

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Mukulu Josua Shanyenga</i>	Case No.: CR 50/2022 Okahao: A495/2017
	Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice Munsu AJ <i>et</i> Honourable Mr. Justice Small AJ	Delivered on: 27 September 2022
Neutral citation: <i>S v Shanyenga</i> (CR 50/2022) [2022] NAHCNLD 99 (27 September 2022)	
The order: <ol style="list-style-type: none">1. The convictions and sentences in respect of both counts are set aside and substituted with findings of: 'Not guilty and discharged on both the preferred charges'.2. If the accused paid any of the fines imposed his money should be refunded.	
Reasons for the order:	
Small AJ (Munsu AJ concurring):	
[1] The matter came before this court on automatic review in terms of section 302 of Act	

no 51 of 1977.

[2] Accused in this matter was charged with two counts, namely, the first count of contravening section 80(1) of the Road Traffic and Transport Act 22 of 1999-Reckless or Negligent Driving and a second count of contravening section 18(1)(a) Road Traffic and Transport Act 22 of 1999-Failure to comply with the instructions of an authorized officer.

[3] The first count of contravening section 80(1) of the Road Traffic and Transport Act 22 of 1999-Reckless or Negligent Driving was framed as follows:

'In that upon or about the 23rd day of December 2017 and on a public road, namely Outapi-Tsandi Main Road at or near Outapi mall and Engine Service in the district of Outapi the said accused did wrongfully and unlawfully drive a motor vehicle with registration number N8579UP recklessly or negligently.'

[4] Normally reckless driving would entail driving without regard to the danger or the consequences of one's actions, but the Act extends the meaning of recklessly to also include any person who drives a vehicle in willful or wanton disregard for the safety of persons or property.¹ The court must regard all the case's circumstances, including the nature, condition, and use of the public road on which the driver committed the offence. The court must also consider the traffic on the road during the alleged violation and the traffic which could reasonably be expected to be on that road at that time. The court also should consider the speed and way the vehicle was driven.²

[5] The second count of contravening section 18(1)(a) Road Traffic and Transport Act 22 of 1999-Failure to comply with the instructions of an authorized officer was framed as follows:

'In that upon or about the 23rd day of December 2017 and at or near Outapi Mall and Engine Service in the district of Outapi the said accused failed to comply with an instruction or direction given to him by a licence inspector, traffic officer, road inspector or vehicle examiner, or obstruct,

¹ See section 80 (2) of the Road Traffic and Transport Act 22 of 1999

² See section 80 (3) of the Road Traffic and Transport Act 22 of 1999

hinder or interfere with such authorized officer in the performance of any refused to adhere to the directives of Phillipus Paulus.'

[6] Section 18(1)(a) of the road Traffic and Transport Act, 1999 reads as follows:

'(1) No person shall-

- (a) fail to comply with an instruction or direction given to him or her by a licence inspector, traffic officer, road transport inspector or vehicle examiner, or obstruct, hinder or interfere with such an authorised officer in the performance of any function under this Act;'

[7] When the matter was initially placed before my brother Munsu AJ, he addressed several queries to the learned magistrate. I believe a summation of the questions will suffice. First, regarding count 2, Judge Munsu pointed out that the charge sheet did not specify the instruction the officer allegedly gave and which the accused allegedly defied. He further requested the learned magistrate to indicate whether the omission of the instruction did not render the charge defective and, if so, whether and how the evidence cured the defect. Finally, in respect of this count, he requested the learned magistrate to indicate how the officer instructed the accused to stop and what evidence demonstrates that the accused was aware of such instruction.

[8] Secondly, my brother asked the learned magistrate that as the State bears the onus to prove the guilt of the accused beyond a reasonable doubt, and it appears from the evidence by the State that Sgt. Amakali was a crucial witness in this matter, if any justifiable reason was advanced, why the State did not call him. He further asked the learned magistrate whether the court was not supposed to draw an inference in favour of the accused instead of the other way round.

[9] Thirdly, my brother pointed out that the accused is on record, saying that the police opened the case against him because "they bumped a car and were trying to pin it on him". He enquired whether this did not suggest that the single witness had a particular interest in the matter. The learned magistrate was further asked if the only witness called by the State did not follow the accused to his house, where did the two of them meet each other. Finally, the

learned magistrate was requested to indicate why the court was satisfied with the evidence of the single witness in the face of the accused's denials (his word against that of the accused) and found that the State managed to prove the case beyond a reasonable doubt.

[10] In answering the aforesaid pertinent queries by my brother, Munsu AJ, the learned magistrate conceded that the charge sheet does not allege how the accused committed the offence in the second count. He further stated that the witness was with a police vehicle when he attempted to stop the accused and that the accused could see that he was being stopped. According to the learned magistrate, the accused failed to comply with the instructions of the police officer when he did not stop his vehicle.

[11] In respect of the witness Amakali not being called to give evidence, the learned magistrate indicated that that was the duty of the prosecutor to call witnesses of the State and not the court. He further replied that the benefit of the doubt is given to the accused when his version is probably true, and the State fails to bring forth any evidence to implicate him. Also that the State had one witness, and that the fact that the accused said there was another police officer, Amakali does not mean he is correct. As the accused was in what the magistrate calls a run and chase, he could not possibly identify which police officer played what role. That was apparently the basis of the court's conviction, and the witness, according to the learned magistrate, was credible. The accused did not dispute how the offence was committed as alleged by the State's witness. The magistrate further explained that according to the accused, he met with Amakali at a bar. They went to the police station, and the accused was arrested.

