

REPUBLIC OF NAMIBIA

NON REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
APPEAL JUDGMENT

Case No.: CA 08/2016

In the matter between:

BALAKIAS SHEKUZA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Shekuza v S* (CA 08/2016) [2017] NAHCNLD 39 (9 May 2017)

Coram: JANUARY, J and TOMMASI, J

Heard: 17 OCTOBER 2016

Delivered: 9 May 2017

Flynote: Appeal – Traffic offence – Reckless driving – *Res ipsa loquitur* – Inferences – Not supported by proven facts – Conviction and sentence set aside

Summary: The learned magistrate convicted the appellant of reckless driving in contravention of section 80(1) of the Road Traffic and Transport Act, Act 22 of 1999 and sentenced him to N\$ 4000 (four thousand Namibian Dollar) or in default of payment 1 (one) year imprisonment. The State did not prove that the appellant was speeding. A photo and sketch plan was used as an exhibit from which the magistrate drew inferences. The proven facts do not support the inferences as the only inference in the circumstances. The appeal succeeds.

ORDER

1. The appeal succeeds;
 2. The conviction and sentence are set aside.
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APPEAL JUDGMENT

JANUARY, J (TOMMASI, J CONCURRING)

[1] This appeal is against conviction and sentence on a charge of contravening section 80(1) of the Road Traffic and Transport Act, Act 22 of 1999 – Reckless or Negligent Driving. The appellant was convicted for reckless driving and sentenced to N\$ 4000 (four thousand Namibian Dollar) or in default of payment 1 (one) year imprisonment.

[2] The appellant in the matter was represented in the court *a quo* by Mr Greyling and again is represented by him in this appeal. The respondent is represented in this appeal by Mr Pienaar. The appellant pleaded not guilty and placed all elements of the offence in dispute.

[3] It is common cause that an accident occurred in a street in Oshakati referred to as Oshakati Main Road. This public road is a dual carriage way in both directions with an island in the middle. The appellant was driving a police vehicle with registration number N14581 SH (hereinafter referred to as the police vehicle) and the complainant a taxi with registration number N 18036 SH (hereinafter referred to as the taxi).

[4] It is further common cause that the taxi was bumped on the driver's side front mudguard, front wheel and bumper. The taxi came to a standstill in the left lane of the dual carriage way more to the middle of the road. The police vehicle landed on its roof some distance off the street and on the left side off the street. Photos were taken shortly after the accident of the scene of accident whilst both motor vehicles were still in the positions where they came to a standstill. A photo and sketch plan were compiled and handed up, without objection, as exhibits in court.

[5] In my view, this is a typical case where the principle of *res ipsa loquitur* (the facts speak for itself) finds application. The magistrate based her finding on the principle and drew inferences from the photo plan. There was only one eye witness who was driving in the opposite direction of the taxi and police vehicle. He witnessed the accident and whereas he knows the complainant in the matter, made a U-turn to enquire about the condition of the complainant. Two other witnesses for the State are police officers who arrived at the scene shortly after the accident. The complainant, the driver of the taxi, also testified.

[6] One of the police officers who arrived at the scene shortly after the accident is the investigating officer. She has experience of 10 years as investigating officer and holds the rank of an inspector in the police. Her responsibility is to do internal investigations and attend accident scenes where police officers are involved. She has 5 years' experience in this regard. She knows the accused and he is also an investigating officer. The investigating officer was accompanied to the scene by a scene of crime officer who took photos and compiled the photo plan.

[7] The investigating officer testified that upon arrival at the scene, she found the taxi driver and confirmed the position of the taxi and police vehicle as set out above in

paragraph 4. The driver of the police vehicle was not at the scene as he was taken to hospital. The investigating officer observed sand on the road and what she called scratching marks later conceded to as yaw (skid) marks. The taxi was on the outside lane and the police vehicle, what she referred to as a VVTI, on its roof some distance 64 meters away off the road.

[8] She testified that the VVTI vehicle is a fast vehicle as she drives one herself. Although the appellant told her that he was driving at 60 km/h, she concluded that the accident was caused by the appellant speeding. The weather was clear with no rain and wind. She confirmed that the scene of crime officer took photographs of the scene.

