

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**THE STATE**

and

**ARON Basson**

(HIGH COURT REVIEW CASE NO.: 615/2008)

**CORAM: MULLER, J et FRANK, AJ**

**Delivered on: 13 June 2008**

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**REVIEW JUDGMENT**

**MULLER, J.:**

[1] The accused faced two charges of contravening the Road Traffic & Transportation Act, No 22 of 1999 (the Act), namely count 1: Exceeding the alcohol concentration in a specimen of his breath (s 82(5)) and count 2: Reckless or negligent driving (s 80(1)). On 29 March 2007 he pleaded guilty to both counts and was questioned in terms of s 112(1)(b) of the Criminal Procedure Act (CPA) on count 2. A statement in terms s 112(2) of the CPA was handed in and certain questions were asked in that regard. I shall revert to this again later herein.

[2] At the end of the questioning by the magistrate, he convicted the accused on count one, but entered a plea of not guilty on count 2. The matter was then remitted to 08 August 2007, but was thereafter postponed on several occasions until 19 March 2008, when the hearing continued.

[3] On that date the accused apparently again tendered a plea of guilty. It is not mentioned on which count, but it is evident that it was in respect of count two (the

one where the plea of not guilty was entered in terms of s 113 of the CPA). The accused was then convicted on count 2 also.

[4] I queried the magistrate in respect of count 2 as follows:

*“On what basis was the accused convicted on count 2?”*

a) *When questioned in terms of s 112(1)(b) of the CPA on 29 May 2007 the accused only admitted that he was involved in an accident. He alleged that he took reasonable steps to avoid an accident by swerving out of the way of an oncoming vehicle. The magistrate correctly entered a plea of not guilty in terms of s 113 of the CPA.*

b) *On March 2008 the accused again pleaded guilty and was again questioned in terms of s 112(1)(b) of the CPA. He did not admit anything in respect of his denial that could be construed as negligence. The prosecutor accepted his plea, but without an admission of this important element and the magistrate convicted the accused without any further ado.*

c) *The charge in count 2 alleged reckless or negligent driving by the accused’s failure to stop at a stop sign.*

*Please explain urgently.”*

[5] The magistrate’s response was the following:

*“1. Your Honourable Reviwing Judge(s) on March 2008 accused had admitted that he did*

*not take a reasonable step to avoid an action.*

2. *He knew that his act was wrong, unlawful and he can be punished.*
3. *Accused was not asked whether he stopped at a stop sign or not.*
4. *On the 29/05/07, accused said that he did take a reasonable step(s) to avoid an accident and the court then recorded a plea of not guilty then on March 2008 he indicated that he wants to offer a plea of guilty and the court asked the only few questions on the remaining elements of the offence of negligent driving.*
5. *If the proceedings is not in accordance with justice, the reviewing Judge is at liberty to intervene with the conviction and sentence.*

**[6] The questioning in respect of count two on both occasions in terms of s 112(1)**

**(b) of the CPA entailed the following:**

*“On 29 May 2007*

**Q. *Has anybody threatened you to plead guilty on count two?***

**A. *Nobody***

**Q. *On the 30/12/2006 were you at or near Hage Geingob Street and 16<sup>th</sup> road in this district?***

**A. *Yes.***

**Q. *Were you the driver of the vehicle registration N97618W?***

**A. *Yes.***

**Q. *Were you driving on a public road?***

**A. *Yes.***

**Q. *What did you do to plead guilty on count two?***

**A. *I was involved in an accident.***

**Q. *Did you take a reasonable step to avoid the accident?***

**A. *Yes.***

**Q. *What did you do?***

**A. *I tried to severed out of the way to avoid an on coming vehicle.”***

*On 19 March 2008*

**PP: *This matter was remanded for your attention; Accused wants to tender a plea of guilty.***

- COURT:** *Is that true and correct?*
- A.** *Yes.*
- Q.** *Did you take a reasonable step to avoid an accident?*
- A.** *No.*
- Q.** *Do you know tat your act was wrong, unlawful and you can be punished?*
- A.** *Yes.*
- Q.:** *Were you he driver of vehicle with Reg. N97618W?*
- A.** *That is correct.*
- Q.** *Were you driving on a public road?*
- A.** *Yes.*
- Q.** *Were you driving on a public road called Hage Geingob Street and 16<sup>th</sup> road in Walvis Bay?*
- A.** *Yes.”*

[7] From his response it seems that the magistrate was satisfied that the accused admitted all the elements of count 2, taking both proceedings regarding count two in terms of s 112(1)(b) of the CPA together.

[8] In count 2 the accused was charged with negligent driving in that he failed to stop at a stop sign and then collided with another vehicle. The magistrate concedes that the accused never admitted that he failed to stop at a stop sign. On neither occasion did this aspect formed part of the s 112(1)(b) questioning. All that the accused admitted on 27 may 2007 is that he was “*involved in an accident*”. He further denied that he did not take reasonable steps to avoid the accident. This caused the magistrate on 29 May 2007 not to accept the plea of guilty, but to enter a plea of not guilty in terms of s 113 of the CPA. On 19 March 2008 the accused said

he did not take reasonable steps to avoid the accident and that he acted “*wrong, unlawful and can be punished*”.

[9] Recklessness is irrelevant and the only issue was negligence. The accused was convicted of negligent driving. Negligence is an element of the offence. The accused had to admit that element or it had to be proved. The act of negligence in this matter is the accused’s failure to stop at the stop sign. He did not admit it. The fact that he admitted that he did not take a reasonable step to avoid the accident is not enough for a conviction of this statutory contravention.

[10] The conviction is in not accordance with justice and must be set aside. Any fine paid by the accused must be repaid to him. The suspension of his driver’s licence must similarly be set aside and any endorsement of his licence to that effect has to be deleted.

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

- a) The conviction and sentence of the accused for negligent driving are set aside;
- b) Any payment by the accused in respect of a fine must be refunded to him;  
and
- c) The suspension of his driver’s licence is set aside and if any endorsement has been made in that regard in his driver’s licence, it must be officially deleted.

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**MULLER, J**

I concur

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**FRANK, AJ**