

SOUTH AFRICA / JUDGMENT

Majeng v S (47/2023) [2023] ZAWCHC 41 (28 February 2023) [2023] ZAWCHC 41

COURT

Western Cape High Court, Cape Town

BEFORE

Wille, Maher

CASE / FILE NUMBER

47/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: 47 / 2023

Magistrate's

Court Serial No: 29 / 2022

Magistrate's

Court Case No: 74 / 2020

In

the matter between:

SECHABA

MAJENG

APPLICANT

And

THE

STATE

RESPONDENT

Coram:

Wille J et Maher, AJ

Received:

9 February 2023

Delivered:

28 February 2023

JUDGMENT**THE COURT:****Introduction:**

- [1] This 'special' review came before us in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 ('the CPA'). An inspection by a Judicial Quality Assurance Officer established that the accused, charged with the offence of contravening the provisions of section 63(1) read with sections 1, 63(2), 63(3), 69, 73, 89 (1), and 89(5) of the National Road Traffic Act 93 of 1996 ('the NRTA'), namely the offence of reckless or negligent driving was found to be 'guilty as charged.' The judgment recorded this conviction in both the J4 and J15 official forms.
- [2] In the circumstances, the Senior Magistrate, Worcester, to whom this information was conveyed by the officer described above, was correct, in the view that the proceedings of which the accused was convicted and sentenced in the Laingsburg Magistrate's Court were not-'in accordance with justice'- and submitted the matter for review. The sentence imposed by the court a quo was a fine of R3500,00 or twenty-four months' imprisonment.

Context:

- [3] The accused was legally represented and 'seemingly' pleaded guilty to the offence of 'reckless' driving. We say 'seemingly' as the accused's legal representative submitted a written plea in terms of section 112 of the CPA. The plea set out the facts and circumstances giving rise to the plea of guilty. In his plea explanation, the accused pleaded guilty to a charge of reckless driving, albeit somewhat ambiguously.
- [4] We describe the plea as ambiguous as in his plea explanation, the accused stated, among other things, that: (a) he voluntarily pleads guilty to the charge of 'reckless or negligent' driving;
- (b) while driving a vehicle he overtook vehicles when it was not safe to do so; (c) oncoming traffic had to slow down for the vehicle he was driving and, (d) he admits his conduct amounted to (could 'be regarded as' or 'be classified as'), but not necessarily equated to reckless driving. The accused did not explain why his conduct constituted the crime of reckless driving, save for the facts listed in his written plea, and no questions were put to the accused by the court.
- [5] Furthermore, the initial written notice handed to the accused, notifying him to appear in court, states that he was summonsed to face charges of 'reckless and negligence (sic) [driving].'

The magistrate was satisfied with the accused's guilty plea and, as already indicated, found the accused 'guilty as

charged.’ The magistrate did not refer to the conviction of the offence of either reckless driving or negligent driving.

As a matter of law and logic, these are two discrete criminal offences, and an accused can only be found guilty of either negligent

or reckless driving and not both in respect of a single incident.

Consideration:

[6] Aside from the apparent error in the accused’s conviction, the proceedings warrant closer scrutiny. The facts and circumstances set out in the written statement by the offender do not per se sustain a conviction of reckless driving. The word ‘recklessness’ imports various degrees of incautiousness.

In context, this means that a person drives recklessly if he or she drives carelessly or thoughtlessly, rashly or inconsiderately,

thereby creating a risk of harm to others.[1]

[7] The distinction between reckless and negligent driving is a matter of degree. Recklessness, in essence, is the more significant form of carelessness and negligence, the lesser form.[2] In this case, it seems apparent that the offender drove a vehicle;

(a) by overtaking when it was not safe to do so and, (b) that oncoming traffic had to slow down for the vehicle which he was driving. The presiding officer did not determine whether the offender’s conduct was of such a high degree as to amount to gross negligence and thus ‘recklessness.’ Gross

negligence includes conscious negligence.

[8] By legislative intervention, the NRTA provides that:

‘...any person who drives a vehicle in wilful and wanton disregard of the safety of persons or property shall be deemed to drive that vehicle recklessly...’[3]

[9] This only makes explicit a feature of recklessness in the ordinary sense. In this case, we have no facts showing; (a) at what speed the offender was driving; (b) why it was unsafe to overtake vehicles in the manner that he did; (c) to what extent the oncoming traffic had to slow down for the vehicle driven by the offender. We

are not persuaded that the accused’s apparent conviction for ‘reckless’ driving can be sustained and upheld on the scant detail in his written statement. Moreover, and in any event, while section 63 of the NRTA, provides in subsection (2), that ‘without restricting the ordinary meaning of the word “recklessly” any person who drives a vehicle in wilful or wanton disregard for the safety or of persons or property shall be deemed to drive that vehicle recklessly.’

