

SOUTH AFRICA / JUDGMENT

Makukunzva v S (A44/2020) [2020] ZAFSHC 220 (15 September 2020) [2020] ZAFSHC 220

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue, Opperman

CASE / FILE NUMBER

A44/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A44/2020

In

the matter between:

B
MAKUKUNZVA
Appellant
and
THE
STATE
Respondent

CORAM:

DAFFUE, et
OPPERMAN, JJ
HEARD

ON:

14 SEPTEMBER 2020

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 15 SEPTEMBER 2020

I

INTRODUCTION

[1] The appellant was convicted in the local Magistrate's Court on a count of speeding insofar as he had exceeded the speed limit of a 120 km/h applicable on the N1 freeway whilst driving at 181 km/h in contravention of s 59(4)(a) of the National Road Traffic Act, 93 of

1996. He was sentenced to a fine of R4 000.00 or 4 months' imprisonment.

[2] Appellant appeals the conviction, having been granted leave to appeal by the court a quo on 9 December 2019.

II GROUNDS OF APPEAL

[3] Appellant alleges that the learned Magistrate erred in finding that the State had proven beyond reasonable doubt the correctness of the speed measured, having regard to the following:

"1. The learned Magistrate erred in finding that the appellant admitted the contents of the Three Tests document dated 1 March 2017 signed by Mr RR Scott;

2. The state failed to prove that all distance checking markers which were used during testing of the measuring device, before use, were validated by a qualified surveyor;
3. The state failed to prove that the speed measuring device was mounted on a firm and stable surface at the time of operation;
4. The state failed to prove a clear visible separation between the vehicle of the appellant and another visible vehicle;
5. Having regard to the above, the state failed to prove the reliability of the speed measuring device."

III ADMISSIONS RECORDED

[4] After some confusion the following admissions were recorded in accordance with the provisions of s 220 of the Criminal Procedure

Act, 51 van 1977 ("CPA"):

4.1 On 1 March 2017 and on the N1 national road, being a public road near Werda Farms in the district of Bloemfontein, the accused was the driver of a white Mercedes Benz motor vehicle with registration number GY 72 NK GP (The registration number according to the charge sheet is DY 72 MKGP. I accept that an error crept in during transcription.)

4.2 The certificate of Test Africa, handed in as exhibit A.

4.3 A document of the Free State Provincial Traffic Department with the heading “Speed Measuring Equipment: Prolaser 4 (Three Tests)”, handed in as exhibit B.

4.4 The particular speed measuring device was properly calibrated in accordance with the calibration certificate handed in as exhibit B1.

4.5 Mr RR Scott was at all relevant times in possession of an Operator’s Certificate, handed in as exhibit C and he was competent to operate the speed measuring device.

[5] Upon reading of the record it appears as if there was serious confusion during the plea procedure. I shall deal with the

uncertainty during the evaluation of the evidence, but wish to indicate at this stage that the plea proceedings appeared to be quite chaotic. The court a quo eventually referred to six admissions whilst there might have been only four or five, depending on how one considers the admissions actually made.

[6] At a stage the court a quo endeavoured to place the admissions on record and indicated in the process that the speed recording device (“the device”)

“functioned properly”. When the appellant was asked to confirm the admissions, he responded positively, but it must have been clear to the court a quo that there was uncertainty as a result of which his counsel was allowed to discuss the issue with him. Upon discussion, Mr Tsotetsi, appellant’s counsel during the trial, reported back to the court a quo and I quote several passages verbatim in order to indicate what was really in dispute eventually:

“MR TSOTETSI: I consulted with him Your Worship the court can confirm with him except one aspect Your Worship that he has informed me about the court has said that we admitted that the machine was calibrated and it was working properly the word worked properly we never said it was working properly.

COURT: Okay.

MR TSOTETSI: We say it was calibrated that is our defence the properly is our defence it was...

MR TSOTETSI: The word properly.

COURT: Should I take it out.

MR TSOTETSI: Please Your Worship.

COURT: Okay agrees the calibration certificate as correct that’s what you said.

MR TSOTETSI: Yes he says that (indistinct) the calibration certificate it is correct that the certificate of Tubelo as it is is correct certificate.

