

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
REVIEW JUDGMENT



NAMIBIA MAIN DIVISION,

Case Title: <i>The State</i> v <i>Mandume Shimwefeleni</i>	Case No: 72/2022 High Court Ref.No.: 888/2022 Division of Court: Main Division
Heard before: Hon. Judge Shivute et Hon. Judge Claasen	Delivered on: 18 July 2022
Neutral citation: <i>S v Shimwefeleni</i> (CR 72/2022) [2022] NAHCMD 350 (18 July 2022)	
The order: a. The conviction and sentence are set aside. b. The fine, if paid, is to be refunded to the accused.	
Reasons for order:	
SHIVUTE J (CLAASEN J concurring): [1] This matter came before me on automatic review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA). [2] An observation was noted on the review sheet. It indicates two names namely; Mandume Shimwefeleni and Johan Hendricks. Having considered the charge sheet, the record of magistrate court's proceedings and the documents attached, the accused in this matter is Mandume Shimwefeleni, as the name Johan Hendricks only appeared on the review sheet and not on the other documents. In future such mistakes should be	

avoided.

[3] The unrepresented accused appeared in the magistrate's court for the district of Keetmanshoop on the charge of theft. He pleaded guilty and the magistrate disposed of the matter in terms of s 112(1)(a) of the CPA. The accused was then convicted of theft and sentenced to a fine of N\$ 600 or two months' imprisonment.

[4] The review court took issue with the charge as the element of intention was omitted in the charge. I directed a query to the magistrate as to how the court satisfied itself that the accused committed the offence of theft if the element of intention is not part of the charge.

[5] The magistrate responded that, although the wording of the charge of theft as drafted on the particulars of the charge excludes specific reference to the element of intention, he is satisfied that the accused is guilty of the offence of which he was charged as the wording of the charge is clear that the accused took the item in question and passed the payment point without paying for it.

[6] He further replied that when the charge was put to the accused, he indicated that he understood and tendered a guilty plea after hearing the allegations. He therefore, remains satisfied that the accused committed the offence as his actions were deliberate and intentional, having raised no defence when the charge was put to him.

[7] In my view, the charge is defective as an essential element of the crime is excluded. In light of the aforesaid it becomes necessary to deal with the elements of the said crime.

[8] The elements of the crime of theft are laid out by CR Snyman¹, which are the following:

'(a) an act of appropriation; (b) in respect of a certain type of property; (c) which takes place unlawfully and (d) intentionally (including an intention to appropriate).'

[9] The magistrate was under a duty to ensure that the unrepresented accused is afforded a fair trial. Fairness in this regard would require from the magistrate to not

¹ C R Snyman *Criminal Law* 5ed (2008) at 484.

simply accept the mere say-so by the accused, but to pose questions to the accused in order to determine his intention at the time the crime was committed.

[10] The court erred by not asking the accused questions to establish his intent thus the conviction and sentence should be set aside.

[11] In the result, it is ordered that :

- a. The conviction and sentence are set aside.
- b. The fine, if paid, is to be refunded to the accused.

N N SHIVUTE Judge	C M CLAASEN Judge