



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2018/00028

In the matter between:

THE STATE

APPELLANT

v

ALFRED MUZAMAI SIMASIKU

RESPONDENT

Neutral Citation: *S v Simasiku* (HC-MD-CRI-APP-CAL-2018/00028) [2018]
NAHCMD 286 (14 September 2018)

Coram: USIKU J and UNENGU AJ

Heard: 10 August 2018

Delivered: 14 September 2018

Flynote: Appeal –Appellant appealing against his conviction of a traffic offence – Grounds raised against the conviction are not proper grounds of appeal but statements of facts – Court rejected and dismissed the appeal.

Summary: The appellant found guilty of a traffic offence under the Roads Traffic and Transportation Act 22 of 1999 is appealing against his conviction accusing the magistrate of various misdirections and errors as grounds of appeal. One such accusation is that the magistrate allowed into record of proceedings the certificate of

calibration of the camera without evidence from an expert witness. On appeal, the court rejected such complaint and *held* that it was too late for the appellant to object to the admission into record as evidence the certificate of calibration of the camera during appeal hearing. *Held* further that the objection should have been raised during the trial for the magistrate to make a ruling thereon. The appeal, as a result therefore, was dismissed.

ORDER

The appeal is dismissed.

JUDGMENT

UNENGU, AJ (USIKU J Concurring)

[1] The appellant is appealing against his conviction of contravening s 76 (4) of the Roads Traffic and Transportation Act¹ delivered by the magistrate sitting at the Magistrate's Court for the District of Walvis Bay on 25 November 2016. After conviction, the appellant was sentenced to pay a fine of N\$100.00 or three months imprisonment, which fine the appellant paid in court immediately after sentencing.

[2] The background of the matter is briefly as follows:

On the 22 October 2015, and on the public road Nangolo Mbumba Drive at Walvis Bay, the appellant while driving a white Toyota Corolla motor vehicle with registration number N 18351 WB was stopped by a Traffic Officer and issued him with a Notice to Appear in Court in terms of s 56 (1) of the Criminal Procedure Act² (the CPA) for driving at a speed of 93 kilometer per hour in a 60 kilometer per hour zone. He was given an admission of guilt fine of N\$ 475 to pay in case he preferred to pay a fine rather than to appear in court for the offence. The appellant did not pay the admission of guilt fine, therefore appeared in court and pleaded not guilty to the

¹ Act 22 of 1999.

² Act 51 of 1977.

charge. However, after a trial, he was found guilty and punished as pointed out above.

[3] Mr Graham Deon Knowles, a Nampol Traffic Officer at Walvis Bay Police Station was the only witness called by the State to testify in the matter even though he was with a colleague, Mr Jacobs from Walvis Bay Municipal Traffic Department. Mr Knowles testified that he and Mr Jacobs were on duty on Nangolo Mbumba Drive when he observed the appellant's vehicle approximately 300 meters away from where they were standing. He saw the appellant pulling from a robot behind another vehicle.

[4] He testified further that he then moved to his camera which was already set facing in the direction where the appellant was coming from. He looked in the lence and saw the reading of the speed and then triggered the camera which gave him the speed reading of 93 kilometer an hour in a zone of 60 kilometer per hour. Thereafter, when the appellant came nearer, he pulled him off the road and invited him to come to the camera to see the speed registered. The appellant asked the witness how he was sure that the speed reading was of his (appellant) vehicle and not of the vehicle which was in front him. Despite the complaint from the appellant, the witness proceeded and issued him with a notice to appear in court.

[5] A certificate of competence and another of the validity of the calibrated machine were handed up in court as exhibits. During cross-examination by the appellant, Mr Knowles could not remember what was discussed between them after he pulled off the appellant.

[6] In his testimony, the appellant told the court that on 22 October 2015, at around 10h30 he was driving from the Police Station towards the lagoon. Next to him in the left lane of the road was another vehicle driven by a white person going in the same direction. He said that both his vehicle and that driven by the white man were pulled off by the witness who asked them to go to the camera. The white man walked in front. While still approaching the camera, the witness told the white man to go back and said to him that the fine was meant for him.

[7] The appellant further testified that he confronted the witness as to how he would know that the speed showing on the camera was speed of his vehicle when the registration number of his vehicle was not captured by the camera. Appellant was then cross-examined by the prosecutor. Thereafter, the appellant was convicted and sentenced.

