



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 71/2017

In the matter between:

LYEETA NAMBINGA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nambinga v S* (CA 71/2017) [2017] NAHCMD 356 (8 December 2017)

Coram: NDAUENDAPO J and USIKU J

Heard: 30 October 2017

Delivered: 8 December 2017

Flynote: Evidence – Traffic offences – Contravening sections 140 (1) a read with sections 1, 60, 146, 147, 150, 155 and 180 of the Road Traffic Ordinance 1967 (Ordinance 30 of 1967) as amended – Driving while under the influence of intoxicating liquor – Contravening section 82 (1) (b) read with sections 1, 49, 50, 51, 86, 89 and 106 of the Road Traffic and Transportation Act 1999 (Act 22 of 1999) – Driving with an excessive blood alcohol level.

Summary: The appellant was arraigned in the Magistrate's Court Mungunda Street facing charges under the repealed Road Traffic Ordinance 30 of 1967 on the main count. On the alternative to the main count he was charged with the offence of driving with excessive blood alcohol level in terms of the Road Traffic and Transportation Act, Act 22 of 1999. Appellant pleaded not guilty to both charges but was subsequently convicted and sentenced on the alternative charge.

ORDER

The appeal succeeds, the conviction and sentence are set aside.

APPEAL JUDGMENT

USIKU J, (NDAUENDAPO J concurring)

INTRODUCTION

[1] As conceded to by the respondent, the appellant was wrongly arraigned in the Magistrate's Court Mungunda Street on a repealed charge of contravening section 140 (1) (a) read with sections 1, 60, 146, 147, 150, 155 and 180 of the Road Traffic Ordinance, 1967 (Ordinance 30 of 1967) as amended – Driving while under the influence of intoxicating liquor. Alternatively the appellant was charged with contravening section 82 (1) (b) read with sections 1, 49, 50, 51, 86, 89 and 106 of the Road Traffic and Transportation Act, Act 22 of 1999) - Driving with an excessive blood alcohol level.

[2] The appellant was acquitted on the main count but was subsequently convicted on the alternative count whereafter he was sentenced to pay a fine of

N\$4000 or 12 months imprisonment. His driver's licence was suspended for three months. He now appeal against his conviction on the alternative count.

[3] Mr Kuutondokwa appeared on behalf of the respondent whilst Mr Kamanya represented the appellant.

[4] In his notice of appeal, counsel for the appellant submitted that the learned magistrate erred on the facts in the evaluation of evidence regarding the time of the motor vehicle collision.

[5] Also that the appellant was charged under the law that has since been repealed. It is borne out by the record of the proceedings that the appellant was acquitted on the main count and was only convicted on the alternative count under which he was charged with contravening the Road Traffic and Transportation Act 22 of 1999.

[6] It is further common cause that Ordinance 30 of 1967 was repealed and replaced by the Road Traffic and Transportation Act, Act 22 of 1997 under which the appellant was charged on the alternative count. The latter Act came into operation as far back as 6 April 2001.

[7] In my view though the appellant was charged under the repealed legislation on the main count, he was not prejudiced because he was acquitted on that charge and only convicted on the alternative charge in terms of the current legislation.

EVIDENCE BEFORE COURT

[8] Mr Sakaria Mwahaluka testified that he was a traffic officer employed by the City of Windhoek. On the 11 July 2015 he was instructed to attend to a motor vehicle collision incident. According to him, he received the report at 07h40 am. Accompanied by his colleague they arrived on the scene at about 08h00. He then asked the drivers of the motor vehicle involved in the collision about what time the collision had occurred. He was informed that the collision could have occurred at 07h35 am.

[9] He decided to take the appellant to the hospital in order for his blood to be drawn. Due to too many patients at the hospital at the time, blood was only drawn from the appellant at 09h05 am by the doctor. The blood kit was then taken to the Wanaheda police station and handed over to the sergeant on duty at the time. He made no reference to the blood kit owner after which the appellant was detained. Mr Mwahaluka persisted that the blood was drawn from the appellant within the two hours legal requirement.

[10] Though he claimed to have ascertained the time of the accident from the two drivers involved, that could not be confirmed as the other driver involved in the collision did not give a statement and as such did not testify. The time of the collision could also not be determined from the notebook in which the witness claimed to have recorded it.

[11] The doctor who drew the blood from the appellant also did not testify neither the charge office sergeant who had received the blood kit from Mr Mwahaluka. Mr Hamukwaya received the blood kit at Wanaheda police station and took it to the National Forensic Science Institute, he too did not testify.

[12] The investigating officer Mr Stefanus Amatundu testified that he was not present at the charge office when the blood kit was brought in by Mr Mwahaluka. Neither did he see the appellant when he was brought to the charge office and detained there. He did not know how the blood kit was kept or stored before it was forwarded to the Laboratory for analysis. The blood kit was never under his custody or control but that he only received the blood results from National Forensic Science Institute afterwards.

[13] Mr Kazapua Uvatera Kaizemi the Chief forensic analyst who analysed the blood at the National Forensic Science Institute did not also testify. However an affidavit in terms of section 212 4 (a) and 8 (a) of the Criminal Procedure Act, Act 51 of 1977 as amended to which he deposed was received in evidence.

[14] The appellant on the other hand confirmed to have driven the motor vehicle involved in the collision. According to him the accident could only have occurred about 06h00 am because he was on his way to open a shop at 06h30 am. He disputed the evidence of the state witness that the collision occurred at 07h35 am.

[15] Having referred to the evidence of the state witnesses and the defence, it is important from the outset to refer to some of the basic legal principles applicable in our law.

(a) Mutually destructive versions

The respondent's case is disputed by the defence and it is trite that, where in a criminal case the court is faced with versions by the state and the defence which are mutually destructive, the court must properly apply its mind. This involves inter alia, weighing up the probabilities of each version. Where this leads to doubt in the court's mind as to the proof of the guilt of the accused, such accused should be given the benefit of the doubt and be acquitted. *S v Engelbrecht*¹.

[16] In the instant case, there is not only doubt whether the blood was drawn within the two hours legal requirement but there is also an issue of the evidential chain in the handling of the blood specimen obtained from the appellant. The doctor who allegedly drew blood from the appellant was not called as a witness in order to shed light whether the kit when received was properly sealed in his/her presence.

[17] In my view the failure on the part of the respondent to call witnesses that handled the blood specimen of the appellant in order to confirm that proper procedures were adhered to, leaves a possibility for it being abused or interfered with. It is important that specimen taken from an accused reflects the actual concentration of alcohol at the time of his/her arrest whilst driving, therefore time is of utmost importance in that if one link in that chain of evidence is broken, or weakened, the reliability of the whole process is endangered and doubt may arise as to the guilt of the appellant (accused).

¹ S v Engelbrecht 2001 NR at 224.

[18] Having carefully considered the evidence before court, I am of the view that no proper procedures were followed which weakened the chain of custody relating to the blood kit used in respect of the appellant, compounded by the evidence of state witnesses and the defence regarding the time of the actual collision. The *court a quo* ought not to have concluded on the evidence as a whole that the prosecution had proven beyond reasonable doubt the guilt of the appellant.

[19] In the light of the above the conviction and sentence cannot be allowed to stand.

[20] In the result, I make the following order:

The appeal succeeds, the conviction and sentence are set aside.

D N USIKU
Judge

G N NDAUENDAPO
Judge

APPEARANCES

APPELLANT: Mr Kamanja
Amupanda Kamanja Inc.

RESPONDENT: Mr Kuutondokwa
Of the Office of the Prosecutor-General