

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 18/2016

In the matter between:

THE STATE

APPELLANT

and

LINDA NDAPEWOSHALI SHADUVA

RESPONDENT

Neutral citation: *S v Shaduva* (CA 18-2016) [2017] NAHCNLD 7 (13 February 2017)

Coram: JANUARY J, TOMMASI J (CONCURRING)

Heard: 21 October 2016

Delivered: 13 February 2017

Flynote: Appeal – Malicious damage to property – Intention to damage not proved
Driving without a driver’s license – Admission of guilt paid – Conviction a misdirection

Summary: The accused in this appeal was convicted for malicious damage to property and driving without a driver’s license in contravention of section 31(1)(a) read

with sections 31(2), 1 and 106(7) of Act 22 of 1999. The evidence does not prove intention to damage but at most negligence. The accused informed the court that she had paid admission of guilt and submitted a receipt to that effect. The convictions are misdirections by the magistrate. The magistrate sentenced the accused and in addition ordered her to compensate the complainant. The convictions, sentences and order to compensate are set aside.

ORDER

1. The appeal succeeds
 2. The convictions, sentences and order for compensation are set aside.
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JUDGMENT

JANUARY J, TOMMASI J (CONCURRING)

[1] This appeal is against conviction and sentence in the magistrate's court Eenhana on charges of malicious damage to property and driving without a driver's license in contravention of section 31(1(a)) read with sections 31(2), 1 and 106(7) of Act 22 of 1999.

[2] The appellant was initially charged with reckless or negligent driving in addition to the abovementioned charges but this charge was withdrawn by the public prosecutor.

[3] The appellant pleaded not guilty to the charges and the State led evidence that the accused bumped a petrol pump at a petrol station with a motor vehicle after the vehicle allegedly exceeded speed whilst being driven by the accused who did not have a driver's license. The State called three witnesses.

[4] One witness is the owner of the filling station who was informed of the incident and the other two are petrol attendants who witnessed the incident. The owner of the filling station testified that he was informed about the incident. The value of the damage is N\$30 067.00. He reported the case to the police and repaired the damage on his own.

[5] The petrol attendants testified that the accused came to the filling station to refill her motor vehicle. The accused turned off the road allegedly with speed, hit a person on the leg and bumped the petrol pump. The petrol pump fell down and was damaged. This witness asked the accused if she had a driver's licence to which she responded that she did not have one.

[6] The accused gave a plea explanation and testified under oath in her defence. She explained that she is guilty of the charge of driving without a driver's license but already paid an admission of guilt fine. She also testified that she already paid an admission of guilt fine and handed a copy of the admission of guilt receipt. She further testified that she did not intent to damage the petrol pump because it rendered a service to her. The problem was allegedly caused by the petrol pedal of the motor vehicle excelling by itself. There are no iron bars protecting the petrol pumps. The vehicle when excelling hit the pavement where the petrol pump is and damaged the pump. She denied that she damaged the petrol pump intentionally.

[7] The accused called a witness to testify in her defence. This witness testified that he was informed by the accused about the accident at Ondobe Service Station. The witness testified that the petrol pump does not belong to the complainant but to Caltex Namibia. The damage was not refunded because Caltex Namibia told the witness that it was not necessary as they do not require clients to repair damages. The witness also experienced the same mechanical problem with the vehicle.

[8] The elements for malicious damage to property..." are (a) damaging (b) property (c) unlawfully and (d) intentionally"¹. The State had to proof beyond reasonable doubt that the accused had the necessary intent to cause the damage. In my view the

¹ C R Snyman, Criminal Law, 4th Edition, 2002, p534

evidence at most establishes that there was possibly negligence. This is not enough to convict the accused.

[9] The accused handed up a receipt for admission of guilt for driving without a driver's license. It was for the State to disprove that the admission of guilt was for something other than driving without a driver's licence. The plea explanation and testimony of the accused amounts to *autrefois convict*.

[10] In my view, further the version of the accused that there was a mechanical failure of the motor vehicle is reasonably possibly true. The learned magistrate misdirected herself by convicting the accused on both counts.

[11] The learned magistrate in her reasons states that: "the appellant failed to show that she paid AOG in respect of CR34/12/2011. She produced the receipt indicating that she paid for notice number 51338.....The version of appeal is not credible and reasonable possible true." The approach is wrong. It is for the State to prove and not for the accused to disprove *autrefois convict*.

[12] In these circumstances the convictions, sentences and order for compensating the complainant stand to be set aside.

[13] In the result:

1. The appeal succeeds
2. The convictions, sentences and order for compensation are set aside.

HC JANUARY, J

MA TOMMASI, J

APPEARANCES:

For the Appellant:

Mr Tjiteere

Dr Weder, Kauta & Hoveka Inc.

For the Respondent:

Adv. Pienaar

Office of the Prosecutor-General