[8] The grounds of appeal raised against the convictions are appearing in para 1 of the Notice of appeal listed as paras 1.1 to 1.7.

[9] Grounds one, two and three are similar but worded differently. The essence thereof is that the learned magistrate misdirected herself and/or erred in law and/or on facts by admitting and relying on the calibration certificate (exhibit "B") which is not evidence in the form of an affidavit as provided for in s 212 (4) or (8) of the CPA for which the author thereof and the person who calibrated the camera were not called by the State to testify as a witnesses in the proceedings.

[10] In his written heads of argument the appellant argues that exhibit "B" is not *prima facie* of what is stated therein. An expert or the person who calibrated the camera is the only person who could tell the court that the camera was in good working condition to measure the speed accurately, he said.

[11] The magistrate in her judgment said that the appellant did not object to the calibration certificate being handed up to form part of the record which indicated that the camera was in good condition. The certificate also indicated the camera or the device was calibrated on 31 July 2015 and that it was valid until 31 January 2016. The notice to appear in court for the offence committed was issued against the appellant on 22 October 2015, a day far from the expiry date of the device.

[12] I agree with Mr Jacobs, therefore that it is too late to complain or to object to the handing up of the calibration certificate on appeal. He should have done so during the trial which he failed to do. Had he objected to the handing in of the certificate as evidence to prove the date when the camera was calibrated and the expiry date, more probable the State would have thought of calling as a witness, the person who calibrated the device to testify. His only problem during the trial was the

speed of 93 kilometer per hour captured by the machine. No objection was raised against the certificate.

[13] It would seem from the papers filed though that the appellant is well conversed with the court procedure. He followed the court proceedings properly to draft the notice of appeal with grounds. Not only that, but also prepared extensive written heads of argument with reference to case law, although the facts in the matter of *Shituna v the State*³ are distinguishable from the facts of the present matter. The learned magistrate was justified to accept the calibration certificate as evidence to prove that the device was in good condition and that it measured the speed correctly.

[14] As already pointed out, it is too late for the appellant to complain against the admission of the calibration certificate into the record of proceedings at this stage. Had he done so during the trial, the magistrate would have considered his objection and made a proper ruling to that effect. It is therefore, my view that grounds one, two and three are without substance and are rejected. In fact these are not proper grounds of appeal but statements of facts.

[15] Similarly, I reject the appellant's argument that the magistrate should not have accepted the evidence of Mr Knowles on the functioning of the device as he is not an expert on how the device measures speed through laser technology. To the contrary, Mr Knowles handed up a certified copy of his certificate of competence certifying that he had successfully completed a course on the basic principles and practical operation of the LTI 20-20 ultralyte laser speed detection system as an operator on 13 August 2007. Meanwhile, the appellant did not attend such a course to rebut Mr Knowles' evidence nor did he (appellant) call an expert to testify on the functioning of the device to refute Mr Knowles' evidence.

[16] Grounds 1.4 and 1.5 are a reiteration of what has been stated in grounds 1.1 to 1.3. Therefore must suffer the same fate. While ground 1.6 is misleading, because the appellant was found guilty as charged, namely guilty of a contravention of s 76

³ (CA 59/2011) [2013] NAHCNLD 51.

(4) of the Roads Traffic Act, 22 of 1999 not guilty of s 76 (1) as the appellant is alleging in the notice of appeal. The ground is also dismissed.

[17] Ground 1.7 is not a ground of appeal at all. Ignorance of the law is not always a ground of justification in law to escape a conviction. Looking at how he had drafted the heads of argument, it shows that the appellant is not illiterate but someone with knowledge of traffic rules. In any event, the magistrate explained all his rights to him at all stages of the proceedings. He was adequately assisted during the trial.

[18] No error or misdirection on the part of the magistrate could be detected from the record of proceedings, therefore and for the reasons stated hereinbefore, the appeal cannot succeed.

[19] In the result the following order is made:

The appeal is dismissed.

E P Unengu
Acting Judge

D N Usiku
Judge

APPEARANCES:

FOR THE APPELLANT: S Jacobs
Instructed by Office of the Prosecutor-General,
Windhoek

FOR THE RESPONDENT: Alfred Muzamai Simasiku (In person)
Windhoek