



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

CR No: 71/2017

In the matter between:

THE STATE

and

BRADLEY KHEIBEB

HIGH COURT MD REVIEW CASE NO 1695

Neutral citation: S v Kheibeb (CR 71/2017) [2017] NAHCMD 351 (06 December 2017)

Coram: ANGULA DJP et LIEBENBERG J

Delivered: 06 December 2017

ORDER

1. The conviction and sentence are set aside.

2. Proceedings to start *de novo* before another magistrate.
3. In the event of a conviction, any sentence already served by the accused must be taken into consideration at sentencing.

JUDGMENT

LIEBENBERG J: (Concurring ANGULA DJP)

[1] The accused appeared in the Mariental Magistrate's Court on a charge of theft of cash in the amount of N\$3 000 and 'airtime' worth N\$975. He was convicted on a plea of guilty and sentenced to a fine which had not been paid.

[2] During the court's questioning in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977, the accused admitted taking the complainant's property. In order to establish whether the accused's act was unlawful, the court asked him whether he had any right or permission to take 'the 2 rolls of steel wire' and whether he knew that it was 'wrongful and punishable by law to take the wires without the owner's consent'. Upon answering in the affirmative, the court convicted.

[3] Whereas the accused had not been charged with theft of any rolls of steel wire, it is beyond comprehension how the court diverted its attention away from what is contained in the charge before court, to something which was clearly not. However, what it does show is that the magistrate's mind was at sea and not in court where it should have been. In this instance the accused was convicted of theft of rolls of wires for which he had not even been charged! To make matters worse, he ended up in prison as a result thereof. The irregularity committed in this instance constitutes such grave injustice done to the accused that it vitiates the entire proceedings and therefore falls to be set aside on review.

[4] Whereas the conviction and sentence are clearly not in accordance with justice, and to prevent any further prejudice done to the accused, this in an instance where the review court may act in accordance with s 304(2)(a) of the Criminal Procedure Act,

1977 and dispose of first obtaining a statement from the presiding magistrate, as it is evident that no reasonable explanation could possibly be proffered to undo the irregularity committed herein.

[5] A disquieting feature of review cases received from the relevant magistrate's court reflect that cases are certified as correct and ready to be sent on review whilst they are actually riddled with mistakes and inaccuracies, and seldom satisfy the prescribed procedures set out in the Codified Instructions. It remains the responsibility of the presiding magistrate to forward review cases to the registrar only when these requirements have been met.

[6] In view of the accused's record of previous convictions having already been admitted into evidence, it would in my view not be proper to remit proceedings in terms of s 312(1) to be continued before the same magistrate. In the circumstances justice would best be served if the accused is brought before another magistrate.

[7] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. Proceedings to start *de novo* before another magistrate.
3. In the event of a conviction, any sentence already served by the accused must be taken into consideration at sentencing.

J C LIEBENBERG

JUDGE

E H T ANGULA

JUDGE