



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case No: CR 27/2017

THE STATE

versus

XUI PIET

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 945/2016)
(MAGISTRATE'S SERIAL NO. 13/2016)

Neutral citation: *S v Piet* (CR 27/2017) [2017] NAHCMD 84
(16 March 2017)

Coram: LIEBENBERG J et SHIVUTE J

Delivered: 16 March 2017

ORDER

The conviction and sentence are set aside.

REVIEW JUDGMENT

SHIVUTE J (LIEBENBERG J concurring):

[1] The accused person was convicted of stock theft and sentenced to 14 (fourteen) months' imprisonment of which 4 (four) months imprisonment are suspended for 5 years on condition that the accused is not convicted of stock theft committed within the period of suspension.

[2] I directed the following query:

'How did the court satisfy itself that the accused admitted all the elements of the offence if there were no questions pertaining to the place where the offence took place, whether the accused knew that at the time he took the goat he was aware that if arrested he could be punished?'

[3] The learned magistrate replied:

'Indeed no questions was put relating to the place. The oversight is sincerely regretted.

It is hoped, however, that despite that oversight, since the accused referred to stealing the complainant's goat on a particular date, which date is referred to in the charge sheet, it can perhaps be accepted that he was referring to the complainant's goat mentioned in the charge sheet.

On the aspect of whether he knew at the time of taking the goat that he could be arrested and punished, may I comment as follows.

Accused knew that he was stealing the goat. It is submitted that the word 'steal', even in the ordinary sense as commonly used by the community in this jurisdiction, implies wrongful and unlawful appropriation of property which does not belong to one. Therefore, where an adult sane person declares that he stole, he is taken to have appreciated the consequences of his actions. Even if he believes he cannot be arrested or he will not be caught, it is submitted

that as long as both the physical and mental elements of the offence are present, the accused's guilt is established.'

[4] Section 84 of the Criminal Procedure Act 51 of 1977 provides the following:

'(l) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars ~ as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.'

In *S v Katari* 2006 (1) NR 205 (HC) at 207B – D the court further reiterated the position under s 84 of the CPA as follows:

'The purpose of this section [ie s 84] is to inform an accused of the case which he or she will have to meet so that he or she knows which allegations to answer and to prepare a defence, if any....'

[5] As section 84 prescribes that the charge must stipulate the place where the offence was committed, the court must ensure that questions pertaining to this aspect of the offence are canvassed accordingly. In *S v Thomas* 2006 (1) NR 83 (HC), the court stated at 84F that:

'Section 112(1) (b) requires of a court in peremptory language to question the accused with reference to the alleged facts of the crime in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty. It may only convict the accused on account of such a plea if it is satisfied on the basis of such answers that the accused is indeed guilty.'

The court further continued at 85B - C that:

'Unless the accused has admitted to all the elements of the offence, he or she may not be convicted merely on account of his or her plea - except, of course, in the case where s 112(1)(a) applies. To disregard the requirements . . . of s [112(1) (b)] would jeopardise especially those accused who are unrepresented or illiterate. Justice requires that only persons who are guilty of a particular crime should be convicted.' [My emphasis.]'

[6] Furthermore, in *S v Lebokeng* 1978 (2) SA 674 (O) the court emphasised that the court should be satisfied not only that the accused committed the act but that he

committed it unlawfully and with the necessary *mens rea*. The questioning by the court should ascertain that an accused who pleads guilty knows what the elements of the offence are and that he admits every one of them. The accused's understanding of the charge must be a key factor in deciding whether his admissions are persuasive of guilt beyond a reasonable doubt.

[7] In conducting the questioning, the court must explain the various elements of the offence in a language and manner which the accused understands and the accused must admit each one of them. What is crucial is that in addition to admitting every element of the offence, the accused must admit the factual allegations on which the elements are based. The court therefore need not put every factual allegation contained in the charge sheet to the accused, but the questioning must reduce the elements of the charge to a factual basis. See *S v Tito* 1984 (4) SA 363 (Ck).

[8] Applying the above legal principles to the present case, the court misdirected itself by not questioning the accused pertaining to the place where the offence took place and by failing to cover the element of unlawfulness.

[9] In view of the above, I am not satisfied that the accused admitted all the elements of the offence. Therefore, the conviction cannot be allowed to stand. As the accused has already served the sentence imposed, I see no reason to remit the matter back.

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

The conviction and sentence are set aside.

N N Shivute

Judge

J C Liebenberg

Judge