

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<p>Case Title: <i>The State v Frans Mathew Nkandanga</i></p>	<p>Case No: CR 47 /2021</p>
<p>High Court MD Review No: 867 / 2021</p>	<p>Division of Court: Main Division</p>
<p>Heard before: Mr Justice Liebenberg <i>et</i> Mr Justice January</p>	<p>Delivered on: 27 May 2021</p>
<p>Neutral citation: <i>S v Nkandanga</i> (CR 47 /2021) [2021] NAHCMD 258 (27 May 2021)</p>	
<p>It is hereby ordered that:</p> <p>(a) The conviction and sentence are set aside.</p> <p>(b) The matter is remitted to the trial court in terms of section 312 of the Criminal Procedure Act 51 of 1977 with the direction to enter a plea of not guilty in terms of section 113 of the CPA, to commence trial proceedings and to bring the matter to its natural conclusion.</p> <p>(c) In the event of a conviction, the time the accused has already served must be</p>	

taken into consideration.

Reasons for the order:

[1] This is a review matter which came before me in terms of section 302 (1) and section 303 of the Criminal Procedure Act 51 of 1977 (CPA).

[2] This is an instance where I deem it necessary to invoke the powers vested in me by virtue of the *proviso* under section 304 (2) (a) of the CPA which allows a judge not to first obtain a statement from the judicial officer who presided at the trial in circumstances where it is obvious that the conviction is clearly not in accordance with justice, and that the person convicted will be prejudiced if the record of the proceedings is not forthwith placed before this court for consideration.

[3] The accused appeared in the magistrate's court for the district of Rundu where he faced a charge of reckless or negligent driving in contravention of section 80 (1) read with sections 1, 49, 50, 51, 80 (3), 86, 89, 106, 107, and 108 of the Road Traffic and Transportation Act 22 of 1999, as amended.

[4] He pleaded guilty and the court correctly invoked section 112 (1)(b) of the CPA. After questioning the accused, the court was satisfied that the accused admitted all the elements of the offence of reckless driving, and convicted him accordingly. He was then sentenced to a fine of N\$6000 or 15 months' imprisonment. It was further ordered that he is disqualified from obtaining a learner's license for a period of three months.

[5] The record does not reflect the exact plea of the accused to the charges of reckless or negligent driving; the record only stating that that the Public Prosecutor 'Reads out the charge in an open court' and the accused 'Understands and pleads' without clearly

indicating that the accused pleaded guilty. On the original charge sheet the words 'Guilty

(s. 112(1)(b))' had been entered, but not to which offence.

[6] The learned magistrate, in light of the authorities below,¹ should have clearly indicated whether the accused is pleading to reckless or negligent driving as these are two distinct offences

[7] In *S v Shigwele*² it was held that section 80(1) of Act 22 of 1999 creates two separate offences of reckless driving and negligent driving, and the Legislature never intended that such offences be regarded as one offence.

[8] Similarly, in *S v Joseph*³ the court stated that reckless and negligent driving are two different offences provided for in section 80(1) of the Road Traffic and Transportation Act and that: '...the presiding judicial officer would be required to make a finding on whether the accused concerned drove the vehicle recklessly or whether he has done so negligently'.

[9] I will now turn to address the nature of the answers provided by the accused through the questioning of the trial court in terms of 112 (1)(b) of the CPA. Amongst other questions posed by the court, the accused was asked as to what speed he was driving, to which he replied that he was travelling at 40 km/h. He said that he pleaded guilty to the charge because he lost control of the vehicle which then went off road. He explained that this was on a 'high way' (district road) and that he lost control of the vehicle because there was an ant-hill in the road which he collided with and thereafter lost control of the vehicle. He further admitted that he failed to bring the vehicle under control because he was in shock after the collision.

[10] The High Court of South Africa in *Motinyane v S*,⁴ which I find to be of

¹ *S v Motlogelwa* (HC . 18/2012) [2012] ZANWHC 44 (4 December 2012).

² *S v Shigwele* (CR 75/2020) [2020] NAHCMD 453 (2 October 2020).

³ 1997 NR 108 (HC) 111C-D.

⁴ *Motinyane v S* (A238/2016) [2017] ZAFSHC 91 (25 May 2017).

persuasive value in light of the accused's plea explanation, said the following:

[9] In our law a driver who "in a moment of crisis is confronted by the need to take safeguarding action must not be judged as though he had adequate time and opportunity to reflect and act with normal circumspection." (See *Stolzenberg v Lurie* 1959(2) SA 67 (W) 74D-E).

[10] A person faced with sudden emergency is treated differently insofar as allowance is made, on his part, for possible error of judgment. (See *Marine & Trade Insurance Co. Ltd v Mariamah & Ano.* 1978(3) SA 480 (A)).

