

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v !Hara-gaeb Tshakame	Case No: CR 59/2023
High Court MD Review No: 2193/2023	Division of Court: High Court, Main Division
Coram: Liebenberg J <i>et</i> Shivute J	Delivered: 1 June 2023
Neutral citation: <i>S v Tshakame</i> (CR 59/2023) [2023] NAHCMD 273 (1 June 2023)	
ORDER: <ol style="list-style-type: none">1. The convictions and sentence on counts 1 – 3 are set aside.2. The matter is remitted to the trial court in terms of s 312 of Act 51 of 1977 to question the accused on his intention at the time of the break-ins in respect of each count.3. In the event of a conviction, the magistrate must take into consideration the period	

which the accused has already served.

REASONS FOR ORDERS:

LIEBENBERG J (SHIVUTE J concurring):

[1] Serving before court for determination is a review matter stemming from the magistrate's court for the district of Omaruru. The accused, along with his co-accused, were charged with three counts of housebreaking with intent to steal and theft. The accused pleaded guilty to all three counts whereas his co-accused pleaded not guilty, as a result of which, their trials were separated. The present review therefore pertains only to the accused who pleaded guilty. Following his guilty plea, accused was questioned in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 and convicted on all three counts and sentenced to 24 months' imprisonment, the counts taken together for sentence.

[2] On review, the following query was addressed to the trial court: 'In view of the court's failure to establish during the s 112(1)(b) questioning on all three counts what the accused's intent was at the time of the respective break-ins, are the convictions in accordance with justice?'

[3] In response, the magistrate concedes that there indeed was no direct question pertaining to the intent of the accused when committing the break-ins. The magistrate contends that the accused, when questioned about the charges alleging that he wrongfully, unlawfully and intentionally committed the offences, his response in the affirmative confirmed his intention.

[4] Trial courts must not lose sight of the purpose of the s 112(1)(b) questioning. It is to establish the factual as well as the legal basis for the plea of guilty. This means that the court, from the accused's admission, must conclude whether the legal requirements for the commission of the offence have been met, i.e. the unlawfulness, *actus reus* and *mens*

*rea.*¹

[5] In each of the charges it is alleged that the accused broke in with the intention to steal. It goes without saying that the element of intent is an essential element of the offences and ought to have been canvassed during the courts questioning. It is not sufficient to draw inferences of an accused's intention when committing an offence. It is clear in this instance that the accused did not admit all the elements of the offences charged, consequently, the convictions and sentence on all counts stand to be set aside.

[6] Based on the foregoing, the following order is made:

1. The convictions and sentence on counts 1 – 3 are set aside.
2. The matter is remitted to the trial court in terms of s 312 of Act 51 of 1977 to question the accused on his intention at the time of the break-ins in respect of each count.
3. In the event of a conviction, the magistrate must take into consideration the period which the accused has already served.

J C LIEBENBERG
JUDGE

NN SHIVUTE
JUDGE

¹ S v Amunyela (CR 66/2021) [2021] NAHCMD 356 (05 August 2021). See also S v Augustu (CR 24/2021) [2021] NAHCMD 158 (15 April 2021); S v Thomas 2006 (1) NR 83 (HC).