COURT: Ja okay admits the calibration certificate as correct.

MR TSOTETSI: Yes.

COURT: Okay yes functioning properly I delete. Furthermore does he also admits that certificate was still valid?

MR TSOTETSI: Yes we agree that it was valid Your Worship the incident happened on the 1st of March it was expiring on the 31st of May.

COURT: Okay yes okay are you happy with that. Ja admits the calibration certificate as correct. Admits that Mr Scott is competent to operate the machine the said machine. And lastly the calibration certificate was still valid. Those are the admission that your advocate placed on record do you agree with that or do you have a problem with that?

ACCUSED: No I agree with it.

COURT: Ja I don't have to bring it under your attention I think your advocate has already explained to you, you must understand that there is no duty upon you to assist the state in any way to prove the charge against you but now if you want to make the submissions I can just record them as formal admissions contemplated with section 220 you must understand that there is no obligation whatsoever on you

to admit them do you understand?

ACCUSED: Yes I understand.

COURT: Do you still want to admit these 6 admissions?

ACCUSED: (indistinct). Yes your Worship

COURT: Alright Mr Tsotetsi."

After this discussion Mr Tsotetsi addressed the court again, indicating that his client did not want the admissions to be made in terms of s 220 of the CPA, but eventually conceded that there could not be any harm in doing so and I quote the outcome thereof verbatim:

"COURT: Okay the admissions as set out by advocate Tsotetsi admission number 1 up to 6 I can record it as formal admissions under section 115(2)(B) of the Criminal Procedure Act read with section 220 admissions deemed to be admissions in terms of section 220 of the Criminal Procedure Act.

MR TSOTETSI: May it please the court Your Worship."

At that stage the documents admitted were handed in as exhibits A, B, B1 and C respectively.

IV THE JUDGMENT OF THE COURT A QUO

- [7] The court a quo found that the two witnesses called on behalf of the State, Mr Scott the operator, and Mr Lavery, a metrologist in the employ of Truvelo Manufacturers (Pty) Ltd, the manufacturer of the particular the device, impressed the court as “excellent, credible and good witnesses” and continued: “The evidence of Mr Scott is directly corroborated by the evidence of Mr Lavery that the machine that captured the speed of the accused person it was functioning correctly and it is improbable that it would have captured the wrong speed and based on his opinion on the documents that has been presented before me EXHIBIT “A” as well as EXHIBIT “B” in particular.

I have no reason to doubt the correctness of the evidence as I have alluded to that impressed me as good and quite credible witnesses.”

- [8] The court a quo found the version of the accused “very strange” and was particularly critical of his version which was never put to Mr Scott, i.e. his vehicle’s speed “was captured through another vehicle”. Consequently the court held that the version of the appellant was “an attempt to exonerate himself from what he did on the particular day.”
- [9] Finally, the court held that the State had proven beyond reasonable doubt that the appellant had driven his vehicle at the speed of 181 kph, that the device was functioning properly and that the reading reflected on the device was indeed the speed at which the accused was travelling.

V EVALUATION OF THE PARTIES’ SUBMISSIONS AND THE JUDGMENT OF THE COURT A QUO

- [10] In evaluating the evidence I am distinctly aware of the following famous dictum by the Appeal Court in *Rex v Hephworth*:^[1]

“A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides.”

- [11] Schmidt and Rademeyer summarised the approach of a court of appeal in evaluating the judgment of a lower court with reference to case law as follows:^[2]

“When an appeal is lodged against a trial court’s findings of fact, the appeal court takes into account that the court a quo was in a more favourable position than itself to form a judgment because it was able to observe witnesses during their questioning and was absorbed in the atmosphere of the trial from start to finish. Initially, therefore, the appeal court assumes that the trial court’s findings were correct, and it will normally accept those findings unless there is some indication that a mistake was made.”

- [12] It is apparent from the defence raised by the appellant, even considering the chaotic situation prevailing during the plea

proceedings, that the proper functioning of the device was placed in contention. This is obviously the reason why the prosecutor

decided to call Mr Lavery to testify as an expert pertaining to the calibration and the functioning of the particular kind of device.

