REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI APPEAL

JUDGMENT

Case no::CA 59/2011

NOT REPORTABLE

In the matter between:

PAULUS MUPIKA SHITUNA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Shituna v The State* (CA 59/2011) [2013] NAHCNLD 51 (8 October 2013)

Coram: LIEBENBERG J and TOMMASI J **Heard: 29 July 2013 Delivered: 29 July 2013**
Reasons Released: 08 October 2013

Flynote: Criminal law - Traffic offences - Contravention of s76(4) of Road Traffic and Transport Act, 22 of 1999 - duty of traffic officers to produce appointment certificate on demand - entrapment - speed traps not unlawful even where traffic officers conceal
their presence whilst measuring speed -laser speed measuring camera used - magistrate concluding that this device operate accurately when switched on - judicial notice - device should form the subject of judicial recognition - no evidence presented that the device was operating accurately at the time.

Summary: The appellant appealed against conviction of having contravened section 76(4) of the Road Traffic and Transport Act, 22 of 1999. In his grounds of appeal, he took issue with (i) the failure of the traffic officer to show his appointment certificate on demand; (ii) the magistrate's acceptance of unauthorised entrapment by the traffic officers; (iii) the magistrate's

conclusion that speed measuring cameras operate accurately when they are switched on; and the magistrate's evaluation of the evidence. The court considered the evidence adduced and concluded that the failure by the traffic officer to produce an appointment certificate does not invalidate the notice to appear in court which he had handed to the appellant. The court further concluded that "speed traps" per se are not illegal and entrapment not a defence where the traffic officers do nothing more than to trap offending motorists and do not entice them in any way to commit an offence. The court was not persuaded that the device used to measure the speed was the subject of judicial recognition. Furthermore no evidence was adduced that the device was operating accurately at the time and the magistrate erroneously expected the appellant to prove that it was defective. The appeal upheld and the conviction and sentence were set aside.

ORDER

1. The appeal is upheld and the conviction and sentence are set aside
2. The court fine of N$500 paid by the appellant to be refunded by the Ministry of Justice and the clerk of the criminal court of the Tsumeb Magistrate's court is directed to assist the appellant in submitting his claim

Reasons to follow

.TOMMASI J (LIEBENBERG J concurring):

JUDGMENT

[1] The appellant was convicted of having contravened section 76(4) of the Road Traffic and Transport Act, 22 of 1999 by the magistrate for the district of Tsumeb. He appealed against the conviction to this court. The court, having heard the appellant and Mr Wamambo appearing on behalf of the respondent, made the following order:

1. The appeal is upheld and the conviction and sentence are set aside
2. The court fine of N$500 paid by the appellant to be refunded by the Ministry of Justice and the clerk of the criminal court of the Tsumeb Magistrate's court is directed to assist the appellant in submitting his claim
3. Reasons to follow.

What follows are the reasons for the order granted.

[2] On 31 December 2010 the appellant drove on a public road between Oshivelo and Gamcams. He was stopped by Warrant Officer (W/O) Jason who explained that he had exceeded the speed limit of 60km/h. W/O Jason showed him the speed recorded on a laser speed measuring camera which reflected that he had travelled 96km/h. W/O Jason handed the appellant a written notice to appear in court in terms of the provisions of section 56 of the Criminal Procedure Act, 51 of 1977 as amended. The notice reflects that the appellant had been charged with having contravened section 76(4) of the Road Traffic and Transport Act, 22 of 1999.

The appellant appeared in the Magistrate's Court for the district of Tsumeb and conducted his own defence. He pleaded not guilty to the charge. During his plea explanation he challenged the procedure adopted at the time he was stopped without disclosing the details of disputed procedure. He further challenged the State to prove that he was travelling at 96km/hour. The State led the evidence of W/O Jason and the appellant testified in his defence. The appellant, despite his plea of not guilty, was convicted and sentenced to pay a fine of N$500 or serve 6 months' imprisonment.

[3] The appellant's grounds of appeal may be summarised as follow:

(a) The traffic officers were lawfully required to show their appointment certificate upon demand and their failure to do so nullifies any subsequent law enforcement activity;

(b) The magistrate erred when he concluded that speed traps i.e when traffic officers conceal their presence on the road whilst measuring the speed, were lawful;

(c) The magistrate erred when concluding the mechanical speed measuring device was measuring accurately every time it is switched on; and.

