



**CASE NO.: CR 32/2011**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**versus**

**OTINIEL TANGENI KAMULILO**

**[HIGH COURT REVIEW CASE NO.: 74/2010]**

**CORAM: SIBOLEKA, J *et* UNENGU, AJ**

**Delivered on: 2011 APRIL 13**

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**REVIEW JUDGMENT**

**UNENGU, AJ.:**

[1] This is a review matter emanating from the Ondangwa Magistrate's Court. The accused was charged with Reckless or Negligent driving in contravention of Section 80(1) of the Road Traffic and Transportation Act 22 of 1999, read with Section 1, 80(3), 86, 89, 106(1) and 106(6) of the

same Act.

[2] He pleaded guilty to the charge, was questioned in terms of Section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977), convicted “as pleaded - negligent driving” and sentenced to pay a fine of N\$1,000.00 (One Thousand Namibian Dollars) in default of payment, six (6) months imprisonment wholly suspended on the usual condition.

[3] Because, the learned Magistrate returned a verdict of guilty as pleaded – negligent driving, I queried her to clarify why she convicted the accused as pleaded – negligent driving seeing that the charge put to the accused and to which he had pleaded is one of Reckless or Negligent driving. I wanted also to know as to what happened to the allegation of Reckless driving.

The learned Magistrate was further requested to state why she did not ask the Public Prosecutor as to whether or not the State would accept a guilty plea on negligent driving. The Magistrate duly complied and replied as follows: I quote verbatim.

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**AD PARAGRAPH 1.1**

The matter was finalized in terms of Section 112(b) Act 51/77, and the

court upon being satisfied that the accused admitted the elements of the offence of Negligent driving convicted the accused as such; and not of Reckless driving. The offence is Reckless or Negligent driving, and the court upon questioning was satisfied that the offence and allegations admitted was within the perimeters of Negligent driving, and as such convicted the accused.

**AD PARAGRAPH 1.2**

The offence of Reckless driving automatically falls away, upon conviction of Negligent driving. The charge in itself has optional or discretion in it, either person gets convicted of Reckless or of Negligent driving.

**AD PARAGRAPH 2**

Not enquiring or asking the prosecutor whether they accept the charge or not is but a mere oversight on my part, however, the court has convicted the accused on the offence the court felt the accused has admitted guilt to, which was Negligent driving.

Due to this oversight on my part, I pray that the sentence will not be set aside.”

[4] The learned Magistrate has indicated in her reply as quoted above that “the court upon being satisfied that the accused admitted the elements of the offence of negligent driving convicted the accused as such ... The record of proceedings does not say so. What was recorded, however, is the following:

“CRT: Prosecutor, is (sic) the facts correct?

SP: Yes.

CRT: Satisfied, accused admitted all the elements of the offence as pleaded – Negligent Driving

Verdict: Guilty as pleaded – Negligent Driving”

[5] As previously indicated, the accused pleaded to the charge of Reckless or Negligent driving, which are two separate offences although provided for in one section, namely section 80(1) of Act 22 of 1999.

See *S v Joseph* 1997 NR. 108 where it was stated that Judicial Officers must convict accused of either the one or other offence. In the *S v Joseph* case *supra*, the accused was also charged with reckless or negligent driving, in terms of the provisions of the repealed Road Traffic Ordinance 30 of 1967.

Therefore, it is wrong for a Magistrate to convict the accused “as pleaded” or “as charged” on a charge of reckless or negligent driving. The correct verdict should be either “guilty - reckless driving or guilty - negligent driving”.

[6] Further, magistrates should take care when dealing with the charge of reckless or negligent driving and not to forget to enquire from the Public Prosecutor who is prosecuting, if she or he will accept a conviction on negligent driving or not, before returning a verdict of guilty on negligent driving. That is necessary, because the State (Public Prosecutor) might want to lead evidence to prove reckless driving against the accused. That being the case, the verdict of guilty as pleaded in this

matter is, in my opinion, incompetent and needs correction.

In the result, the following order is made:

1. The verdict of guilty as pleaded – Negligent driving is set aside, and substituted for Guilty – Negligent driving.
2. The sentence is in order and is confirmed.

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**UNENGU, AJ**

I agree.

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**SIBOLEKA, J**