

REPUBLIC OF NAMIBIA

HIGH COURT OF  
WINDHOEK  
REVIEW JUDGMENT



NAMIBIA MAIN DIVISION,

<b>Case Title:</b> The State versus Isai Amunyela	<b>Case No:</b> 115/2022
	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Hon. Judge Liebenberg <i>et</i> Hon. Judge Shivute	<b>Delivered on:</b> 21 October 2022
<b>Neutral citation:</b> <i>S v Amunyela</i> (CR 115/2022) [2022] NAHCMD 576 (21 October 2022)	
<b>The order:</b> The conviction and sentence are set aside.	
<b>Reasons for order:</b>	
SHIVUTE J ( LIEBENBERG J concurring):  <u>Introduction</u> [1] The matter was submitted to this court for review in terms of section 302 of the Criminal Procedure Act 51 of 1977 (CPA).  [2] The accused was charged in the Magistrate's Court in the district of Lüderitz with the following crimes:  Count 1: Reckless or negligent driving contravening section 80(1) read with sections 1, 49, 50, 51, 80(3), 86, 89, 106, 107 and 108 of the Road Traffic and Transport Act 22 of 1999 as amended (The Act).	

Count 2: Driving with an excessive breath alcohol level contravening section 82(5) (a) read with sections 1, 82(6), 82(7), 86, 89(1) and 89(4) of the Road Traffic and Transport Act 22 of 1999 as amended.

Count 3: Failure to comply with instruction/direction of a peace officer contravening section 18(1)(b) read with sections 1, 49, and 106 of the Road Traffic and Transportation Act 22 of 1999, further read with section 334 of the Criminal Procedure Act 51 of 1977 as amended.

[3] The State withdrew counts 2 and 3 against the accused. The accused pleaded guilty to count 1 and the court applied section 112(1)(a) of the CPA. He was then convicted of count 1 and sentenced to a fine of N\$ 2000 or two months' imprisonment.

#### Query

[4] A query was directed to the Magistrate to enquire the following:

1. The accused was convicted of reckless or negligent driving. These are statutory offences, why is the provision of the law contravened not indicated on the review sheet?
2. Why was the accused convicted of both reckless and negligent driving?
3. How did the court satisfy itself that the accused drove recklessly or negligently if the offence was dealt with in terms of s 112(1)(a) of Act 51 of 1977?
4. Is reckless driving not a serious offence for it to be dealt with in terms of s 112(1)(a) of the Act?
5. Why was the provision of section 51(1) of the Road Traffic and Transportation Act 22 of 1999 not invoked?
6. If the accused was only convicted on the first count, why are the other offences reflected on the review sheet?

[5] The magistrate's response is summarised as follows:

The statutory provisions of the offence that the accused was convicted of and only the offence the accused is convicted of should have been indicated on the review cover sheet. Further, the State withdrew counts 2 and 3 and only proceeded with count 1, in other words negligent driving but it was not recorded. That's why he accepted the application to proceed in terms of section 112(1) (a) and hence the non-application of

section 51(1) of the Road Traffic and Transport Act. However, he stands to be corrected.

[6] This judgment is written for academic purposes as the accused already served his sentence and it would only be an injustice to remit the matter to the trial court in terms of section 312(1) of the CPA.

#### Applicable law

[7] Section 80(1) of Act 22 of 1999 creates two separate offences of reckless driving and negligent driving. The legislature never intended that such offences be regarded as one offence.<sup>1</sup>

[8] It was wrong on the part of the learned magistrate to convict the accused on 'reckless or negligent driving'. The correct approach was for the court to make a finding on whether the accused concerned, drove the vehicle in a reckless manner or drove it in a negligent manner. Therefore, the magistrate had to deal with the matter in terms of section 112(1)(b) of the CPA in order to question the accused and determine which offence the accused committed. Even though the magistrate responded that the court proceeded with negligent driving, he failed to record such. It is important for the record to show what is happening in court as well as to indicate the correct position as the review court can only rely on the record which consists of the magistrate's court proceedings. The review sheet must also indicate the correct details. In this instance, the review sheet indicated that counts 2 and 3 are withdrawn where it is written sentence, which is incorrect as only the offence the accused is convicted of and its sentencing should appear. There is a duty on magistrates to properly go through records before certifying it.

[9] As stated in *S v Swart*,<sup>2</sup> section 112(1)(a) creates the impression that the offence is minor and less serious. It therefore amounts to a travesty of justice to invoke the provisions of section 112(1)(a) in serious cases such as this one. It is clear that the magistrate failed to exercise his discretion judiciously, thus irregular for the magistrate to have invoked the provisions of section 112(1)(a) in this matter.

#### Conclusion

<sup>1</sup> *S v Haingura* (CR 51/2021) [2021] NAHCMD 270 (2 June 2021).

<sup>2</sup> *S v Swart* 2019 (1) NR 197 (HC).

[10] It is not clear from the record of proceedings as to which charge the accused was convicted of. Furthermore, the magistrate should not have invoked section 112(1)(a) in offences of this nature. It is for these reasons that the conviction of the accused on the charge of reckless or negligent driving cannot be allowed to stand and falls to be set aside.

[11] In the result, the following order is made:

The conviction and sentence are set aside.

<b>N N SHIVUTE</b>	<b>J C LIEBENBERG</b>
<b>Judge</b>	<b>Judge</b>