(d) The magistrate failed to consider his evidence and contradictions in the evidence of the State Witness.

I shall deal with the grounds set out in (a) to (c) and where appropriate, consider the appellant's ground set out in (d)

Duty of traffic officers to produce appointment certificate

[4] The magistrate's response to the ground as set out in paragraph (a) was as follow: "To be shown or not the appointment certificate does not mean that the Appellant did not over speed before he was stopped by the Traffic Officer (sic)." Evidence was adduced by the Appellant that he requested the traffic officers to produce their appointment certificate and they failed to do so. The magistrate clearly considered this evidence as not relevant to the charge. The question for deliberation is whether the magistrate erred when he concluded that these facts would have no bearing on the charge preferred against the appellant.

[5] Section 11 (9) of the Road Transport Act, 22 of 1999 stipulates that:

" When performing any function under this Act, and if requested by any person in relation to whom such function is sought to be performed, an authorised officer shall produce to that person his or her certificate of appointment" [my emphasis]

This section however should be read with section 90 of the same Act which provides as follow:

"In any prosecution under any of the provisions of this Act, except section 19, the fact .that any person purports to act or has purported to act as a traffic officer, ... shall be *prima facie* evidence of his or her appointment."

[6] The authority to hand an accused a written notice in terms of section 56 of the Criminal Procedure Act, 51 of 1977 however is conferred upon traffic officers in terms section 334 of the same Act which governs the appointment and powers of peace officers. The material provisions of section 334 are the following:

"1(a) The Minister may by notice in the Gazette declare that any person who, by virtue of his office, falls within any category defined in the notice, shall, within an area specified in the notice, be a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers defined in the notice.

(b) ...

2(a) No person who is a peace officer by virtue of a notice issued under subsection

(1) shall exercise any power conferred upon him under that subsection unless he is at the time of exercising such power in possession of a certificate of appointment issued by his employer, which certificate shall be produced on demand"

(b) A power exercised contrary to the provisions of paragraph (a) shall have no legal force or effect." [my emphasis]

[7] Traffic officers are empowered by GN 206 in GG 4113 of 1 September 2008 to hand an accused a written notice as means to secure his/her attendance in a magistrate's court in terms of section 56 of the Criminal Procedure Act.

[8] The appellant correctly submitted that if a traffic officer fails to produce his appointment certificate on demand it may render a power which was exercised, such as the power to hand a

written notice to an accused, of no legal force or effect. The evidence adduced by the appellant therefore should have been evaluated to make a factual finding whether there was a request by the appellant and a failure by the traffic officer involved to produce his appointment certificate. In the absence of such a factual finding by the court *a quo,* this court may reach its own conclusion.

[9] W/O Jason testified that he was a traffic officer and purported to have performed the functions of a traffic officer when he measured the speed of the appellant's vehicle and thereafter stopped him. W/O Jason however, when asked to explain the procedure followed, did not state that he had showed his appointment certificate to the appellant. I therefore accept that under these circumstances he did not do so.

[10] This, in terms of section 90 of the Road Traffic and Transport Act, constituted *prima facie* evidence that he was appointed as a traffic officer. When he handed the written notice in terms of section 56 to the appellant however, he exercised the power conferred upon him in terms of the Criminal Procedure Act read with the above mentioned Notice in Government Gazette. Both section 11(9) of the Road Traffic and Transport Act and section 334(2)(a) prescribes that the appointment certificate should be produced <u>on demand</u>. It is my understanding that there is no general requirement that traffic officers should produce their appointment certificate when performing functions as a traffic officer or when issuing written notices. However if there is a demand the provisions compel the officer to produce the certificate; the duty only arises when requested to do so.

[11] The magistrate, before cross-examination by the appellant, explained to him that he should raise issues which the witness omitted to testify on and which he deemed to be important. The appellant indicated that he understood the explanation. The appellant, although he disputed the procedure during his plea explanation, did not dispute the appointment of W/O Jason and neither did he dispute his authority to validly issue a written notice during cross-examination.

