

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no.: HC-NLD-CRI-APP-CAL- 2019/00057

In the matter between:

MATEUS NEKUNDI

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Nekundi v S* (HC-NLD-CRI-APP-CAL-2019/00057) [2020]
NAHCNLD 29 (20 February 2020)

Coram: SALIONGA J *et* JANUARY J

Heard on: 5 December 2019

Delivered: 20 February 2020

Flynote: Criminal Procedure - Appeal - Traffic offences - Suspension of driver's licence - When to be imposed - Section 50 of Act 22 of 1999 - Cannot be imposed

for a contravention of regulation 232 (4) r/w 369 GN 53 /2001 r/w section 1,86 & 89 of Act 22 of 1999 as amended. Court has no power to suspend the licence of a motorist who has been convicted of an offence not relating to driving of a motor vehicle.

Summary: The appellant was convicted upon his own admission of guilty on a charge of occupying a seat in a motor vehicle and failing to wear a safety seat belt in contravening Regulation 232 (4) r/w 369 GN 53 /2001 r/w section 1,86 & 89 of Act 22 of 1999 as amended. He pleaded guilty and was convicted pursuant to section 112 (1) (a) of Act 51 of 1977. Appellant was sentenced to N\$1000 (thousand) dollars or hundred (100) day's imprisonment. In addition the appellant's licence was suspended for six (6) months in terms of section 50 of Act 22 of 1999. Suspension of or disqualification from obtaining a driving licence can only be imposed in terms of section 50 of Act 22 of 1999 where the offence in respect of which the appellant is convicted, is related in some way to the manner of his driving of the motor vehicle. Appeal court upheld the appeal against the order of suspension of his driving licence finding that the order was incompetent to the offence appellant was convicted of. Further dismissed the appeal against sentence holding that there was no misdirection or irregularity on the part of the presiding officer.

ORDER

1. The appeal partially succeed;
2. The conviction and sentence are confirmed;
3. The order suspending the appellant's driving licence is set aside.

APPEAL JUDGMENT

Introduction

SALIONGA J (January J concurring):

[1] The appellant was charged with contravening the provisions of the Road Traffic and Transport Regulations GN 53/2001 by occupying a seat in a motor vehicle and failing to wear a safety seat belt.

[2] Appellant pleaded guilty to the charge and was fined N\$ 1000 or 100 days. He was also sentenced to N\$ 500 or 50 days for contempt of court and his driving licence was suspended for six (6) months. The appellant now appeals against both sentences imposed. He was concerned that an order made by the Oshakati magistrate court for the district of Oshakati suspending his driving licence will totally distract his future.

[3] The appellant appeared in person and the respondent was represented by Mr. Gaweseb.

Grounds of appeal

[4] The grounds of appeal were all against the fine sentences imposed and none relates to an appeal against the suspension of a licence save mentioning that the suspension of his licence will distract his future.

[5] At the onset of the hearing, counsel for the respondent correctly conceded that the magistrate wrongly applied section 50 of the Roads Traffic and Transport Act 22 of 1999 as amended in suspending the appellant's licence. However with regard to appeal against sentence, counsel submitted that it should be dismissed.

[6] Although the appellant did not specifically indicate any grounds relating to the order suspending his licence in his notice of appeal, I find it prudent to consider the issue at this stage in the best interest of justice. More so that the appellant is unrepresented and secondly that the respondent conceded in his heads of argument that the magistrate was wrong in making such order. Consequently the issue for determination is whether the sentences imposed were inappropriate or excessively harsh or not and whether or not the order of suspension or disqualification of the appellant's driving licence was competent for this offence.

[7] As stated earlier that appellant did not include in his notice of appeal any ground against the order suspending the driving licence. It is no surprise that the

magistrate did not give reasons why he suspended the appellant's licence for six months.

Ad sentence

[8] In order to succeed with the appeal against sentence, the appellant must show that:

(i) there was an irregularity in the sentence imposed;

(ii) that the sentence induces a sense of shock in that the sentence imposed by the court a quo is so shockingly disproportionate to any sentence that this court sitting as a court of first instance would have imposed.

[9] When applying the above principles as enunciated in the decided cases, it becomes apparent that in those cases none of the grounds upon which an appeal court can interfere with sentence have been established. In the light of the above there is no justification for the appeal court to interfere with the sentences imposed.

Ad suspension or disqualification

[10] The general power of the court to order a suspension of a driver's licence or to order that a person be disqualified from obtaining a driver's licence if he does not hold a licence, is provided for in the Act, Act 22 of 1999. Section 50 of the Act states that:

'subject to section 51, a court convicting a person of an offence in terms of this Act or at common law, relating to the driving of a motor vehicle...'

[11] It seems to us that the phrase "relating to the driving of a motor vehicle" in section 50 of the Act gives sufficient indication that the power is only exercisable when the essence of the offence committed concerns the driving of a motor-vehicle. See *R v Masiza* 1949 (3) SA 974 (E) a case which was referred to with approval in *R v Michaelis* 1950 (2) SA 353 (SR). The question then arises as to the precise meaning of the words or phrase "offence in connection with the driving of a motor vehicle", and whether the offence of occupying a seat in a motor vehicle and failing to wear a safety seat belt is such an offence.

[12] The phrase “relating to the driving of a motor vehicle has been interpreted to mean an offence involving the actual driving of a vehicle”. It is quite apparent that the offence the appellant was convicted of can be committed by a person who never drives at all. A person would be equally guilty of the offence even if he was to occupy a seat without necessarily driving such a vehicle. Whether or not the accused happens to be actually driving a car at the time of his apprehension by the police is not a necessary element of the offence at all. Accordingly offences such as occupying a seat in a motor vehicle and failure to wear a safety seat belt is not an offence which depends on the manner in which a motor vehicle is driven.

[13] Suspension of or disqualification from obtaining a driving licence can only be imposed in terms of section 50 of Act 22 of 1999 where the offence in respect of which an accused is convicted, relates in some way to the manner of his/her driving a motor vehicle. In our view therefore this offence does not fall within the scope of section 50 of the Act and the order of suspension in the present case must be set aside.

[14] In the result;

1. The appeal partially succeed;
2. The conviction and sentence are confirmed;
3. The order suspending the appellant’s driving licence is set aside.

J T SALIONGA
JUDGE

I agree,

H C JANUARY
JUDGE

APPEARANCES:

FOR THE APPELLANT: Mr M Nekundi (In person)
Erf 179, Greenwell, Windhoek

FOR THE RESPONDENT: Mr T Gaweseb
Of Office of the Prosecutor General, Oshakati