

**CASE NO.: CR 48/2010**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**versus**

**ATILA SHEEHAMA**

**[HIGH COURT REVIEW CASE NO.: 416/2010]**

**CORAM: NDAUENDAPO, J et SIBOLEKA, J**

**Delivered on: 2010 SEPTEMBER 24**

**REVIEW JUDGMENT**

**SIBOLEKA, J.:**

[1] The 59 year old accused was charged for Reckless or Negligent Driving in contravention of section 80(1) of Act 22 of 1999. He pleaded guilty and was questioned in terms of section 112(l)(b) of Act 51 of 1977. He was sentenced N\$2000,00 or 10 months imprisonment wholly

suspended for five years on the usual conditions of good behavior.

[2] When this matter came before me on review I directed the following query to the Magistrate:

"The Honourable Reviewing Judge remarks as follows:

1. Would it not have been appropriate for you to tell/explain to the unrepresented accused why you were questioning him in terms of section 112(l)(b) of Act 51 of 1977.
2. Why are there no reasons for your sentence.
3. You convicted the accused for contravening sec. 80(1) of the Road Traffic and Transportation Act No. 22 of 1999, but you did not comply with section 51(1) of that Act; please explain."

[3] The Magistrate's reply has now been received and it reads: "**AD PARAGRAPH**

**1:**

I have perused the CPA, and nowhere is it mentioned that the accused should be explained of Section 112(l)(b) consequences, from my own interpretation, does this section basically upon an accused indicating that he is guilty, and the prosecutor directs the court to apply such Section, is the court only in a position to question the accused as to why he/she is pleading guilty, the court is thus normally on the look-out for any defence the accused may raise, or any mistake made upon pleading guilty, due to the fact that such person is a unsophisticated person..."

Also:

I refer the Honourable Justice to - The Digest of Decisions in connection with the Criminal Procedure Act, 51/77, written by J J Swart, printed 1993, that states w.r.t.o Sec. 112(l)(b) that:

"...To protect the accused against the consequences of an unjustified plea of guilty. It is not necessary for the court to inform the accused of the purpose and nature of the questioning, the implications of the making of any statements or his right to remain silent, for to do so could discourage the accused from answering questions, which would defeat the purpose of the questioning i.e. to test the plea of guilty..."

Cases referred to:     **Nkosi 1984(3) SA 345(A); Tito 1984(4) SA 363 (Ck) at 364 paragraph C-D; Naidoo**

**1989(2) SA 144 (A).**

Also:

..."It is the duty of the presiding officer to question the accused in order to establish that he understands the elements of the offence and in fact intends pleading guilty. There is however no duty cast upon a judicial officer to explain the consequences of a plea of guilty to an accused or to ask the accused whether he has had sufficient opportunity to prepare his defence or whether he desires to engage the services of a legal adviser. It may well be desirable for a judicial officer to do all those things where the accused is obviously an illiterate or uneducated person, but there is no duty cast upon him to do so..."

Cases referred to: **Mthetwa, Kanyile 1978(2) SA 674 (O)**

In lieu of the abovementioned I fully stand by the decided court cases, and believe that it is not necessary for the court to explain Section 112(l)(b) to the accused, however I stand to be corrected of this issue. The issue of explaining such rights has exhausted itself the Honourable Justice is thus humbly requested to guide me as to how such rights should be explained.

**AD PARAGRAPH 2:**

As I have found; was it not immediately imposed on a magistrate to furnish reasons for sentence however, should the Judge be of an opinion should such magistrate be queried with regard to sentence. However, I apologise for thus omission.

**AD PARAGRAPH 3:**

In the matter before me, have I convicted the accused of C/S 80(1) of Act 22 of 1999 - Negligent Driving. The Traffic Act 22/99 at Section 51(1) in no uncertain terms provides that: "51(1) Where a person who is the holder of a driving licence is convicted by a court of an offence -

(a) Under Section 78(l)(a), (b), (c) in the case of an accident which resulted in the death or injury of a person;

(b) Under Section 80(1) of driving a vehicle recklessly; or

Under section 82(1), (2), (5) or (9)

The court shall; apart from imposing a sentence and except if the court under Section 50(l)(a) issues an order for the cancellation of the licence, issue an order whereby every driving licence held by such person is suspended in accordance with the provisions of subsection (2).

I now refer the Honourable Justice to the abovementioned, i.e. to Section 51(1) of the said Act.

Section 51(1) is in no uncertain terms as clear as can be; this Section amongst others indicates the type of offence which is applicable for suspension/cancellation/or disqualification of a driving licence and it clearly states that with regard to Sec.51(l) (b) - Reckless driving. Thus Section 51(1) in general does not include offences such as Negligent driving to be included be it directly or indirectly.

Thus Section 51(1) Act 22/99 does not concern offences such as Negligent driving."

[4] On the query why the provisions of section 112(l)(b) was not explained to the undefended accused, the Magistrate said she perused the Criminal Procedure Act, Act No. 51 of 1977 but did not come across a section that requires her to do so. This reasoning is not correct and is hostile to a fair trial.

