CASE NO.: CR 121/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

IIPINGE VETTA NAVI **1ST ACCUSED**

SHIGWEDHA MIKA SHIVUTE **2ND ACCUSED**

(HIGH COURT REVIEW CASE NO.: 660/2007)

CORAM: MAINGA, J *et* VAN NIEKERK, J

Delivered on: 2007/08/10

REVIEW JUDGMENT

VAN NIEKERK, J:

[1] In this matter the two accused were charged jointly with one count of housebreaking with intent to steal and theft of goods from a shop. They pleaded guilty and were questioned in terms of Section 112(1)(b) of the Criminal Procedure Act, 51 of 1977. I have no issue with the questioning of accused no 1. In my view he was correctly convicted.

[2] Accused no 2 admitted most of the allegations in the charge sheet, but when he was asked, *"Did you realize that you were committing an offence to* (sic) *which you could be punished?"*, the accused answered, *"Yes, I knew but there was nothing that I could have done and I did not know that I could be arrested."* When the matter was sent on review, this answer struck me as being qualified. I asked the trial magistrate whether the accused did not appear to raising some defence, perhaps of acting under necessity or duress. I also asked whether the accused's answer should not have been clarified before the magistrate could be satisfied that he is guilty of the offence charged.

[3] To this the learned magistrate responded: -

"My response thereto is as follows; When the accused replied: 'yes, I knew but there

was nothing that I could have done and did not know that I could be arrested,' this in my humble opinion did not make me think that he was raising any defence to the question as to whether he realized he was committing on *(sic)* offence. The accused's response put in another words was simply that he realized that he was committing an offence to which he could be punished. He qualified his response by saying there was nothing that he could have done and did not know he could be arrested. The underlying factor is that he thought he was not going to be arrested and therefore I was of the opinion that even such defences like necessity or duress could not apply. Initially, at the commencement of the proceedings accused 2 had indicated that he was not influenced by any person to plead guilty to the charge."

[4] The learned magistrate may very well be right in his interpretation that all the accused means to say, in fact, is that he did not think be would be arrested and, that there was nothing that he could have done to prevent his arrest. This is a plausible interpretation of the accused's answer. However, the accused's answer may also be interpreted in a different way. As the learned magistrate himself says, the accused *"qualified"* his answer. This is especially clear from the fact that he used the word *"but"* after saying ".The answer may just as well be interpreted that the accused, for some reason, *"could"* not act differently than he did (in the sense that he was for some reason unable to act differently) and that he did not realize that what he was doing was something for which he *"could"* (as opposed to "might" or "would" be arrested). The difficulty may have been created by the interpretation from the language used by the accused to English. The point simply is this: the accused's answer is not clear and as such a court cannot be satisfied that he is guilty of the offence to which he has pleaded guilty. In my view the learned magistrate should have asked further questions to clarify the accused's answer before convicting him.

[5] There is another aspect with which I should deal although I did not raise this with the learned magistrate in my query. The magistrate questioned the two accused jointly, i.e. he posed one question and then recorded the reply by each accused before moving to the next question. I cannot say that in this particular case this method of questioning (which I have noticed the particular magistrate has followed in other review cases) has led to an error or irregularity. However it is fraught with danger, e.g. that the one accused may be burdened by the answer given by the other, which the former accused does not accept as true. (See e.g. *S v Faber* 1979 (1) SA 710 (NC) at 712B). It may also lead thereto that an accused, especially an uneducated and unrepresented accused merely echoes what his co-accused is saying without applying his mind properly to the question. I agree with respect with the view expressed in the *Faber* case (at 712D) that it is a highly undesirable procedure to adopt to question co-accused at the same time. They should be questioned separately, each one on all the allegations in the charge, before the next is questioned on all the allegations. This unfortunately means the magistrate must

record the same questions over and over, but there is no way around it.

[6] To return to the matter at hand, I am of the view that the conviction of accused no 2 is not in order because of the problem discussed earlier in this judgment and I therefore make the following order:

1. The conviction and sentence of accused no 1 are confirmed.

2. The conviction and sentence of accused no 2 are set aside and the matter is remitted to the magistrate in terms of section 312(1) of the Criminal Procedure Act, 51 of 1977, in order to comply with the provisions of section 112(1)(b) or section 113 of the Act, as the case may be.

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VAN NIEKERK, J

I agree.

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MAINGA, J