

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: The State v Daniel Daniel	Case No: CR 125/2022
High Court MD Review No: 1173/2022	Division of Court: Main Division
Heard before: Judge January <i>et</i> Acting Judge Christiaan	Delivered on: 13 June 2023
Neutral citation: <i>S v Daniel</i> (CR 125/2022) [2023] NAHCMD 315 (13 June 2023)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside2. The matter is remitted to the trial magistrate in terms of s 312 of the Criminal Procedure Act, 51 of 1977, as amended, with the direction that the proceedings in respect of count 1 be dealt with afresh from the stage of plea.3. In the event of a conviction, the magistrate, in considering an appropriate sentence, should have regard to the time the accused has spent in custody and/or a fine he might have paid.	
Reasons for order:	

January J (AJ Christiaan concurring)

[1] The case was submitted from the Katutura Magistrate's Court for automatic review pursuant to s 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused was charged with: 1. Possession of stolen stock in contravention of s 2 read with ss 1, 11(1)(a), 15 and 17 of Act 12 of 1990, as amended in that upon or about the 6th of December 2021 at or near Seeis in the district of Windhoek the accused was found in wrongful and unlawful possession of stock and produce, to wit: a cattle carcass to which there is a reasonable suspicion that it has been stolen and was unable to give a satisfactory account for such possession. 2. Transport of stolen meat in contravention of s 8 of the Stock Theft Act 12 of 1990 in that upon or about the 6th December 2021 and at or near B6 National road between Hosea Kutako Airport and Seeis in the district of Windhoek the accused did unlawfully and intentionally transport cattle meat without a permit.

[3] The second charge was eventually withdrawn and the prosecutor informed the court that it amounts to a duplication. It is arguable whether or not it would have constituted a duplication but it is best left for a decision at another appropriate time. The accused pleaded guilty on the first count of possession of suspected stolen stock or produce, to wit a cattle carcass. The public prosecutor indicated that the matter may be disposed of in terms of section 112(1)(a) of the CPA. The magistrate acceded, convicted the accused and sentenced him to N\$4000 or 24 months' imprisonment of which N\$2000 or 12 months are suspended for 3 years on condition that the accused is not convicted of possession of game meat (sic) committed during the period of suspension.

[4] The review cover sheet erroneously reflects that the accused was also convicted for contravention of s 8 of the Stock Theft Act 12 of 1990 whereas this charge was withdrawn. In addition, there is no typed annexure of the charge attached to the typed proceedings sent for review.

[5] I directed a query to the magistrate in the following terms:

1. 'The magistrate must see to it that the case record submitted for review is properly bound in

sequence to the proceedings. In this case there is no charge annexure for the typed review proceedings.

2. Whereas the original record reflects that the accused was charged with possession of suspected stolen stock, to wit, a cattle carcass, firstly, how is the disposal of the matter in terms of section 112(1)(a) of the CPA justified and;
3. Secondly, what is the relevance of the partly suspended sentence on condition that the accused is not convicted of the possession of game meat?

[6] The response from the magistrate is as follows:

1. 'I apologise for the lack of charge annexure for the typed review proceedings, it's an oversight on my part, shall not happen again.
2. I concede that, I shall have used 112(b) but I mistook it for game meat, an oversight on my part. I again apologise.
3. It was further an (sic) typing error and should have read possession of suspended stolen stock.'

[7] It is reiterated that magistrates should not slavishly follow requests by public prosecutors in the adjudicating of cases in terms of section 112(1)(a) of the CPA. Once the case is before court and the accused has pleaded, the invoking of section 112 (1)(a) of the CPA after a plea of guilty, falls within the discretion of the court. The prosecutor may be invited to address the court as regards to the charge(s) but the court must exercise its discretion judiciously on the way forward. The court is guided by the nature and seriousness of the offence to form an opinion if the offence does not merit a fine in excess of N\$6000 or punishment of imprisonment or any other form of detention without the option of a fine.¹

[8] Section 112 (1)(a) of the CPA should only be applied where the crimes are 'trivial', 'minor' or not 'serious'.² Presiding judicial officers should not lose sight of the objective of s 112 (1)(a) which is to dispose of trivial offences and only if the offence does not merit punishment of imprisonment or any other form of detention. The provision confers a

¹ See: Commentary on the Criminal Procedure Act, *Du Toit et al*, Original Service 1987 at 17-2; Conviction solely on a plea of guilty.

² *S v Onesmus, S v Amukoto, S v Shipange* 2011 (2) NR 461.

discretionary power to the presiding judicial officer that must be exercised judiciously.³

[9] The questioning in terms of s 112(1)(b) has a twofold purpose, namely to establish the factual basis of the plea of guilty and to establish the legal basis of such plea. The court must conclude whether the legal requirements for the commission of the offence have been met from the accused's admissions.⁴ In addition, the magistrate needs to satisfy him/herself that the accused does not have a valid defence.

[10] The accused in this matter might have had a valid defence in the matter at hand. Without any questioning, it remains guesswork. The magistrate misdirected himself in applying section 112(1)(a) because the offence of possession of suspected stolen stock contravening section 2 of Act 12 of 1990 cannot be regarded as a minor offence.

[11] The condition of suspension of the sentence with reference to game meat is irrelevant to the crime of possession of a cattle carcass. The apology that the magistrate mistook the allegation of a cattle carcass, as alleged, for game meat does not make sense. In the circumstances, the conviction and sentences fall to be set aside.

[12] In the result:

1. The conviction and sentence are set aside.
2. The matter is remitted to the trial magistrate in terms of s 312 of the Criminal Procedure Act, 51 of 1977, as amended, with the direction that the proceedings in respect of count 1 be dealt with afresh from the stage of plea.
3. In the event of a conviction, the magistrate, in considering an appropriate sentence, should have regard to the time the accused has spent in custody and/or a fine he might have paid.

³ *S v Onesmus, S v Amukoto, S v Shipange* 2011 (2) NR 461.

⁴ *S v Kalongo* (CR 100/2021) [2021] NAHCMD 510 (01 November 2021).

H C JANUARY JUDGE	P CHRISTIAAN ACTING JUDGE