The Magistrate has vehemently denied knowledge of the reason why such an explanation is necessary. It is however very interesting to note that in the fourth paragraph of her reply to my query, she has quite correctly stated that very important reason why section 112(l)(b) of Act 51/77 should in fact be explained to the undefended accused, she stated:

It may well be desirable for a judicial officer to do all those things where the accused is obviously an illiterate or uneducated person

For the benefit of the Magistrate and others who have recently been appointed to the bench (Lower Courts) I will quote the annexure (pro forma form) on section 112(l)(b) that was among the various annexures handed out to all Magistrates by the Justice Training Centre some years back. It states that:

"PLEA OF GUILTY  
Proceedings in terms of  
Section 112(l)(b) of Act 51 of 1977

After entering the plea(s) of the accused on the charge sheet:

- The accused's legal representative in terms of Section 112(2) submits a written statement by the accused, marked

Further questioning by the Court (Question / Answer)

- He / She is told by the Court as follows:  
"You have pleaded guilty to the charge(s) brought against you and you are now afforded the opportunity to relate to the Court what happened or what you actually did. If from your account it is not clear which allegations contained in the charge you admit, the Court will question you in order to determine whether you are in fact guilty of committing the offence you are charged with."

Accused confirms that he understands the abovementioned and states:  
(Record questioning by way of Question and Answer.)"

These are the annexures currently being used in all Magistrates Courts country wide. They contain various legal rights that have to be explained to an undefended accused during the course of a trial in a criminal matter. Section 112(l)(b) of Act 51/77 annexure is attached hereto for easy reference.

[5] The aspect of explaining to an undefended accused who has pleaded guilty the purpose of questioning him in terms of section 112(l)(b) of Act 51/77 is very important in our justice system. It does not necessarily have to be contained in the Criminal Procedure Act 51 of 1977 as the Magistrate argues. It is one of the values that comes along with the demands of a fair trial as embraced by the constitutional dispensation in which we are now. It stands to reason that such an explanation is equally as important as all the other rights.

[6] If section 112(l)(b) explanation is not done, the accused may in the end be surprised why the Court convicts him without evidence being lead. It is a value that has been found to be appropriate in the adjudication of justice.

[7] I will now look at the list of some of the rights that need to be explained to an undefended accused at various stages of the criminal trial:

- the right to apply for bail;
- the right to legal representation;
- the right to the disclosure of docket (witness's statements);
- the right of the accused in terms of section 112(l)(b) after pleading guilty;
- the right of the accused at the close of the States' case: such as the right to testify, to call witness, to be cross-examined, and to remain silent (as well as the consequences of the last option);
- the right of the accused in terms of sec. 115 after he has tendered a plea of not guilty;
- the right to address Court before judgment;
  - the right to address Court in mitigation of sentence and to reply to the State's submissions in aggravation of sentence;
- the right of the accused to review and appeal;
  - the right of the accused to seek the State's assistance to bring his witnesses to Court;
  - the right of the accused to react to the Prosecutors request for a postponement;
  - the right to be informed of the reasons why he is convicted or acquitted (reasons for judgment) and reasons for the sentence imposed on him.

[8] The above list is not exhaustive, the reason being that law is a developing

phenomena. More rights could still gradually find their way into our justice system.

[9] I cannot overemphasize the importance of providing reasons for judgment and sentence in all instances where evidence has been lead (trial) and providing reasons for sentence only, in all convictions in terms of section 112(l)(b) of Act 51/77.

[10] It is this Court's considered view that a Magistrate has a duty to provide a judgment that indicates which factors he did consider in reaching a balanced sentence taking into account the circumstances of the accused, the nature of the offence and the interest of society. (See *State vZinn* 1969(2) SA 537 and *State v Rabie* 1975(4) SA 855 (A).

[11] On the query why the Magistrate did not invoke section 51 after convicting the accused on negligent driving the Magistrate said that section does not concern offences such as negligent driving. This reasoning is very unfortunate indeed.

Section 51(1) of the Road Traffic and Transportation Act 22 of 1999 reads:

"Suspension of licence upon conviction of certain offences -51(1):  
where a person is the holder of a driving licence is convicted by a  
Court of an offence -

- (a) under section 78(l)(a), (b) or (c) ...
- (b) under section 80(1) of driving a vehicle recklessly or ...
- (c) under section 82(1), (2), (5) or (9) ...

[12] The Court shall apart from imposing a sentence and except if the court under section 50(1) (a) issues an order for the cancellation of the licence, issue an order whereby every driving licence held by such person is suspended in accordance with the provisions of subsection (2).

[13] An order of suspension pursuant to subsection (1) shall be made for such a period as the Court may determine, but which shall not be less than

- (a) three months in the case of a first conviction.
- (b) one year in the case of a second conviction, and
- (c) five years in the case of the third or subsequent conviction.

The accused in this matter was convicted of negligent driving in contravention of section 80(1) of Act 22 of 1999 which reads:

"Reckless or negligent driving:  
80(1) No person shall drive a vehicle on a public road reckless or negligently."

The use of the words "... the Court shall, ..." in section 51(1) makes it very clear that the suspension of a driving licence is mandatory on conviction for contravening sections 78(l)(a), (b) and (c); 80(1), and 82(1), (2) (5) and (9). (See *State v James Shimwandi* Case No. CR 70/2008 High Court Review case No. 340/2008 delivered on 17.06.2008 and *State u F. Lombard*; and *State v H. C. Van Niekerk* Case No. 20/2007 High Court Review Case No. 227/2007.)

In the result the Court makes the following order:

The conviction and sentence are confirmed and the record is returned to the trial Court for the Magistrate to comply with the provisions of section 51 of Act 22 of 1999.

## **SIBOLEKA**

I agree



**NDAUENDAPO, J**