

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: The State v Matomola Wamunyima	Case No: CR19/2022
High Court MD Review No: 1090/2022	Division of Court: Main Division
Heard before: Judge January <i>et</i> Acting Judge Christiaan	Delivered on: 13 June 2023
Neutral citation: <i>S v Wamunyima</i> (CR 19/2022) [2023] NAHCMD 316 (13 June 2023)	
The order: <ol style="list-style-type: none">1. The conviction and sentence in relation to count one, reckless driving, are set aside.2. In terms of s 312 of the CPA, the accused person should be brought before the court and the Magistrate is directed to properly question the accused in terms of section 112(1)(b) of the CPA in relation to count one, reckless driving, and if not satisfied, to bring the matter to its natural conclusion.3. In the event of a conviction, the Magistrate is to consider the period of imprisonment that the accused has already served or the fine paid by the accused.4. The convictions on counts 2, 3 and 4 are confirmed but the sentences are amended as follows; Count 2: N\$2000 or six months' imprisonment wholly suspended for five years on	

condition that the accused is not convicted of failing to render assistance to an injured person caused by a motor vehicle of which he was the driver in contravention of s 78(1)(c) of the Road Traffic and Transportation Act No. 22 of 1999;

Count 3: N\$2000 or six months' imprisonment wholly suspended for five years on condition that the accused is not convicted of failing to report an accident caused by a motor vehicle of which he was the driver in contravention of s 78(1)(f) of the Road Traffic and Transportation Act 22 no. of 1999;

Count 4: N\$2000 or six months' imprisonment wholly suspended for five years on condition that the accused is not convicted of failing to stop after an accident caused by a motor vehicle of which he was the driver in contravention of s 78(1)(a) of the Road Traffic and Transportation Act No. 22 of 1999.

5. The order of suspending the driver's licence for six months is set aside.
6. The order of prohibiting the accused to obtain a driver's licence for a period of six months after conviction is confirmed.

Reasons for order:

January J (concurring Christiaan AJ):

[1] The case was submitted from the Katima Mulilo Magistrate's Court for automatic review pursuant to s 302(1) of the Criminal Procedure Act No. 51 of 1977 (the CPA).

[2] The accused was charged with:

1. Reckless driving in bumping a pedestrian in contravention of s 80(1)(a) read with ss 78(5), 86, 89 and 106 of the Road Traffic and Transportation Act No. 22 of 1999 (the Act);

2. Failing to render assistance to an injured person after an accident in contravention of s 78(1)(c) read with ss 1, 78(5), 86, 89 and 106 of the Road Traffic and Transportation Act 22 of 1999;

3. Failing to report an accident in contravention of s 78(1)(f) read with ss 1, 78(5), 86, 89 and 106 of the Road Traffic and Transportation Act 22 of 1999.

4. Failing to stop after an accident in contravention of s 78(1)(a)) read with ss 1, 78(5), 86, 89 and 106 of the Road Traffic and Transportation Act 22 of 1999;

[3] The accused pleaded guilty on all four charges. The Magistrate applied s 112(1)(b) of the CPA, convicted him and sentenced him on count 1 to N\$5000 or 10 months' imprisonment and on count 2 to N\$2000 or six months' imprisonment, on count 3 to N\$2000 or six months' imprisonment and on count 4 to N\$2000 or six months' imprisonment. The sentences on counts 2, 3 and 4 are wholly suspended for five years on condition that the accused is not convicted of similar offences committed during the period of suspension. The accused driver's license was suspended for a period of six months. The original record of proceeding reflects a handwritten note reflecting that the accused was ordered not to obtain a driver's licence for six months.

[4] The magistrate asked limited questions in relation to the manner of driving and whereas the accused was only charged with reckless driving, I directed a query in the following terms:

'1. The learned magistrate must explain how the conviction of reckless driving is justified in circumstances where limited questions were asked about the manner of driving. The magistrate should also consider the judgment of *S v Iita* (CR 49 /2021) [2021] NAHCMD 260 (27 May 2021) in the response.

2. The record of proceedings of 25 April 2022 reflects that the accused does not have a driver's license. How is the order of suspension of his driver's licence justified in these circumstances?

3. What is meant by 'similar offences' in the condition of suspension in relation to counts 2, 3 and 4?

4. Is it competent for a court to suspend any sentence on a condition that he/she is not convicted

of similar offences?”

