



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no CR14: /2017

In the matter between:

THE STATE

And

MARTIN KUDUMO

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO. 185/2015

Neutral citation: *S v Kudumo* (CR 14 /2017) [2017] [NAHCNLD 80 (10 August 2017)]

Coram: TOMMASI J and JANUARY J

Delivered: 10 August 2017

Flynote: Criminal Procedure — Trial — Plea — Plea of guilty — Culpable homicide Questioning in terms of s 112(1)(b) Act 51 of 1977 — Judicial officer to question the accused with reference to the alleged facts of the case in order to ascertain whether the accused admits the allegations in the charge — Test is what

accused actually said — And not what Court thought of the answers — Accused's answer does not constitute an unequivocal admission that he was negligent.

ORDER

1. The conviction and sentence in respect of count 1, culpable homicide, are set aside and the case is remitted to the district court with the direction that the accused be questioned further or that a plea of not guilty be entered.
 2. The conviction and sentence in respect of count 2, having contravening section 31 of the Road Traffic and Transport Act 22 of 1999, i.e. driving without a driver's license is confirmed.
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REVIEW JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] This is an automatic review emanating from the district court of Eenhana. The accused herein was convicted of two counts i.e. culpable homicide and having contravened section 31 of the Road Traffic and Transport Act 22 of 1999, driving without a driver's license. He was sentenced to pay a fine of N\$1500 or 6 month's imprisonment for culpable homicide and N\$1000 or 20 days imprisonment for driving without a licence.

[2] The accused was sentenced on 26 May 2015; the matter was submitted for review on 16 June 2015. This court directed a query to the learned magistrate on 7 October 2015 and she replied thereto on 11 February 2016.

[3] The accused herein pleaded guilty to both counts. He was convicted of the second count in terms of the provisions of section 112(1)(a) and was questioned in terms of section 112 (1)(b) in respect of the charge of culpable homicide.

[4] I raised the following query with the learned magistrate:

‘The learned magistrate asked the accused the following question:

‘Did you foresee that by driving an unroadworthy vehicle you may cause an accident include (sic) killing someone?’

The answer by the accused was as follows:

‘Yes’ but I did not know that the vehicle was not roadworthy.

Was the learned magistrate satisfied that he accused admitted that he negligently caused the death of the deceased’

[5] The learned magistrate responded as follows:

‘The accused by answering ‘yes’ made the court to believe that accused foresaw that by driving an roadworthy vehicle he might cause an accident. It is the duty of any driver before assumes (sic) driving to ascertain that the vehicle he intend to drive is roadworthy.’

[6] The accused admitted that the deceased was ‘overrun’ by the vehicle, and that the vehicle was not roadworthy because the petrol pumped at high motion causing the car to drive fast. The key statement was that he did not know that the vehicle was not roadworthy. The accused made no admission to the effect that he failed to ascertain that the vehicle was in a roadworthy condition prior to driving it and neither could the judicial officer presume that the accused knew what the duties of a driver are. The accused was not the holder of a driver’s license.

[7] The judicial officer’s duty in terms of section 112(1)(b) is to:

‘... question the accused with reference to the alleged facts of the case in order to ascertain whether the accused admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.’

[8] In *S v Goagoseb* 1995 NR 165 (HC), at page 165 I, Hannah J stated as follow:

'While I agree with the magistrate that in most cases such a bald assertion would carry very little weight it must be remembered that the accused was being questioned in terms of s 112(1)(b) of Act 51 of 1977 and the test is what the accused has said, not what the Court thinks of his answers.'[my emphasis].

[9] Likewise, the learned magistrate in this case could not go beyond the answer of the accused. The accused indicated that he was unaware of the fact that the vehicle was not roadworthy. The magistrate erred when she held the view that he ought to have ensured that the vehicle was roadworthy. She could not have been satisfied on the strength of the accused's answer that he admitted all the elements of the offence of culpable homicide as his answer does not constitute an unequivocal admission that he was negligent.

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

1. The conviction and sentence in respect of count 1, culpable homicide, are set aside and the case is remitted to the district court with the direction that the accused be questioned further or that a plea of not guilty be entered.
2. The conviction and sentence in respect of count 2, having contravening section 31 of the Road Traffic and Transport Act 22 of 1999, i.e. driving without a driver's license is confirmed.

M A TOMMASI
JUDGE

I agree

H C JANUARY

JUDGE