that a driver who finds himself in a position of imminent danger cannot be held guilty of negligence merely because, in that emergency, he does not act in the best way to avoid the danger.⁵ However, not every unexpected occurrence constitutes a sudden emergency, nor is every act committed in a critical situation necessarily excusable. The doctrine should not be pushed too far. At all times, the driver is required to take reasonable care and use reasonable skills. An example of sudden emergency is a sudden unexpected mechanical failure.⁶

[30] Where a collision was due solely to a sudden unexpected mechanical defect, like a sudden failure of the brakes, such occurrence may exculpate a driver from criminal liability, because a reasonably prudent driver is not required to anticipate that his vehicle's brakes might fail at any moment without warning.⁷

[31] Although there is no onus on an accused to establish a defence of an unexpected mechanical defect, a fanciful, speculative or hypothetical suggestion of how a collision could have occurred (otherwise than by negligence) will not be sufficient to induce a court to refrain from drawing an inference of negligence where the facts warrant such an inference.⁸

⁵ W E Cooper. 1982. *Motor Law*. Vol. 1. Cape Town: Juta & Co Ltd, at 521.

⁶ Ibid.

⁷ Ibid, at 524.

⁸ Ibid.

[32] Grounds four and five challenge the court a quo's findings that the appellant became aware that the brakes of the vehicle were exhibiting faultiness, but proceeded to drive the vehicle to the place where the incident took place, and was on this basis, negligent for proceeding to drive to an area that he is aware people frequented. The appellant himself admitted that he:

- (a) was aware that people frequented the place where the incident occurred;
- (b) noticed on two occasions on his way to the place where the incident occurred that the brakes were low on fluids, and therefore not normal, and
- (c) was an assistant mechanic at the time of the incident.

[33] In light of the appellant's own testimony, it is evident that he did not exercise due diligence and was negligent in proceeding to drive a vehicle that was experiencing a mechanical defect. The appellant must have known that the brakes were not acting normally as they were low on fluid is a warning that the brakes were not reliable. This warning negates the proposition that the appellant was met with a sudden emergency when the brakes completely failed him. It is on this basis that the court finds that the court a quo did not misdirect itself when it found that the appellant was negligent in continuing to drive a vehicle while being aware that the vehicle he was driving warned him that there was something wrong with the brakes.

[34] With regard to ground six, counsel for the appellant, in the court a quo, challenged a photo plan stating that the initial one showed that the deceased was in the road. The testimonies of the two State eye witnesses as well as that of the appellant was that the deceased, together with the eye witnesses, were seated in front of the wall near a parked car, in the parking space that the appellant drove into. Counsel's argument therefore has no merit. Such 'discrepancy' of the order in which the deceased and the two eye witnesses sat is immaterial. Had the appellant kept a proper look-out,

he would have noticed before he manoeuvred for parking that the parking area he intended to use was not clear of people, no matter who sat in the middle, left or right.

[35] The last ground is flawed in that it seems that counsel for the appellant is suggesting that drivers may assume that a parking area is clear of obstacles or humans. This goes against the driver's legal duty to always keep a proper look-out on the road and when parking. The driver ought to be aware of his surroundings, including the parking space, he wants to take up. He was under a duty to exercise due diligence before driving into a parking area where his view was obstructed.

[36] Additionally, the appellant's experience of the defects on the brakes on two occasions on his way to Zion should have made him act even more careful to avoid injuring himself, other road users and others' property.

[37] These factors a reasonable person acting carefully would have foreseen. Therefore, all these factors occurring at once do not create a sudden emergency, one that would not be anticipated by the reasonable person. For the above reasons, this court finds no misdirection on the part of the court a quo.

Sentence

[38] Finally, regarding the appeal against sentence, criticisms were levelled against the court a quo that it overemphasised the crime at the expense of the personal circumstances of the appellant and that it failed to take into account the obvious facts and circumstances of this case in order to come to a just and proper conclusion when considering a suitable sentence. Counsel further argued that the sentence of three years direct imprisonment on a first offender is inappropriate and induces a sense of shock.

[39] In *S v Tjiho* 1991 NR 361 (HC), in the headnotes, it was held that a court of appeal will only interfere with the sentence of the trial court were:

- '(i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentencing process;
- (iii) the trial court failed to take into account material facts or overemphasised the importance of facts;
- (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal'.

[40] This court endorses the above principles.

[41] Regarding sentencing, we are of the opinion that the sentence imposed by the court a quo does not induce a sense of shock and is not inappropriate in the circumstances. This court is satisfied that the court a quo appreciated the personal circumstances of the appellant and it did not over-emphasise the seriousness of the offence considering that a precious life was lost. Therefore, there was no misdirection on the part of the court a quo and the appeal against sentence is bound to fail.

Order

[41] In the premise, the following order is made:

- (1) The appeal against conviction and sentence is dismissed.
- (2) In terms of s 50(1)(a)(i) of the Road Traffic and Transport Act 22 of 1999, the appellant's licence is suspended for a period of six (6) months. The appellant to hand over his licence to the clerk of court Rehoboth Magistrate's Court on 9 August 2023. However, the suspension and the endorsement of the licence will take effect once the appellant has completed serving his sentence.
- (3) The appellant's bail is cancelled and he is to report himself at Rehoboth Magistrate's Court on 9 August 2023 at 09h00 for the court a quo to issue a warrant for committal. Failure by the appellant to report himself to the said court, will result in the issuance of a warrant of arrest by that court.

N N SHIVUTE
Judge

P CHRISTIAAN
Acting Judge

APPEARANCES

APPELLANT: B Isaacs
Of Isaacs & Associates Inc., Windhoek

RESPONDENT: P Kumalo
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