

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Fidelis lita</i>	Case No: CR 49 /2021
High Court MD Review No: 866 / 2021	Division of Court: Main Division
Heard before: Mr Justice Liebenberg <i>et</i> Mr Justice January	Delivered on: 27 May 2021
Neutral citation: <i>S v lita</i> (CR 49 /2021) [2021] NAHCMD 260 (27 May 2021)	
It is hereby ordered that: a) The conviction and sentences on Count 1 and Count 2 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 for accused to be questioned in respect of Count 1 to ascertain recklessness or to enter a plea of not guilty in terms of section 113 of the CPA, and the matter to be brought to its natural conclusion.	

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 (the CPA).

[2] This is yet another instance, emanating from the same court, 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 exempts a judge from first obtaining 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 person in this matter appeared in the magistrate's court for the district of Rundu on a charge of reckless 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. The accused also faced a second charge of defeating or obstructing the course of justice.

[4] The accused pleaded guilty to both counts and the court questioned him in terms of section 112 (1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA). The accused was convicted on his pleas of guilty and sentenced on the first count to a fine of N\$ 4000 or 1 year imprisonment, and on count two he was sentenced to a fine of N\$ 6000 or 2 years' imprisonment.

[5] During questioning he informed the court that he was driving on a gravel road when the vehicle overturned after he lost control of it when approaching a turn. He answered that he drove at a speed between 60 and 80 km/h.

[6] In questioning the accused, the court framed its questions in a manner that points towards negligent driving, although the accused was later convicted on a charge of

reckless driving. This is evident from the questions in relation to the reasonable man test, in that the court asked the accused if a reasonable man, placed in the same circumstances, would have conducted himself in the same manner and caused the accident. The accused responded that a reasonable man would still have caused an accident because he had entered the turn on a high speed. He was also asked in relation to the lack of exercising due diligence as a driver, which is also more relevant to negligent driving than it is to reckless driving. He responded saying that he only came to realise that after the case was opened. He was further asked whether he was aware that it is wrong to drive 'fast' on a gravel road, such as the one in question, to which he responded in the affirmative.

[7] In *S v Shigwele*,¹ 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] In *S v Joseph*,² the court similarly stated that reckless and negligent driving are two distinct offences provided for in section 80(1) of the Road Traffic and Transportation Act by stating the following: '...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] Regarding the difference between reckless and negligent driving, in *S v Shigwele (supra)* 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

¹ *S v Shigwele* (CR 75/2020) [2020] NAHCMD 453 (2 October 2020).

² *S v Joseph* 1997 NR 108 (HC) 111C-D.

particular circumstance might exist and that his conduct might bring about a particular result and then take reasonable steps to guard against such possibility.'

[10] 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)

[11] In the present matter, none of the answers provided by the accused in relation to the first count show that he has admitted to have been reckless in the manner in which he operated the motor vehicle. The closest to this assertion is that he was 'speeding' when driving between 60 and 80 km/h. He was not asked questions that are relevant to the charge of reckless driving but the questions are more in relation to the charge of negligent driving, as demonstrated above. In answering these questions the accused did not admit to have been driving recklessly as per the elements of the offence. In the absence of such relevant questions the court misdirected itself when coming to the conclusion that the accused admitted to the elements of reckless driving. It could therefore not have been satisfied that the accused is indeed guilty as required in terms of section 112 (1) (b) of the CPA and should have entered a plea of not guilty on the charge of reckless driving. It was then open to the court to establish through questioning whether the accused admitted having driven the vehicle negligently and if so satisfied, whether the state accepted the lesser plea. This it failed to do. For the aforesaid reasons, the

conviction on count 1 is to be interfered with and falls to be set aside.

[12] The charge of defeating or obstructing the course of justice set out in count 2, is based on the allegation that the accused left the scene after the accident before the police arrived in order to determine whether or not he was under the influence of alcohol, when there was a reasonable suspicion that it was the case. During the court's questioning the accused was asked why he left the scene to which he responded that he did so because people gathered and some were threatening him. He then decided to take a taxi and go home. He further informed the court that one person who was a passenger in his car got injured and he was aware that it is wrong to leave the scene. In respect of this count also, the accused raised a defence by informing the court that he had to leave the scene due to threats directed to him, which ought to have prompted the court to enter a plea of not guilty but not convict in terms of section 112 (1) (b) of the CPA. Further than that, the charge of defeating or obstructing the course of justice is not the correct charge that should have been put to the accused taking into consideration his alleged conduct. His conduct does not amount to defeating or obstructing the course of justice and appropriate charges should have been brought in terms of section 78 of the Road Traffic and Transportation Act 22 of 1999. For those reasons that conviction cannot be allowed to stand and will therefore be set aside.

[13] In the result, it is hereby ordered.

- a) The conviction and sentence on Count 1 and Count 2 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 for accused to be questioned in respect of Count 1 to ascertain recklessness or to enter a plea of not guilty in terms of section 113 of the CPA, and the matter to be brought to its natural conclusion.

J C LIEBENBERG JUDGE	JANUARY JUDGE