[9] In cross-examination the witness conceded that the measuring wheel was not calibrated as it was not necessary as there was nothing wrong with it and it is used in measuring at all accidents. She attended firstly a five month first course and thereafter another five month advance course in the reconstruction of motor vehicle accidents. The witness is neither a traffic accident analyst nor an engineer with experience in traffic safety neither an expert in the reconstruction of motor vehicle accidents.

[10] The investigating officer could not dispute the version of the appellant; that he was driving in the right inside lane of the road and that the taxi in the left outside lane; that the appellant was driving at 60km/h; that the taxi driver applied brakes and attempted to cross the lane where the appellant was driving in; that the police vehicle hit the taxi on the right front part which was protruding into his right lane. The crash caused the police vehicle to hit the middle man (island) with the right front tyre causing the police vehicle to swerve to the left, resulting in the yaw marks. Eventually the police vehicle hit the left curb/edge of the road, swerved sideways and landed on its roof. The momentum of the police vehicle resulted in it landing on its roof.

[11] The scene of crime officer testified that he attended the scene with the investigating officer, took photographs, took measurements with a measure wheel and compiled a photo plan and sketch plan. He knows the appellant. He identified the photo plan and handed it up in court. The witness indicated that there was a mistake on the photo plan in that he erroneously marked the directions of the respective motor vehicles

as A and B on it. Point A should be direction B and *vice versa*. The directions and points were shown to him by the taxi driver. Both motor vehicles travelled in the same direction in two separate lanes.

[12] The photos depict the following: directions of the motor vehicles A and B in the same direction in two separate lanes; point X, the point of impact opposite an intersection of a T-junction to the right; point C, the wheel cover of the taxi closer to the intersection of the T-junction to the right; point D, the position of the taxi in the left lane close to the white line separating the two lanes of the dual carriageway; point E, the police vehicle on its roof some distance from the taxi and the point of impact; point F a bill board as fixed point to the back of the overturned police vehicle; G, two skid/scratch or yaw marks on the right lane of the dual carriageway crossing the left lane in the direction of the overturned police vehicle. It is visible on one of the photos that there is a curb edge of the road separating the pavement from the road where the police vehicle left the road to the left and whereto the yaw marks direct to. This curb has an edge and is in my estimate about 100mm – 120 mm higher than the road surface. It is the normal type of curb separating streets from pavements or sidewalks and disallowing motor vehicles to drive on the curb or sidewalk.

[13] The measurements are as follows:

X to D = 27.1 m

X to E = 64.2 m

E to F = 28.1 m

F to D = 98.2 m

[14] In cross-examination, the scene of crime officer testified that from his observations he thinks that the taxi driver turned right from the left lane into the right lane wherein the police vehicle was driving in order to turn right into the intersection. This witness had nothing to say when the version of the appellant as set out in paragraph 10 above was put to him.

[15] The taxi driver testified that he was driving in the left lane of the dual carriage way and was bumped by the police vehicle (a white pickup). He only saw dust in front of him and never saw the police vehicle approaching. He does not know where the other car came from but it must have come from behind. The taxi was bumped on the right front side nearby the indicator light. Afterwards when the witness was going to the police car, the police was already there. He did not see the driver of the police car. According to him the police car rolled twice and landed on its roof. This witness denied that he wanted to turn and went into the inner right lane. In his opinion the police car must have driven over 60 km/h because otherwise it would not have overturned.

[16] In cross-examination the witness was not so sure whether the police vehicle could have been driven more than 60km/h. He stated that he was driving at 50 km/h as he was looking for customers. He conceded that the taxi moved for a distance after impact but remained straight in the direction he was driving. He confirmed that the police vehicle hit the edge of the sidewalk and rolled over. The witness was no longer sure if the police vehicle rolled twice. It is depicted in the photo plan that the front wheels of the taxi were turned in a right direction as if wanting to turn into the intersection. The witness could not give a plausible explanation why the front wheels were in that direction. All he could say is that may be the wheels turned on impact and later that he might have turned the steering wheel after the taxi came to a standstill. He confirmed that the eye witness approached him afterwards and enquired about the accident. According to this witness he had to fill in black or blank spots for the eye witness indicating, in my view, that the eye witness did not witness everything as he claims.