If the court a quo had any doubt about the defence raised, it could have enquired exactly what was in dispute. This was not done.

[13] I am satisfied that the version of the appellant could and should have been rejected as false. Wherever his version conflicts

with that of Mr Scott, there cannot be any doubt that Mr Scott's version is to be preferred. However, this is not the end of the enquiry as will be seen from the next paragraphs.

[14] The full bench in this division, relying on *S v Skele*, [3] considered the questions to be put to an accused, who pleads guilty, in terms of the provisions of s 112(1)(b) of the CPA. The following is stated by Musi AJP (as he then was), the scribe of the full bench in *State v Phuzi*: [4]

"[29] In order to prove that the speed limit was exceeded the state would have to prove that the speed-measuring device was reliable for the purpose; that it determined and registered the speed accurately; and that it was properly set up in accordance with the manufacturer's specifications. It is axiomatic that a properly trained person would be able to set up the device in accordance with the manufacturer's specifications."

[30] The court cannot take judicial notice of the fact that the person who operated the device is trained to do so. The court can also not take judicial notice of the fact that all traffic officers are trained to set up speed-measuring devices. Likewise, it cannot take judicial notice of the fact that the speed-measuring device functioned properly." (emphasis added)

[15] The learned judge summed up the position as follows:[5]

"[39] To sum up:

(a) Fault in the form of intention or negligence is an element

of the offence of exceeding the speed limited;

(b) when an accused is questioned in terms of s 112(1)(b) the magistrate must ascertain whether the accused admits:

(i) the recorded speed;

(ii) the proper functioning of the speed-measuring device; and

(iii) the competence of the traffic officer to set up and operate the speed-measuring device. ...

[42] ... This might seem to be overly pedantic, but, as was said in *Pelser* the seriousness of the offence demands that the procedural requirements be strictly adhered to."

- [16] In casu Mr Scott successfully completed a course pertaining to the theory and operation of the Truvelo Prolaser 4 speed capturing device used. Exhibit C was admitted. It is also common cause that Mr Scott completed the Speed Measuring Equipment: Prolaser 4 (Three Tests) certificate, exhibit B.
- [17] The sole issue to be determined by the court a quo was the functionality of the device which was pertinently placed in issue. The court a quo was satisfied that the State had proven its case beyond reasonable doubt. The functionality of a device or machine entails more than one aspect. Surely, even a well-manufactured and calibrated device may not function correctly if it is not properly set up according to the specifications of its manufacturer, otherwise specifications would be superfluous. Consider, for example a newly purchased fridge that is placed up-side down by its new owner. It will not function.
- [18] Upon Mr Pieterse's submission in the application for leave to appeal, he not having been involved in the trial, that evidence had to be led to the effect that the device had been mounted on a firm and stable surface in accordance with the manufacturer's

guidelines, the court a quo reacted as follows:

"We know that next to the N1 it is ground, it is not water. It is ground, it is not water. And then it is a surface. And then it cannot be a planting land, it is a hard surface... You know, certain things they are so glaring that one do not have to expect the prosecutor to prove that. ... Not generally, it has always been like that. The N1 is not, there is no water there. Then why would the police go, the traffic officer go and mount the machine in water? ... Yes that ground there, it does not move. It is firm and stable."

- [19] The aforesaid remarks by the court a quo in the absence of evidence by Mr Scott as to how the device was set up, is unfortunate. There is no clear evidence that the device was mounted, and if so, whether it was mounted on a firm and stable surface. Upon a question by the prosecutor to explain in detail what Mr Scott did and how the speed was captured, he said the following:

"Okay what I usually do it if I should input (sic) the device of the car and capture that specific car speed and that car is already way over access (sic) of the speed limit and then I stay on that specific car until it gets into what we call the range that it where we get onto the road and stop him or her whatever the accused is and show them their speed and follow the procedures of an arrest after." (emphasis added)

Thereafter Mr Scott continued to explain that the cursor of the device was fixed on the vehicle and what transpired thereafter. There is no evidence whatsoever as to how the device was set up and whether or not it was in compliance with the manufacturer's

guidelines.[6] I quote from paragraph 3.2 of the guidelines:

"3.2 Site selection and setup for laser – setup and installation shall -

- (a) at all times whilst being operated be mounted on a firm and stable surface."

