

**CASE NO.: CR 133/2007**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**SAMUEL NDEUTAPO SHIINDI**

**ACCUSED**

(HIGH COURT REVIEW CASE NO.: 781/2007 )

**CORAM** : DAMASEB, JP *et* GIBSON, J

DELIVERED :

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**REVIEW JUDGMENT:**

**GIBSON, J:**

[1] The accused was charged, in count 1, with a contravention of the Road Traffic & Transportation Act, No. 22 of 1999 as amended. The count to which the accused pleaded guilty, was correctly laid in terms of Section 80(1) of the Act.

[2] However I had reservations about confirming the conviction for negligent driving. Rather, I felt that the accused should have been convicted of reckless driving. However I reflected further and noted that the test for negligence is objective, **See: *Kruger v Coetzee 1966 2 SA 428 at 430 E-F.***

[3] As a result I was content to find that a diligens paterfamilias in the position of the accused, and the circumstances, would not have foreseen that his manner of driving would have caused injury to another

or would have resulted in damage or loss.

[4] Accordingly I would confirm the conviction and sentence in Count 1.

[5] As regards Count 2 i.e. the charge of driving without a driver's licence, thus refers to a contravention of Ordinance 30 of 1967 and its relevant section which, it is unnecessary to set out herein because the Ordinance has been repealed and replaced by the Road Traffic and Transportation Act, Act No. 22/1999, as amended. That conviction and sentence cannot stand as the charge does not appear to have been amended during the trial. Indeed when the trial magistrate came to sentence the accused he referred to the repealed provision. Thus accused was sentenced as follows: N\$300-00 (Three hundred Namibian dollars) or three (3) months imprisonment wholly suspended for five (5) years on condition accused is not convicted of C/S. 56(1) of the Road Traffic Ordinance No. 30 of 1967.

[6] The proceedings and sentence should have been conducted under the New Act, No. 22 of 1999 as was done in respect of the 1<sup>st</sup> count. The trial magistrate has conceded in his reply to my query that he erred in that he did not read the charge correctly.

[7] Charging a person and conducting proceedings under a repealed

provision renders the proceedings invalid and a nullity: **See: High Court Review Case CR 2786/98 S v Bernard Shinyemba.** In the light of this irregularity the conviction and sentence are declared nullity and set aside.

[8] It is ordered that the record be sent back to the magistrate's court for the prosecutor to consider whether or not to charge the accused afresh under the correct Statute.

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**GIBSON, J**

I agree

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**DAMASEB, JP**