[12] The undisputed evidence adduced by the State thus established a *prima facie* case that W/O Jason was duly appointed as a traffic officer at the time he performed the above-mentioned

functions

[13] The appellant mentioned W/O Jason's failure to produce his appointment certificate on demand for the first time when he testified. The failure to produce an appointment certificate on demand was inconsistent with the notion that W/O followed due process. The appellant was privy to what had transpired between him and W/O Jason. It is trite that disputed evidence cannot be left unchallenged and the result of the appellant's failure to cross-examine the witness on this disputed point may entitle the State to assume that W/O Jason's evidence was accepted as correct. This principle was adequately explained by the magistrate and it is evident from the record that the appellant was neither ignorant of the law nor unsophisticated. The appellant, although unrepresented, was well prepared and fairly familiar with the applicable legal provisions. The appellant was thus in a position to challenge the disputed procedure adopted by W/O Jason at the time. His omission to cross-examine on this issue cannot be ascribed to ignorance of the law or the facts.

[14] The weight of the appellant's evidence should be determined in light of the above factors. The only plausible explanation for the appellant's failure to afford W/O Jason, whilst still in the witness box, the opportunity of giving any explanation is that it was a mere afterthought and his testimony in the circumstances lack credibility. Although the court may accept that W/O Jason did not produce his appointment certificate, it cannot safely rely on the appellant's testimony that he demanded same.

[15] This court is satisfied that the functions W/O purported to have performed in terms of the Road Traffic and Transport Act was authorised. In determining whether the power to hand a written notice to the appellant was exercised contrary to the provisions of section 334(2(a), the court must be satisfied that there was a demand made to W/O Jason to produce his appointment certificate. His omission to do so is not sufficient.
This court is satisfied that the State had proven beyond a reasonable doubt that W/O Jason performed his functions as an appointed and thus authorised traffic officer.

[16] It follows that the appellant's ground that W/O Jason's failure to produce an appointment

certificate should invalidate the notice handed to him, must fail.

Entrapment by traffic officers

[17] The appellant, during the trial, raised entrapment as a defence when he testified and objected to the fact that the traffic officers gathered evidence by way of a “speed trap” i.e by concealing their presence whilst measuring the speed of his vehicle. The magistrate in his judgment considered the appellant’s evidence that the police officer’s were concealing their presence. He held the view that there would be no point if traffic officers are clearly visible as this would defeat the purpose of detecting offenders. The appellant’s ground of appeal stated that the magistrate erred by confirming that unauthorised entrapment by the State was legal in Namibia.

[18] The court has to determine whether the magistrate erred when he accepted that traffic officers were acting lawfully when they concealed their presence whilst measuring speed.

[19] In S v De Bruyn 1999 NR 1 (HC) this court considered entrapment as a defence and, without deciding the issue, expressed the opinion that: “Any reasonable, fair-minded person would immediately recognise the intrinsic unfairness involved in a government official deliberately enticing or inducing someone, not otherwise predisposed to commit an offence, to commit one, and then, having done so, to turn round and instigate a prosecution against such person.”

[20] W/O Jason testified that he was measuring the speed of vehicles. Nothing in his evidence suggests that the original criminal design originated with him. His aim was merely to detect those motorists who offended by exceeding the speed limit. It is probable that he may have concealed his presence in the manner testified to by the appellant as this practice is not uncommon. In. S v AZOV 1974 (1) SA 808 (T) Snyman J at page 809 B - D describe this kind of trap in the following manner:: “There is the trap which most of us dislike so much where a traffic inspector puts a cord across the road and when you go over it too fast he traps you. There the traffic inspector has done nothing really to entice you to exceed the speed limit; he has merely

set about trapping you. In that respect perhaps the Afrikaans expression is a better one where one would say in such a case "Hy het horn betrap". He did not entice him into doing the thing, he simply caught him doing it by setting up special machinery in order to catch him. There is no reason why a trap of that kind should be treated with the disapproval which is suggested in general about traps." I equally see no reason why this court should disapprove of speed traps even where traffic officers conceal their presence on the road.

[21] The magistrate considered and accepted the appellant's evidence that the traffic officers concealed their presence but was not persuaded that their conduct was in any way unlawful. Having regard to the above cited authorities and having considered the facts of this matter, this court is of the view that the magistrate correctly dismissed the appellant's defence of entrapment.