[17] The eye witness testified that he was driving from the side of Ongwediva and passed the taxi of the complainant from the opposite direction. He saw a bakkie (pick-up truck) coming from behind the complainant and passing the taxi. It passed the complainant and went into the lane of the complainant. When passing it hit the taxi on the right front wheel. It hit the pavement and overturned. This witness made a U-turn as he knew the driver of the taxi. He found the taxi driver outside the vehicle with no injuries.

[18] According to this witness, the taxi was on the left lane when bumped. The police vehicle did not go far into the lane of the taxi before the accident. The police vehicle hit the taxi on the right front side. This witness testified that the police vehicle was driving very fast because its brake marks continued for a long distance. During cross-examination the witness conceded that the tyre marks were in fact yaw/skid marks. This witness was adamant that he witnessed the accident. In cross-examination he could not confirm that the police vehicle was driving fast. It further became evident that he did not observe the whole accident as at some point he had to make observations from his rear view mirror and only afterwards noticed the police vehicle on its roof. According to him the accident happened 10 meters in front of him and he was driving at 60 km per hour. This witness also disputed the photo- and sketch plan contrary to the other State witnesses. He could not dispute the evidence that the taxi moved about 27 meters after the impact whereas he testified that the taxi immediately came to a standstill. This witness refuted the version of the complainant about the filling in of blank spots.

[19] The appellant testified in his defence that he is a police investigating officer with 11 years' experience; that on the relevant date he was on his way to the police station; that the sun was still shining and there was not a lot of cars on the road; that a taxi was driving in the outside lane and he was driving on the inside lane; that both cars were not driving fast; that when both cars approached a T-junction the police vehicle was slightly behind the taxi; that the taxi's break lights suddenly went on without indicating it wanted to turn; the taxi suddenly turned to the inside lane; that the front of the taxi (nose) was over the white separating lane of the dual carriage way; that as a result of the turning of the taxi, the appellant bumped the taxi with the front part of the police vehicle; the appellant lost control of his vehicle, hit the pavement on the right side and veered off to the left, hit the pavement on the left and overturned.

[20] The magistrate ruled that not much of the evidence was in dispute and that the only issue was whether the appellant was reckless or negligent. She relied on the photo- and sketch plan to make a finding in this regard. The court accepted that although speeding was not proven that the damage and positions of the vehicles spoke for itself. She found that the fact that the police vehicle came to a standstill on its roof a

considerable distance from the point of impact; the damage to the taxi; the fact that the taxi remained stationary on the road are, amongst others, indications that the appellant was considerably speeding in a 60 km/h zone and thus acted recklessly.

[21] In my view the findings of the learned magistrate amounts respectfully to mere speculation and conjecture. No expert in motor vehicle reconstruction testified and no speeding of the appellant was proved. I have indicated hereinbefore that the version of the appellant was not disputed by the police officers who attended the scene shortly after the accident. In fact, the scene of crime officer corroborates the evidence of the appellant although it is merely his opinion. I find that the inferences of the learned magistrate are not the only inferences to be drawn from the facts. It is a proven fact that the accident occurred at an intersection or T-junction. The photo of the taxi indicates the front wheels of the taxi being turned in the direction of the intersection as if to turn. The so-called break marks were described as skid marks and appears on the photos as such. These facts, in my view, makes the version of the appellant reasonably possibly true that there was a sudden emergency for the appellant and that he tried to avoid the bumping by swerving to the right of the road resulting in him hitting the pavement causing his vehicle to swerve to the left pavement. Accordingly the appellant deserved the benefit of the doubt and should have been acquitted.

[22] In the result:

1. The appeal succeeds;
2. The conviction and sentence are set aside.

H C JANUARY
JUDGE

M A TOMMASI

JUDGE**APPEARANCES:**

For the Appellant:

Mr Jan Greyling Jnr.

Of Jan Greyling & Associates

For the Respondent:

Adv. Pienaar

Of Office of the Prosecutor-General