Mr Scott never tested that the device was mounted and also never tested that it was mounted on a firm and stable surface. The question is whether we should accept that Mr Scott, a properly qualified operator, set up the device in accordance with the operational requirements when the functionality of the device was specifically placed in dispute.

[20] I turn now to the grounds of appeal. Notwithstanding Mr Pieterse's submissions I am satisfied that the first ground of appeal has no merit. The appellant is an attorney and was represented by an advocate. The Speed Measuring Equipment:

Prolaser 4 (Three Tests) document completed by Mr Scott and handed in as exhibit B was admitted. It was never the appellant's

case that the contents thereof were in dispute and it was never put to Mr Scott that he filled out the form incorrectly. It is apparent from the document that Mr Scott prepared the device before usage that particular day in accordance with the requirements set out in paragraph 3.1 of the guidelines. As is apparent from the document, fixed distance and zero velocity tests were executed at the 100 meters' validation distance at Lengau DLTC. After the appellant was caught speeding and at the end of his shift Mr Scott did the same tests. If appellant wanted to dispute the 100 meters' validation distance relied upon by Mr Scott in exhibit B, he should have made it clear and/or disputed the correctness of the contents of exhibit B. This was not done and consequently, he cannot now rely on the State's failure to present evidence of a land surveyor or other qualified person to confirm that the distance of 100 meters was correctly measured.

[21] The second ground of appeal does not hold any water for the same reason mentioned in the previous paragraph. It is evident that Mr Scott did the required tests at the start and end of his shift that particular day, as is apparent from exhibit B.

[22] The fourth ground of appeal is really an afterthought, bearing in mind the clear evidence of Mr Scott and the failure by appellant's

counsel to put his eventual version to Mr Scott for his comment. Mr Pieterse wisely decided not to labour this issue at all. In any event, I am satisfied that no reasonable person, not even to speak of a qualified traffic officer, would explain that it is possible to detect the speed of a vehicle through a vehicle driving immediately in front of it.

[23] The only ground of appeal with merit is the third ground, read with the fifth ground. Although it was stated in Phuza[7] that it "is axiomatic that a properly trained person would be able to set up the device in accordance with the manufacturer's specifications,"

it does not follow that this is always done. The prosecutor should have ensured that Mr Scott testify about the set up. One single sentence would suffice, i.e. that he mounted the device in accordance with the manufacturer's specifications as contained in the guidelines. As the record reflects, there is no evidence that the device was properly mounted in accordance with the guidelines and consequently the State failed to prove the reliability of the device in the specific factual setting.

[24] Mr Hoffman supported the judgment of the court a quo in his written heads of argument, but after listening to the dialogue between the court and appellant's counsel, he readily conceded that the lack of evidence in respect of the proper set up of the device was fatal for the State's case. Consequently, he did not endeavour to convince us that the appeal should be dismissed.

VI

CONCLUSION

[25] This appeal is adjudicated based on a technicality and within a specific factual matrix. The judgment shall not be used as setting a precedent for future speeding cases. The appeal should be upheld as the State failed to prove beyond reasonable doubt that the speed measuring device functioned correctly and reliably.

VII

ORDERS

[26] Consequently the following orders are made:

1. The appeal is upheld.
2. The conviction and sentence are set aside.

J P DAFFUE, J

I concur

M OPPERMAN, J

On behalf of Appellant: ADV KF PIETERSE

Instructed by: STEYN ATTORNEYS

BLOEMFONTEIN

On behalf of Respondent: ADV R HOFFMAN

Instructed by: DPP

[1] 1928 AD 265 at 277

[2] Law of Evidence, loose-leave edition, issue 17 at par 3.3

[3] 1974 (4) SA 384 T at 387 A - D

[4] 2019 (2) SACR 648 (FB) paras 29 & 30

[5] Ibid paras 39 & 42

- [6] December 2012 version of the Speed Measuring Equipment and Traffic Light Violation Monitoring Equipment guidelines
- [7] Loc cit at par 29
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