The speed measuring device

[22] The evidence of W/O was that the laser speed camera recorded that the appellant was driving 96km/h. The appellant disputed that he drove at this speed. The magistrate was satisfied that the evidence justified a conviction and held the view that: "The camera being used by the traffic officer's on the road they are not calibrated like the weigh bridge machines. Once they are switched on to operate, they used to operate normal." No evidence to this effect was led and it must be inferred that the magistrate arrived at this conclusion by taking judicial notice of the fact that generally, the speed measuring device (laser camera) would operate normally if switched on. The appellant contended that the magistrate erred when he concluded that the mechanical speed measuring device was measuring accurately every time it is switched on. The magistrate, in response to this ground of appeal stated that there was no evidence adduced by the Appellant to show that the measuring device was defective.

[23] This court has to consider whether the process of speed measuring by a laser camera is the subject of judicial recognition, whether the magistrate correctly concluded that there was an onus on the appellant to prove that the device was defective; and whether adequate proof was provided to the court *a quo* that the device used by W/O Jason was operating accurately at the time it recorded the speed.

[24] It is trite that the State bears the onus to prove the commission of the offence beyond reasonable doubt. The appellant in his plea explanation clearly disputed that he drove at the speed of 96km/h. The State was required to present evidence which would satisfy the court that the appellant travelled at a speed in excess of the speed limit.

[25] In S v Blaauw's Transport (Pty) Ltd and Another[1] Totemeyer AJ, stated the following at page 590 J - 591 A-D, paragraph 10 & 11:

" In the matter of S v Mthimkulu 1975 (4) SA 759 (A), Corbett JA (as he then was) held at 763H as follows:

'Whenever the facta probanda include concepts such as weight, speed, time, length (or distance) or a combination of two or more of these concepts, proof thereof must normally be presented in terms of the measures in current use at the time.'

He further held (at 763H - 764A) that:

'Theoretically, such evidence of measurement should always comprehend proper testimony as to the trustworthiness of the method or process followed in order to make the measurement and as to the accuracy of any instrument used in that process.'

Corbett JA (at 764C) in principle accepted that, depending on the circumstances, a proper testimony of the aforesaid nature will be 'preliminary professional testimony (1) to the trustworthiness of the process or instrument in general (when not otherwise settled by judicial notice): *(2)* to the correctness of the particular instrument'.'Tmy emphasis]

[27] W/O Jason did not explain the process by which this device was capable of measuring speed accurately. The magistrate, in order to take judicial notice should have been sufficiently familiar with the speed measuring device before dispensing with the need to call expert evidence. It is not apparent from his judgment that this was the case.

[28] W/O Jason furthermore gave no indication that the device he was operating at the time was capable of correctly measuring the speed. Without evidence to this effect the court *a quo* could not have concluded that the speed which was recorded on the camera was correct.

[29] Counsel for the State correctly conceded that the magistrate erred when he accepted that the State had proven the guilt of the appellant beyond reasonable doubt. The appellant

1 2006 (2) NR 587 (HC)

correctly pointed out in his evidence that the camera and the speed “are not different things because one is dependent on the other. Without the camera you do not have the speed”. The process by which the camera was able to calculate the speed travelled must either be explained by an expert witness or must be so familiar that it forms the subject of judicial recognition. I am not persuaded that such process may form the subject of judicial recognition as it is not such a notorious process which does not require proof of accuracy.[2]

[30] The assurance that the device used was in proper working order at the time falls within the knowledge of the person who operated the device at the time. No such evidence was adduced by the State. In addition to absence of this evidence, the magistrate erroneously expected the appellant to prove that the device was defective; a fact the appellant could not possibly have been expected to have personal knowledge of. There was no onus on the appellant to prove that the speed measuring device was defective and in these circumstances the magistrate thus erred when he concluded that the appellant was required to prove that the speed measuring was defective.

[31] In the absence of conclusive evidence of the speed at which the appellant was travelling, the State did not establish beyond reasonable doubt that the appellant exceeded the speed limit. The magistrate, on the evidence before it, therefore could not have convicted the appellant of having exceeded the speed limit. In the result the appeal succeeded and the conviction and sentence were set aside.

2 (The Mthimkulu case at 365E; S v Harvey 1969 (2) SA 193 (RA) at 199 - 201; S v Hengst 1975 (2) SA 91 (SWA).)

M A Tommasi

Judge

JC Liebenberg

Judge

APPEARANCES

APPELLANT: In Person

RESPONDENT: Mr. N Wamambo

Of the Office of the Prosecutor-General