

REPUBLIC OF NAMIBIA



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

Case Title: <i>The State v Piet Baltzer</i>	Case No: CR 73/2023
High Court MD Review No: 694/2023	Division of Court: High court Main Division
Heard before: D Usiku J et P Christiaan AJ	Delivered on: 7 July 2023
Neutral citation: <i>S v Baltzer</i> (CR 73/2023) [2023] NAHCMD 389 (7 July 2023)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The matter is remitted to the trial court in terms of s 312 of the Criminal Procedure Act to question the accused on his intention at the time of the break-in.3. In the event of a conviction, the magistrate must take into consideration the period which the accused has already served.	

REASONS FOR ORDER

Christiaan AJ and D Usiku J (concurring)

[1] This matter was submitted to this court for review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused was convicted on the strength of his guilty plea on one count of housebreaking with intent to steal and theft. He was thereafter sentenced to 36 months imprisonment of which 12 months were wholly suspended for a period of 5 years. On review, the following query was sent to the magistrate:

‘1. How did the court satisfy itself that the accused at the time he was breaking into the house had an intention to steal, if he was not asked any question pertaining to such intention?’

[3] The presiding magistrate responded to the query, by conceding that the question pertaining to the determination of intention is not reflected on record, but when she consulted her handwritten notes, she found that a question was asked to establish intention to steal, but that she erroneously omitted to type the question into the record. Failure to ascertain and/or to record questions pertaining to the accused person’s intention of breaking into the house, exclude vital information which render the conviction to be bad in law. The learned magistrate requested guidance of the court in this regard, which I will dutifully proceed to do.

[4] The learned magistrate is required to determine whether all the elements of the offence had been admitted by the accused and to find that the offence has been proven beyond reasonable doubt, in order to return a guilty verdict thereon. It appears that the magistrate did not proofread the record of proceedings before it was sent on review. The ultimate responsibility is on the magistrate to see to it that a proper record of proceedings is sent to the High Court¹.

¹ *S v John; S v Joao; S v Tjekulile* (CR 9/2021) [2022] NAHCNLD 26 (28 March 2022) at paragraph 16

[5] 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*.²

[6] In the present case, the accused was charged with housebreaking with intent to steal and theft, the intention of the accused at the time he was breaking into the premises must be established for the court to satisfy itself that accused intended to steal at the time he was entering. 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 he was charged with, consequently, the convictions and sentence on all counts stand to be set aside.

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

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

P CHRISTIAAN ACTING JUDGE	D USIKU JUDGE

² *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).