- [10] This is subject to subsection (3), which provides that when the court, in considering whether subsection (1) has been contravened, the court shall have regard to all the circumstances of the case, including but without derogating from the generality of subsection
- (1) or (2), the nature, condition and use of the public road upon which the contravention is alleged to have been committed, the amount of traffic which at the relevant time was or which could reasonably have been expected to be upon that road, and the speed at and how the vehicle was driven.
- [11] When accepting the accused's plea and convicting the accused, the court did not have regard to any of the above peremptory considerations. Insufficient details in this respect are set out in the accused's plea.
- [12] An additional problem arising from the conviction is that in terms of section 35 of the NRTA, upon conviction in terms of section 63(1) of the NRTA, namely where a court finds that the offence was committed by driving recklessly and the accused is the holder of a driving licence or a licence and permit, it shall be suspended in the case of a first offence for a period of at least (six) months, unless the court is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively. Even with the provisions of those subsections, the court may order that the suspension or disqualification shall not take effect or shall be for such a shorter period as the court may consider fit.
- [13] No sworn evidence was adduced at the trial to justify the court's decision not to suspend the accused's licence for the obligatory six month period, assuming it was his first offence and assuming that the guilty verdict was for reckless driving.
- [14] Therefore, the default setting under the NRTA is that an accused's licence must be suspended. To avoid this automatic consequence by operation of law, there must be evidence adduced, on oath, which shows that a suspension is not justified. In that case, the sub-section provides that a decision to suspend the accused's licence is precatory and not mandatory. Section 63(3) of the NRTA then provides that the court may, after considering the evidence, order that there either be no suspension or a suspension of the accused's licence for less than six months. As neither of the above enquiries took place, the court could neither find the accused guilty of reckless driving for this reason alone nor rule that the accused's licence was not to be suspended.
- [15] It is also not competent to convict an accused when charged in the alternative as being guilty 'as charged.' To re-iterate, the 'reckless' and 'negligent' driving offences are discrete. The accused could only have been found guilty of one or the other, namely either 'reckless driving' or 'negligent driving' but not both.
- [16] The evidence and content of the accused's plea are insufficient to sustain a reckless driving conviction. There is no evidence or any admissions in respect of, among other things, the nature, condition and use of the public road where the offence was committed, the amount

of traffic which was or which could reasonably have been expected to be upon the road, and the speed and the way the accused drove the vehicle. In all the circumstances, the proceedings were not –‘in accordance with justice’- and the conviction falls to be reviewed and set aside.

- [17] In our view, this is a matter where this court should convict the accused (in this case on the alternative charge of negligent driving) as is provided for in section 304(2)(c)(i) and (iv) of the CPA and then to impose a sentence or make such order as the magistrate's court ought to have imposed or made in terms of 304(2)(c)(iv) of the CPA.
- [18] In the circumstances, and as negligent driving is a lesser offence than reckless driving and the accused's plea explanation does not include sufficient unequivocal admissions to cover all the elements of the crime of reckless driving, the accused is clearly guilty of the alternative charge of negligent driving.
- [19] There is no prejudice to the accused as the apparent conviction for the more serious offence of reckless driving is set aside, and in its stead, he is found guilty of a lesser offence. Furthermore, on a conviction of negligent driving, there is no statutory provision empowering a court to order that the accused's licence be endorsed (namely suspended), which also redounds to the benefit of the accused as this potential consequence is avoided. There is,

unarguably, no prejudice to the accused in this regard.

- [20] The sentence was imposed for an apparent conviction of reckless driving, and accordingly, it too falls to be set aside, and the sentence considered afresh. We say it is unnecessary to remit the matter to the trial court for sentence as this court is in as good a position as the trial court to impose an appropriate sentence. As regards an appropriate sentence, the degree of negligence evinced by the accused in the manner in which he drove his vehicle, is at the ‘extreme’ end of the negligence continuum, and it can only be described as constituting a ‘high’ degree of negligence.
- [21] The accused drove a minibus taxi into the lane of oncoming traffic when it was unsafe to do so. He thereby endangered the lives of his passengers and the occupants of the approaching vehicles, whose drivers had to take evasive action to avoid a collision. In the circumstances, we can see no justification to reduce the fine imposed by the court a quo even though it may have been intended as a conviction on the more serious offence of reckless driving.
- [22] In light of the degree of negligence, a fine of less than R3500,00 imposed by the trial court would be wholly inappropriate. We believe imposing a fine of R3500,00 is appropriate based on the admitted facts.

- [23] The Senior Magistrate, Worcester, is requested to bring to the attention of magistrates in his cluster of courts that where an accused is charged with the statutory crime of reckless or negligent driving, the accused person can be convicted either of reckless or negligent driving, but not both.
- [24] Further, before an accused can be found guilty of reckless driving, in terms of subsection 63(3) of the NRTA, the court must have regard to all the circumstances of the case, including but without derogating from the generality of subsection (1) or (2), the nature, condition and use of the public road upon which the contravention is alleged to have been committed, the amount of traffic which at the relevant time was or which could reasonably have been expected to be upon that road, and the speed at which and how the vehicle was driven.
- [25] Where an accused is found guilty of reckless driving and is the holder of a driving licence or a licence and permit, the court must suspend the accused's licence or a licence and permit for a period of at least six months for a first offender and a more extended period for second, third or multiple offenders in terms of section 35(1) of the NRTA, unless the court is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify a suspension or disqualification or should be for a shorter period as the court may consider fit.

Order:

[26] In the result, it is ordered as follows:

1. The conviction of 'guilty as charged' is set aside.
2. Any conviction that may have been returned against the accused for 'reckless' driving is set aside.
3. The accused is convicted of 'negligent' driving.
4. The sentence imposed upon the accused is set aside.
5. The accused is sentenced afresh to a fine of R3500,00, and the payment of R3500,00 by the accused on 7 March 2022, as reflected in Court Fine Receipt G0638940, shall be deemed to be the payment of the fine so imposed.
6. The Registrar of the High Court is requested to deliver a copy of this judgment to the Senior Magistrate, Worcester, to bring to his notice the content of this judgment.

WILLE, J

I agree:

MAHER, AJ

[1] S v Van Zyl 1969 (1) SA 553 (A) 558 B.

[2] S v Smith 1973

(3) SA 217 (T) 219 A

[3] Section 63(2) of the Act.

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