

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT  
PRACTICE DIRECTIVE 61

<b>Case Title:</b> <i>The State v Mbambo Mpoko</i>	<b>Case No:</b> CR 81/2023
<b>High Court Review No:</b> 741/2023	<b>Division of Court:</b> Main Division
<b>Heard before:</b> January J et Usiku	<b>Delivered on:</b> 21 July 2023
<b>Neutral citation:</b> <i>S v Mpoko</i> (CR 81/2023) [2023] NAHCMD 427 (21 July 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence in respect of count three are confirmed.</li><li>2. The convictions and sentences in respect of counts one and two are set aside.</li><li>3. The matter is remitted in terms of s 312 of the Criminal Procedure Act 51 of 1977 (CPA) for the accused to be properly questioned in terms of section 112 (1)(b) of the CPA in respect of counts one and two and for the court to satisfy itself that</li></ol>	

the accused admits all the elements of the offences, otherwise to enter a plea of not guilty in terms of s 113 of the CPA and bring the matter to its natural conclusion.

3. When sentencing the accused, the court should take into consideration the portion of the sentences the accused had already served or the fines paid.

**Reasons for order:**

JANUARY J (Usiku J concurring )

[1] This matter came on review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (CPA). The accused was arraigned in the Magistrate's court for the district of Rundu where he faced one count one, of reckless or negligent driving in contravention of s 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 Act), count two, using a vehicle without the owner's consent in contravention of s 83 (2) of the Road Traffic and Transportation Act 22 of 1999 read with sections 1,86,106(1) and 106(2) of the Act, and count three, of driving without a driver's licence in contravention of s 31 (1) (a) read with s 31 (2) of the Road Traffic and Transportation Act 22 of 1999.

[2] The accused opted to conduct his own defense after the magistrate explained his rights to legal representation. The accused pleaded guilty to all three counts, upon his second appearance in court. The magistrate applied s 112(1)(a) in respect of count 3 convicted the accused as charged. Section 112(1)(b) was applied in respect of counts one and three.

[3] After questioning by the magistrate in terms of s 112(1)(b), he was satisfied that the accused pleaded to all elements of the offence and convicted him on both count one and count two. The accused was sentenced to a fine of N\$3000 or 8 months' imprisonment in respect of count one, N\$4000 or 10 months' imprisonment in respect of count two and

N\$1000 or 2 months' imprisonment in respect of count three.

[4] This court has no qualms with the conviction and sentence in respect of count three and it will accordingly be confirmed.

[5] The magistrate convicted the accused on both reckless and negligent driving in contravention of s 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, without drawing a distinction between the offences.

[6] I consequently directed a query to the magistrate in the following terms;

'1. The Magistrate must explain if the accused was convicted for both reckless and negligent driving since he was convicted as charged.

2. Considering the case of *S v Rumayi* (CR 91/2021) [2021] NAHCMD 462 (6 October 2021), a review matter from the Rundu Magistrates Court, is the conviction justified?'

[7] The magistrate responded as follows;

'1. It was an error from the court' side to convict the accused for both reckless and negligent driving. From the questioning in terms of s 112 (1) (b) the court was satisfied that the accused drove in a negligent manner.

2. I am guided by the case of *S v Rumayi* (CR 91/2021) [2021] NAHCMD 462 (6 October 2021) and *S v lita* (CR 29/2021) [2021] NAHCMD 260 (27 May 2021) and I humbly concede that the conviction of Count 1 is not in accordance with justice, however I stand guided by the Honourable Review Judge.'

[8] In *S v Shigwele*<sup>1</sup> endorsed by the court in *S v Rumayi*<sup>2</sup> 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. (my emphasis)

[9] Similarly, in *S v Joseph*<sup>3</sup> the court stated that reckless and negligent driving are

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

<sup>2</sup> *S v Rumayi* (CR 91/2021) [2021] NAHCMD 462 (6 October 2021).

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

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’.

[10] Considering the above dicta, the magistrate committed a misdirection by convicting the accused on both reckless and negligent driving. This conviction can thus not stand as it is not in accordance with justice. In her response to the query, the magistrate indicated that she was satisfied that the accused drove in a negligent manner.

[11] Although not initially queried, upon perusal of the record, it is evident that the accused indicated to the magistrate that he has a lawful defense for his actions in respect of counts one and two. The relevant portions of the record reads as follows:

‘COUNT 1:

PROCEED QUESTIONING ACCUSED IN TERMS OF SECTION 112 (1) (B) OF ACT 51 OF 1977 AS AMENDED.

...Q: Do you have any lawful defense for your actions?

A: Yes...

COUNT 2:

PROCEED QUESTIONING ACCUSED IN TERMS OF SECTION 112 (1) (B) OF ACT 51 OF 1977 AS AMENDED.

...Q: Do you have any lawful defense for your action?

A: Yes...’

[12] Notwithstanding the aforementioned indication of a defense, the magistrate proceeded to state that she was satisfied that the accused admitted to all the allegations of the respective charges and convicted him accordingly.

[13] The correct procedure to ensue would have been for the magistrate to enter a plea

of not guilty on his behalf in terms of s 113 of the CPA.

[14] In *S v Augustu*, it was held that the primary purpose of questioning the accused in terms of s 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. Moreover, when the court questions the accused, it must ensure that he admits all the elements of the offence in such a 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.<sup>4</sup>

[15] In conclusion, the magistrate could not have been satisfied in the present case that the accused admitted all the elements of the offences charged with in counts one and two. The convictions can therefore not be permitted to stand and should be set aside.

[16] In the result, the following orders are made;

1. The conviction and sentence in respect of count three is confirmed.
2. The convictions and sentences in respect of counts one and two are set aside.
3. The matter is remitted in terms of s 312 of the Criminal Procedure Act 51 of 1977 (CPA) for the accused to be properly questioned in terms of section 112 (1)(b) of the CPA in respect of counts one and two and for the court to satisfy itself that the accused admits all the elements of the offences, otherwise to enter a plea of not guilty in terms of s 113 of the CPA and bring the matter to its natural conclusion.
3. When sentencing the accused, the court should take into consideration the portion of the sentences the accused had already served or the fines paid.

<b>H C JANUARY</b>	<b>USIKU J</b>

<sup>4</sup> *S v Augustu* (CR 24/2021) [2021] NAHCMD 158 (15 April 2021).

<b>JUDGE</b>	<b>JUDGE</b>
--------------	--------------