

1/94 IN THE SUPREME COURT OF NAMIBIA

In the CRIMINAL APPEAL of:

HOFENI KANDJIMI	APPELLANT
versus	
THE STATE	RESPONDENT

CORAM: MAHOMED, C.J.
DUMBUTSHENA, A.J.A.
LEON, A.J.A.

Delivered on: 1994.10.04

APPEAL JUDGMENT

MAHOMED, C.J.: The Appellant was convicted in the Magistrate's Court the offence of driving while under the influence of intoxicating liquor and he was sentenced to a fine of R800 or 4 months imprisonment in default of payment and an additional 6 months imprisonment conditionally suspended.

His appeal to the High Court of Namibia was dismissed. The evidence led on behalf of the State created a strong case against the Appellant and the Appellant would have been hard put to establish that on an objective reading of the record and the probabilities he should not have been convicted of this offence. I have however, a difficulty in this matter. It arises from the provisions of paragraph 4 of the Notice of Appeal against the judgment of the Magistrate which was

filed on behalf of the Appellant. That paragraph reads as follows:

"The Learned Magistrate erred in the law and/or on the facts to reject the version of the Appellant as being untrue."

The Magistrate in his reasons for judgment responded to this complaint in the Notice of Appeal by the following paragraph:

Ad paragraph 4 : The Court never rejected the testimony of the Appellant as being untrue.

On the basis of this finding the Magistrate, should have acquitted the Appellant. In order to find an accused person guilty beyond reasonable doubt, the State must prove beyond reasonable doubt that the version deposed to by the Appellant is false. The Magistrate says in express terms that he did not reject the version of the Appellant which was that he v/as not driving the vehicle under the influence of liquor. If the Magistrate did not reject that version, it follows that he could not say as that the State proved the guilt of the Appellant beyond reasonable doubt. That proposition appears clearly inter alia from the case of R v M 1946 AD p.1023 followed by numerous other cases in this country. It is perfectly true that in certain other passages in the Magistrate's reasons for judgment he suggests that he does reject the version of the Appellant and does find that it could not reasonably possibly be true but, in response to a direct complaint that he should have never rejected the Appellant's evidence as being untrue, he

expressly says that he never rejected that version as being untrue.

In these circumstances it is not for this Court to substitute a different finding of fact for the finding which the Magistrate appears to have made and in my view, it follows that the appeal should succeed. In fairness to the High Court which dismissed the appeal I should record that this particular objection based on the Magistrate's reaction to the notice of appeal was never articulated before the High Court and was not a point articulated in the Appellant's main heads of argument or in the Appellant's supplementary heads of argument. It was raised on appeal for the first time by me.

In the result I would order that the appeal be upheld and the conviction and sentence of the accused be set aside.

MAHOMED,

MAHOMED,

C.J. I agree

DUMBUTSHENA, A.J.A.

I agree

LEON,
A.J.A.

APPELLANT'S ADVOCATE:

RESPONDENT'S ADVOCATE:

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R. Totemeyer

(Government Attorneys)

S. Winson