[5] The Magistrate responded as follows:

‘In reply to the queries;

1. The court asked a question on how the accused was reckless and he stated that he was reckless in that he failed to keep a proper lookout when he swerved and ended up bumping another person. The court was of the view that the accused has admitted to the charge of Reckless driving. However after reading the case of *S v lita* (CR 49 /2021) [2021] NAHCMD 260 (27 May 2021), I have realized that the conviction on reckless driving is not justified as more details and elements with regards to the manner in which he drove.
2. The proceedings of 25 April are wrong. The typist added proceedings and court order of 16 May 2022 on a page where proceedings of 25 April 2022 were attached. The actual order is hand written note of 16 May 2022 after the court had ordered the suspension of the driving licence and it was brought to the court’s attention that the accused does not in actual fact possess a driving licence.
3. Similar offences will be offences which are specified as count 2, 3 and 4 which are C/S 78(1) Act 22 of 1999, failing to render assistance, C/S 78(1)(f) Act 22 of 1999 as amended, failing to report an accident and C/S 78(1)(a) Act 22 of 1999 as amended, Failing to stop vehicle after an accident.
4. The court was of the view that it is competent to attach such a condition on the suspended sentence.

The Honourable reviewing Judge may give further guidance in this regard.

I hope the above is in order.’

[6] The particulars of the charge and relevant portion of the record of proceedings in relation to the element of recklessness reflect as follows:

‘That the accused is guilty of contravening section 80(1) of the Road Traffic and Transportation Act 22 1999, read with sections 1, 80(3), 86, 89, 106(1) and 106(6) of the said Act.

In that upon or about the 20th day of January 2022 and at or near/ between Caprivi Senior Secondary and old NHE in the district of Katima Mulilo and on a public road, namely Gravel road between CSSS and NHE, the said accused did wrongfully and unlawfully drive a motor vehicle with registration number N 8012 KM Reckless. By bumping a pedestrian.'

".....

Crt: Tell the court what happened?

A – I was driving from CSS, I saw a male and female persons walking. I hooted at them. I moved from one to the other but the girl also moved to the same side and I bumped her.

Q: did you know that what you were doing was wrong and unlawful?

A: yes

Q: did you know that you were committing an offence and could be punished?

A: yes

Q: the State alleges that you drove a vehicle reckless, how did you drive a motor vehicle recklessly?

A: I failed to keep a proper look out when I swerved I bumped another person

Q: do you admit or deny that you drove a motor vehicle recklessly?

A: I admit

Q: The State alleges that you bumped a pedestrian, do you admit or deny that?

A: I admit

Crt: all allegations are admitted, found guilty as pleaded

Acc: understands'

[7] The accused was thereafter properly questioned in terms of s 112(1)(b) of the CPA and convicted on the remaining charges. We have no qualms with those proceedings and

will confirm it. The Magistrate sentenced the accused on those individual charges with separate fines, alternatively imprisonment. The sentences are in order. However, the record reflects: 'The sentences on count 2, 3 and 4 are wholly suspended for a period of 5 years on condition that accused is not convicted of similar offences committed during the period of suspension.' This is wrong and will be dealt with later in this judgment.

[8] This court dealt with the crimes of reckless or negligent driving in the review case of *S v lita*¹ referred to in the query to the Magistrate. In that case the accused was also charged, amongst other, on a charge of reckless driving, in contravention of s 80 (1) read with ss 1, 49, 50, 51, 80 (3), 86, 89, 106, 107, and 108 of the Road Traffic and Transportation Act 22 of 1999 as amended. 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. The court reiterated with reference to the cases of *S v Shigwele*² and *S v Joseph*³ that reckless and negligent driving are two different offences. The conviction was set aside.

[9] In addition, it was reiterated 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'.

[10] With reference to *S v Shigwele*, (*supra*), the difference between recklessness and negligence was stated 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.'

¹ *S v lita* (CR 49 /2021) [2021] NAHCMD 260 (27 May 2021).

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

³ *S v Joseph* 1997 NR 108 (HC) 111C-D.

