



CASE NO.: CR

20/2012

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

THE STATE

and

SIMEON NGHISHINAWA

(HIGH COURT REVIEW CASE NO.: 57/2012)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 21 September 2012

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused appeared in the magistrate's court Eenhana on charges of (i) culpable homicide, and (ii) driving a motor vehicle without a driver's licence in contravention of s 31 (1)(a) of Act 22 of 1999. He pleaded guilty and was subsequently convicted and sentenced to fines of N\$1 500 or 15 months' imprisonment and N\$2 000 or 6 months' imprisonment, respectively.

[2] On review a query was directed to the magistrate enquiring from her as to the admission(s) made by the accused during the s 112 (1)(b) questioning in terms of Act 51 of 1977 that showed that the accused had driven the said vehicle in a negligent manner, thereby causing the vehicle to overturn, consequentially killing the deceased. It is neither clear from the charge nor the questioning done by the court whether the deceased was a passenger on the vehicle or a pedestrian at the roadside.

[3] The magistrate's reply to this part of the query is cryptic and appears in the following terms (*verbatim*):

- to
the
1. The accused acted negligently while driving motor vehicle because if he was driving at the normal speed the vehicle getting off the main road the roadside could have not lost balance to such extent to causing death of the deceased.
 2. By driving without a driver's licence the accused acted with intention where as culpable homicides resulted from his negligent.'

[4] It seems to me the magistrate in her reply reasons, firstly, that the accused exceeded the 'normal' speed limit and as a result thereof the vehicle veered off the road and overturned; secondly, whereas the accused was not the holder of a valid driver's licence, this was either the cause or a contributing factor to his negligent driving. Whereas these conclusions are not borne out by the record of proceedings, it seems necessary to quote same *in extenso* (as far as it concerns the questioning conducted by the court):

'SECTION 112 (1)(B) ACT 51/1977 APPLY

Count 1

Q: 06.04.2009 on Eenhana – Okongo main road did you drive any motor vehicle?

A: Yes.

Q: Was that vehicle involved in an accident on that date?

A: Yes.

Q: What was the accident all about?

A: The vehicle lost balance while I was driving to the road side and it nearly

hit the tree and it overturned.

Q: Did any person died in the course of that accident?

A: Yes.

Q: Who is that person?

A: I do not know her.

Q: Do you dispute that the deceased is Fransina Shangelao Nangango?

A: No.

Q: Do you dispute that you cause the death of the deceased?

A: No.

Q: Did you force (foresee) that by driving a motor vehicle you may cause
an accident, if you do not drive carefully?

A: Yes.

Q: Did you know that it is a crime to cause the death of a person and that
you could be punished for that?

A: Yes.

Count 2

.....

(2) Q: Did you have a Driver's Licence or any document deemed to be a
licence, or a temporally (sic) authorization reiteration (sic) section 31
Act 22/99?

A: Yes.

Q: What document did you have?

A: I had a temporally (sic) licence learner's licence but I was not
accompanied by a qualified driver.

Q: Did you know that the law does not allow you to drive without a driver's
licence?

A: Yes.'

[5] It must be clear from the excerpt that the court did not question the accused on the speed he was driving at the time; neither did he disclose it himself or can this be inferred from the answers provided by the accused when questioned by the court. It seems to me that this is a conclusion the court had reached by drawing inferences from the answers provided by the accused – something the court was not entitled to do. (See *S v Thomas*¹)

[6] It is trite law that s 112 (1)(b) of Act 51 of 1977 requires of the presiding officer in peremptory terms to question the accused with reference to those facts alleged in the charge in order to ascertain whether the accused admits

¹ 2006 (1) NR 83 (HC).

the allegations in the charge to which he or she pleaded guilty. Further, the answers the accused person gives when questioned by the court do not constitute 'evidence' given on oath from which the court may draw inferences; thus, regard must be had to what the accused says and not what the court thinks of it (see *S v Mkhize*²).

[7] When applying the aforesaid principles to the present facts it is obvious that the learned magistrate could not have come to the conclusion from what the accused had said that the motor vehicle he was driving, travelled at an excessive speed, causing the driver to lose control over it and the motor vehicle overturning. The accused was not at all questioned on the speed the motor vehicle was travelling and the magistrate's reasoning that it exceeded the 'normal' speed is unsubstantiated. It is clear from the record that the reason given by the accused for the accident to have happened was that 'the vehicle lost balance while I was driving to the road side and it nearly hit the tree and it overturned'. This answer necessitated further questioning by the magistrate in order to establish what the accused meant by saying the motor vehicle 'lost balance' and what, in his view, was the cause of that. It could reasonably be that it was because of a tyre blowout that he lost control over the motor vehicle; and that the cause of the accident was not necessarily dependent on the manner in which the accused drove the vehicle. The accused's acceptance that he was the cause of the deceased person's death followed on a leading question by the court and should never have been put to the accused. In the present circumstances the magistrate for this reason alone could not have been satisfied that the accused admitted negligence on his part and should have noted a plea of not guilty in terms of s 113 of the Criminal Procedure Act. There is also another.

[8] Although it is not entirely clear from the magistrate's reply what she meant by saying 'By driving without a driver's licence the accused acted with

² 1978 (1) SA 264 (N) at 268B.

intention where as culpable homicides resulted from his negligent' (sic) it suggests that the accused, having driven the motor vehicle without a driver's licence (count 2), was wilful and through his negligence caused the death of another. It seems to me that this conclusion was reached solely because the accused had already pleaded guilty to the second charge (driving without a driver's licence), a fact the court relied on when still questioning the accused on count 1 and even before establishing the accused's guilt through questioning him on count 2. Once again, the magistrate was not entitled to draw such inference and by so doing committed a serious misdirection as there is nothing on record suggesting that the fact that the accused was not a licensed driver, in any way, impacting on his driving skills or the manner in which he handled the vehicle at the relevant time.

[9] From the answers given by the accused when questioned on count 2 it is evident that he was the holder of a learner's licence but that he, at the time of the accident, did not have another person seated next to him to supervise his driving as required by law (Regulation 110 (3)(a)). He was therefore wrongly charged and instead should have been charged in contravention of Regulation 369 (b) of the Road Traffic and Transport Regulations³. The conviction on count 2 therefore is also not in order and has to be set aside.

[10] For reasons apparent from the judgment I have decided against remitting the matter in terms of s 312 of Act 51 of 1977 to the same magistrate. In my view justice will best be served if proceedings start afresh before another magistrate.

[11] In the light of the conclusions reached herein, there is no need to deal with the remaining issues pertaining to sentence raised in the query except for saying that whereas the accused has paid a part fine in respect of the fines imposed by the court, he should be refunded.

³ No 2503 Government Gazette dated 30 March 2001.

[12] In the result, the Court makes the following order:

1. The conviction and sentence in respect of both counts are set aside.
2. The accused to be summoned to appear in the magistrate's court Eenhana and tried by a magistrate other than magistrate Hanhele.
3. The accused to be refunded for any court or part fines paid by him as a consequence of his conviction and sentence in this case.

LIEBENBERG, J

I concur.

TOMMASI, J