[12] The accused pleaded not guilty to both counts. In respect of Count 1 he denied spinning the vehicle. In respect of Count 2 he stated that there was no officer by the name Phillipus but that it was Amakali. He also indicated that he is not sure if Amakali's surname is Phillipus.

[13] The single witness Phillipus Paulus stated that the accused was speeding over speeding and drove zig-zag in town. That they tried to stop him, but he refused to stop. According to this witness, the accused was overtaking two vehicles at a time, spun his vehicle, and drove off. The witness shared his opinion with the court averring that the accused drove recklessly.

He said that one of the vehicles pumped, probably bumped, a road sign. The vehicle bumped the road sign to avoid another car. The accused's car had already passed at that time. The accused overtook vehicles on the left by moving onto the right lane. He could not say how far if any, oncoming cars were at that stage. According to the witness, there was enough space between the vehicles in the left lane for the accused's vehicle to move back into the left lane when cars came from the front. The court asked how the accused drove, and the witness said recklessly that the accused's driving could have caused accidents with other road users. He, however, did not say how the accused's driving could have caused the accidents

[14] The accused's version is reasonably straightforward. He testified that he drove the vehicle and was stopped by Amakali. After he stopped, Amakali requested his licence, which he handed over. Amakali asked him why he was going so fast, which he denied saying the tires spun because of sand on the road. He was allowed to continue. Later, Amakali phoned him and asked him to meet with him. He found Amakali at a bar, who told him his [accused's] vehicle caused an accident. He was arrested because a police vehicle was damaged. He denied seeing Officer Paulus at all that day.

[15] The State submitted, among other things, that Paulus attempted to stop the accused by using a police siren. However, this evidence appears nowhere in the record, and the court does not refer to it in its judgment.

[16] The court said in the judgment: 'The accused did not dispute failing to comply with the instruction of the authorized officer neither driving in a reckless or negligent manner. The accused further failed to call Sgt. Amakali an police officer who is available at all times to corroborate his version that the evidence of the State witness is false and that Fillups was not at the scene of crime.' And later: 'Accused further failed to even bring the death certificate to verify there was a dead person at his house on the day of the incident.' And finally stated before convicting him of reckless driving on count 1 and of count 2: 'The court is convinced that the accused had driven in a negligent or reckless manner and that he also failed with the traffic office instruction despite his issue of mistaken identity.'

[17] It is trite law that the State carries the onus of proving an accused's guilt beyond a

reasonable doubt. There is no onus on an accused to prove his innocence.³

[18] No onus rests on the accused to convince the Court of the truth of any explanation he gives. If he explains, even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied not only that the explanation is unlikely, but that beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true, he is entitled to his acquittal.⁴

[19] Reasonable doubt about the accused's guilt does not depend on whether the Court subjectively believes him or not. Thus, the Court does not even have to reject the State's evidence to acquit him. But, if there is a reasonable possibility that his evidence might be true, he must be acquitted or be given the benefit of the doubt.⁵

[20] From the reasons it is abundantly clear that the learned magistrate, notwithstanding the reply to my brother Munsu AJ, saddled the accused with a burden to prove his innocence and to call witnesses. The shoe is on the other foot. The State should have called the witness and if they neglected to do so it warranted a negative inference. In the circumstances the failure by the State to call Amakali to testify justified the inference that in State counsel's opinion his evidence could possibly have given rise to contradictions which could have reflected adversely on the credibility and reliability of the single witness.⁶

[21] Furthermore, speed alone is not necessarily indicative of either negligence or recklessness. That depends on the prevailing circumstances. A traffic officer's opinion that someone drove recklessly is inadmissible as a witness cannot decide what the court must decide on. The court must decide whether the driving was negligent or reckless, not a witness. The witness should place adequate evidence before court as to how the accused drove from which the court can decide whether such driving constitute negligent or reckless

³ *Woolmington v Director of Public Prosecutions* [1935] 1 AC 462 at 481 – 482 as followed in *S v Koch* 2018 (4) NR 1006 (SC) paragraph 10.

⁴ *S v Haileka* 2007 (1) NR 55 (HC) in paragraph 7 approving and applying *R v Difford* 1937 AD 370 at 373; *R v Vlok and Vlok* 1954 (1) SA 203 (SWA) at 207B – D.

⁵ *S v Haileka* 2007 (1) NR 55 (HC) in paragraph 7 approving and applying *S v Kubeka* 1982 (1) SA 534 (W).

⁶ *S v Teixeira* 1980 (3) SA 755 (A) at 764B, *S v Noble* 2002 NR 67 (HC) at 74G-75A, *S v Mwanyekele* 2014 (3) NR 632 (HC) paragraph 18.

driving as defined in the Act. Whether it can properly be described as willful or wanton disregard for the safety of persons or property must almost inevitably depend upon the circumstances of the case.⁷

[22] In my view reasonable doubt exists in this matter and such doubt should have been given to the accused.

[23] As a result it is ordered that:

1. The convictions and sentences in respect of both counts are set aside and substituted with findings of: 'Not guilty and discharged on both the preferred charges'.
2. If the accused paid any of the fines imposed his money should be refunded.

Judge(s) signature:	Comments:
Small AJ:	
Munsu AJ:	

⁷ Although decided on the predecessor of section 82(2) of the Traffic and Transport Act 22 of 1999, see *S v Amuntenya* 1998 NR 204 (HC)