

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

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| Case Title: <i>The State v Reinhold Nembwaya Malakia</i> | Case No: CR 40/2023 |
| | Division of Court: Northern Local Division |
| Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler J | Delivered: 20 October 2023 Reasons: 3 November 2023 |
| Neutral citation: <i>S v Malakia</i> (CR 40/2023) [2023] NAHCNLD 110 (3 November 2023) | |
| It is hereby ordered that: <ol style="list-style-type: none">1. The conviction and the sentence are set aside.2. In terms of s 312 of the Criminal Procedure Act 51 of 1977 as amended, the matter is remitted to the magistrate to properly question the accused in terms of s 112(1) (b).3. The period already spent in custody should be considered if the accused is convicted and sentenced again. | |
| Reasons for the order: | |
| KESSLAU J (SALIONGA J concurring) | |

[1] This is a review matter in terms of section 302(1) of the Criminal Procedure Act 51 of 1977, as amended (CPA).

[2] The accused was charged in the Magistrate's court of Ondangwa on a charge of theft. He pleaded guilty and, after a brief questioning in terms of s 112(1)(b) of the CPA, was convicted and sentenced.

[3] A query was sent to the magistrate stating that:

'It appears from the record of proceedings that the elements of intention, wrongfulness and unlawfulness were not properly covered during the questioning by the Magistrate. Was the Magistrate satisfied of the guilt of the accused without covering these elements?'¹

[4] The magistrate responded as follows:

'In reply to the query, I concede that the court ought not to have been satisfied with the guilty of the accused without covering the elements of intention, wrongfulness and unlawfulness. The court omitted to ask any questions regarding the accused's intention to appropriate the property (money) by depriving the owner of the stolen money permanently of his rights of ownership. These are essential elements of the crime of theft and must be admitted by the accused before a court can be satisfied that he admits all the allegations in the charge. These aspects could have easily been covered by asking a question or two about why the accused took the goods; or what he wanted to do with the goods; or whether he had any intention to return the goods to the owner and/or whether he knew that it was wrong and a punishable act to take someone's property without their consent or permission.'

[5] In light of the extensive concession made by the learned Magistrate in his reply the conviction and sentence will be set aside.

[6] In the result the following order is made.

1. The conviction and the sentence are set aside.
2. In terms of s 312 of the Criminal Procedure Act 51 of 1977 as amended, the matter

¹ *S v Valedo and others* 1990 NR 81 (HC).

is remitted to the magistrate to properly question the accused in terms of s 112(1) (b).

3. The period already spent in custody should be considered if the accused is convicted and sentenced again.

| Judge(s) signature | Comments: |
|---------------------------|------------------|
| KESSLAU J: | None |
| SALIONGA J: | None |