



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: CR 73/2013

In the matter between:

**THE STATE**

and

**FREDERICK EKANDJO**

**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 702/2013)

**Neutral citation:** *S v Ekandjo* (CR73-2013)[2013]NAHCMD314(1 November 2013)

**Coram:** HOFF J and UNENGU AJ

**Delivered:** 1 November 2013

**Flynote:** Criminal Procedure – Review questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977 – Accused not admitting all allegations of the offence charged with – Conviction and sentence set aside.

**Summary:** The accused who conducted own defence pleaded guilty to an offence of Housebreaking with the intent to commit an offence unknown to the State – Convicted as charged and sentenced. On review, both the conviction and sentence set aside and the matter remitted to the magistrate to enter a plea of not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1977 as the accused did not admit all allegations of the offence he was charged with.

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## ORDER

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- (1) The conviction and sentence are set aside.
  - (2) The matter is remitted to the magistrate with a direction that a plea of not guilty be entered on behalf of the accused and for a trial to follow if the State so wish.
  - (3) In the event that the accused is convicted after evidence has been led, the magistrate must take into account, the fine or a part fine paid, if any, by the accused or the sentence or part thereof served by the accused, when passing sentence.
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## JUDGMENT

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UNENGU AJ (HOFF J concurring):

[1] This matter comes before me on automatic review<sup>1</sup>. The accused who conducted his own defence, was charged with an offence of Housebreaking with the intent to commit a crime unknown to the State, of which the annexure to the charge sheet reads as follows: "The accused is/are guilty of the crime of Housebreaking with intent to commit an offence unknown to the State. In that upon or about the 28<sup>th</sup> day of May 2013 at or near Farm Singberg in the district of Karibib the accused did unlawfully and intentionally break and enter the house of Anita Potgieter with the intent to commit a crime unknown (sic) the State'.

[2] The accused pleaded guilty and after questioning in terms of the provisions of the CPA<sup>2</sup>, the magistrate expressed the view that the court was satisfied that the accused person admitted to (sic) all allegations contained in the charge annexure and elements of the offence, found the accused guilty as charged, and sentenced the accused to pay a fine of N\$2000.00 or in default of payment 6 (six) months imprisonment. The accused did not pay the fine, hence the automatic review.

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<sup>1</sup> Section 302 of the Criminal Procedure Act 51/1977 (CPA)

<sup>2</sup> Section 112(1)(b)

[3] Upon reading the record of proceedings, I was not satisfied that the proceedings in the case appeared to be in accordance with justice and sent the following query to the magistrate:

**'REVIEW CASE NO.: KRB-CRM-742/2013**

HIGH COURT REF. NO.: 1406/2013

**MAGISTRATE SERIAL NO.: 23/2013**

THE STATE vs FREDERICK EKANDJO

The Honourable Reviewing Judge remarked as follows:

"1. During questioning in terms of section 112(1)b of the Criminal Procedure Act, 51 of 1997, as amended, when asked by the Court "What was your intention when entering the house through the windows", the accused answered "I wanted to see what was inside as I did not know"

2. Further, on a follow up question namely, "so you had no intention to steal anything from the house? The accused replied: "No".

3. In view of the aforesaid answers by the accused, why was a plea of not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1977 not entered?"

Your urgent response is appreciated.'

[4] The magistrate responded to my query as follows:

**'REVIEW CASE NO.: KRB-CRM-742/2013**

HIGH COURT REF. NO.: 1406/2013

**MAGISTRATE SERIAL NO.: 23/2013**

Re: THE STATE vs FREDERICK EKANDJO

**In response to the Honourable Reviewing Judge's remarks:**

1. The accused person was charged with housebreaking with the intent to commit an offence unknown to the state. The court subsequently questioned the accused person based on the said charge.
2. From the questioning, it can be noted that the accused person entered the house by opening the window wider and gaining access to the house, thus, the accused person broke into the house, as he has to move something that was in his way.
3. The court attempted to establish the intention of the accused person for breaking into the house, but his response, after a number of attempts was that 'he wanted to see what was inside the house'.
4. Having considered the above and the offence that the accused person was charged with, the court was satisfied that even though the accused person's responses did not establish the offence of housebreaking with the intent to steal, the responses however did satisfy the elements of housebreaking with the intent to commit an offence unknown to the state.

On that basis the court entered a guilty plea, and the accused person was convicted for housebreaking with the intent to commit an offence unknown to the state, as his intention was not established.

I sincerely do hope the response is in order and seek the guidance of the Honourable Reviewing Judge.'

[5] The magistrate in his reply to the query has attempted to justify and vindicate his glaring blunder. The fact of the matter is that the accused did not admit the intention to commit the offence unknown to the State or any specific offence.

[6] On a pertinent question asked by the magistrate 'what was your intention when entering the house through the window?' The accused answered: 'I wanted to see what was inside as I did not know'. This answer was followed up with this question: 'Why did you not look through the window?' The accused replied: ' I could

not see properly, there were curtains'. The magistrate still not satisfied and asked another question, this time a leading question.

'Q: So you had no intention to steal anything from the house?

A: No'

[7] Nevertheless, the magistrate proceeded and convicted the accused as charged and punished him as pointed out above even though an important element (allegation) of the offence the accused was charged with was not admitted. The magistrate, in this case, should have entered a plea of not guilty in terms of the provisions of the CPA<sup>3</sup> for the State to prove the intention to commit the unknown offence he was charged with. The failure to enter a plea of not guilty on behalf of the accused is a misdirection which resulted in a miscarriage of justice. Therefore, both the conviction and sentence cannot be allowed to stand.

[8] In the result, the following order is made:

(1) The conviction and sentence are set aside.

(2) The matter is remitted to the magistrate with a direction that a plea of not guilty be entered on behalf of the accused and for a trial to follow if the State so wish.

(3) In the event that the accused is convicted after evidence has been led, the magistrate must take into account, the fine or a part fine paid, if any, by the accused or the sentence or part thereof served by the accused, when passing sentence.

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Acting

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<sup>3</sup> Section 113 of the CPA

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E Hoff  
Judge