[11] In this matter under review, the Magistrate only asked the accused how he drove recklessly. The accused responded that he did not take a proper look out. This points to negligence. No other question or follow up questions were asked to satisfy the Magistrate that the accused was indeed driving recklessly. In other words, whether he drove in wilful disregard to the safety of others persons or property. The magistrate, thus, correctly conceded that the conviction of reckless driving is not justified. It therefore falls to be set aside. We reiterate that 'it is trite that the questioning of an accused in terms of section 112(1)(b) is in fact a safety or precautionary measure for the presiding officer in that it ensures that no unjustified conviction is given against the accused. Consequently, the magistrate through this procedure is required to determine if the accused is indeed admitting to the allegations in the charge sheet and if so, whether the accused is guilty of the offence charged.'⁴

[12] Another issue is the manner in which the accused was charged with only reckless driving. Section 80 of Act 22 of 1999 (the Act) 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.' (own emphasis)

[13] It is clear from the abovementioned section that the Legislator regards particular

⁴ *S v Samuele* (CR 69/2019) [2019] NAHCMD 353 (20 September 2019).

unlawful driving as either reckless or negligent in the context of the section. It criminalised that particular driving as either reckless or negligent. It is, in our view, clear that negligent driving is not a competent verdict to reckless driving which, according to the prescribed sentences, is the more serious of the two. It follows that where an accused is only charged with reckless driving, he or she cannot as a consequence of admissions only to negligent driving be convicted for that offence. The consequence in such circumstances would therefore be an acquittal. It is therefore advisable to follow the wording in s 80(1) of the Act to charge the accused for his or her unlawful driving as reckless or negligent driving.

[14] We have already in paragraph 6 above referred to the suspension of the sentences on counts 2, 3 and 4. The Magistrate imposed individual sentences in relation to those counts and for all three offences, then suspended the sentences simultaneously wholly for a period of five years on condition that the accused is not convicted of similar offences committed during the period of suspension.

[15] This court has on numerous occasions in the past stated that the words 'same offence' or 'similar offence' and the omission of the words 'committed' are too vague and uncertain. Such condition must be clear and the accused should know exactly what conduct may lead to him having to serve the sentence. (*S v Valeshia* 1973 (3) SA 934 O). In the same vein it was emphasised that the word 'same' offence like the word 'similar' offence are always a difficult word to construe with certainty. In *S v Mothobi* 1972 (3) SA 841 (O) Kumleben, AJ referred to *R v Reveals* 1959 (1) SA 75 AD where Schreiner ACJ said:

'It has been said that that the word (similar offence) is almost always a difficult word to construe ... obviously there are degrees of similarity or likeness, some approaching and exceptionally perhaps ever reaching, sameness, others amounting to no more than a slight resemblance. The similarity may be basic or superficial, general or specific ...'⁵

[16] The accused was convicted of three different offences namely; for failing to

⁵ *S v Farmer* (CR 64/2014) [2014] NAHCMD 328 (5 November 2014); Also: *S v Afrikaner* (CR73/2022) [2022] NAHCMD351 (18 July 2022); *S v Damon* (CR 13/2022) [2022] NAHCMD 132 (24 March 2022); *S v Mwilima* (CR 38 /2021) [2021] NAHCMD 221 (10 May 2021).

render assistance to an injured person after an accident, failing to report an accident and failing to stop after being involved in an accident. To order the suspension of the sentences, as the Magistrate did, simultaneously for all three the offences on 'similar offences', poses the question if the suspended sentence will be put into operation if he commits any of the offences in future during the period of suspension. This is vague and confusing.

[15] In the result:

1. The conviction and sentence in relation to count one, reckless driving, are set aside.
2. In terms of s 312 of the CPA, the accused person should be brought before the court and the Magistrate is directed to properly question the accused in terms of section 112(1)(b) of the CPA in relation to count one, reckless driving and if not satisfied, to bring the matter to its natural conclusion.
3. In the event of a conviction, the Magistrate is to consider the period of imprisonment that the accused has already served or the fine paid.
4. The convictions on counts 2, 3 and 4 are confirmed but the sentences are amended as follows;
Count 2: N\$2000 or six months' imprisonment wholly suspended for five years on condition that the accused is not convicted of failing to render assistance to an injured person caused by a motor vehicle of which he was the driver in contravention of s 78(1)(c) of the Road Traffic and Transportation Act No. 22 of 1999;

Count 3: N\$2000 or six months' imprisonment wholly suspended for five years on condition that the accused is not convicted of failing to report an accident caused by a motor vehicle of which he was the driver in contravention of s 78(1)(f) of the Road Traffic and Transportation Act No.22 of 1999;

Count 4: N\$2000 or six months' imprisonment wholly suspended for five years on

condition that the accused is not convicted of failing to stop after an accident caused by a motor vehicle of which he was the driver in contravention of s 78(1)(a) of the Road Traffic and Transportation Act No. 22 of 1999.

5. The order of suspending the driver's licence for six months is set aside.
6. The order of prohibiting the accused to obtain a driver's licence for a period of six months after conviction is confirmed.

H C JANUARY JUDGE	P CHRISTIAAN JUDGE