[11] In situations of sudden emergency "It is not every error of judgment which is excusable as amounting to negligence, but only one which a reasonably careful and skilled driver of a vehicle might commit. There can only be a moment of agony if the person whose conduct is in question had neither the time nor the opportunity to weigh the pros and cons of the situation in which he found himself." (See *Goode v SA Mutual Fire & General Insurance Co. Ltd* 1979(4) SA 301(W) 307A).'

[11] In light of the answer by the accused that he lost control of the vehicle after bumping an ant-hill on the road, the learned magistrate could not have been satisfied that the accused admitted all the elements of the offence of reckless driving because he has clearly, in light of the case law provided above, raised a valid defence.

[12] From the court's questioning, the accused was asked questions that are more related to *negligence* driving, although he ended up being found guilty of reckless driving. He was asked if he thinks that a reasonable man, driving under the same circumstances, would have caused an accident after having driven over an ant-hill at a speed of 40 km/h and, whether a competent driver would have manipulated the vehicle differently. He was also asked if he is aware that it is a crime to drive on a public road without exercising sufficient diligence and competence; and whether he would have noticed the ant-hill on the road and avoid it if he was a diligent driver.

[13] In her ruling, the learned magistrate found that the accused is properly charged with the offence of reckless driving and that he, not being a licensed driver, took a huge risk to drive on a public road. The trial court also found that the accused was not able to

manipulate the vehicle as the competent driver would have done under the circumstances. And further, that all the elements are 'proven' by the answers of the accused, although he attempted to convince the court that he drove at 40 km/h.

[14] Regarding the difference between reckless and negligent driving, in *S v Shigwele*⁵ it was held as follows:

[16] In determining whether section 112(1)(a) is appropriate *in casu*, it is important to note that a person drives recklessly when he or she drives a motor vehicle in wilful disregard for the safety of persons or property. Negligent driving on the other hand entails driving a motor vehicle in a manner contrary to what a reasonable person in the position of the accused would have done. A reasonable person in the circumstances would have foreseen the possibility that a particular circumstance might exist and that his conduct might bring about a particular result and then take reasonable steps to guard against such possibility.' (Emphasis provided)

[15] Section 80 of Act 22 of 1999 reads as follows:

'80 Reckless or negligent driving

(1) No person shall drive a vehicle on a public road recklessly or negligently.

(2) Without restricting the ordinary meaning of the word "recklessly" any person who drives a vehicle in wilful or wanton disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly.

(3) In considering whether an offence has been committed under subsection (1), the court shall have regard to all the circumstances of the case including, but without prejudice to the generality of the foregoing provisions of this section, the nature, condition and use of the public road on which the offence is alleged to have been committed, the amount of traffic which at the time actually was, or could reasonably have been expected to be, upon that road and the speed at and manner in which the vehicle was driven.' (Emphasis provided)

[16] The questions posed by the learned magistrate relating to the conduct of a reasonable man, placed within the same circumstances as the accused, clearly shows

⁵ *S v Shigwele* (CR 75/2020) [2020] NAHCMD 453 (2 October 2020).

that the test applied by the magistrate was that relevant to determine negligence and not reckless driving, of which the accused was ultimately convicted. In deciding whether the accused admitted to the charge of reckless or negligent driving, regard should have been had to the provisions of section 80 (3) of the Road Traffic and Transportation Act. Moreover, that the answers of the accused were that he was driving at a speed of 40 km/h on a high way when he bumped an ant-hill on the road and lost control of the vehicle. Despite having pleaded guilty to the charge, the accused's answers clearly raised a defence to the charge of reckless driving. In questioning the accused, the trial court did not satisfy itself that the accused drove the vehicle in a wilful disregard for the safety of persons or property because few or no questions were posed in that regard. In the absence thereof, the magistrate's omission to explore such possibility resulted in a misdirection, vitiating the conviction on the charge of reckless driving which cannot be permitted to stand.

[17] The primary purpose of questioning the accused in terms of section 112(1)(b) of the CPA following a plea of guilty, is to safeguard the accused against the result of an unjustified plea of guilty.⁶ Moreover, when the court questions the accused, it must ensure that he admits all elements of the offence in such way that it enables the court to conclude for itself whether the accused is guilty of the offence charged. The accused's answers must establish an unequivocal plea of guilty. If there is any doubt, a plea of not guilty should be entered.⁷

[18] In the result, it is ordered:

- (a) The conviction and sentence are set aside.
- (b) The matter is remitted to the trial court in terms of section 312 of the Criminal Procedure Act 51 of 1977 with the direction to enter a plea of not guilty in terms of
- (c) section 113 of the CPA, to commence trial proceedings and to bring the matter to

⁶ *The State v Mangundu* (CR 67/2016) [2016] NAHCMD 316 (17 October 2016).

⁷ *S v Combo and Another* 2007 (2) NR 619 (HC).

<p>its natural conclusion.</p> <p>(d) In the event of a conviction, the time the accused has already served must be taken into consideration.</p>	
<p>J C LIEBENBERG JUDGE</p>	<p>H JANUARY JUDGE</p>