

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CR No: 36/2018

In the matter between:

THE STATE

v

VICTORY HOABEB

(HIGH COURT MD REVIEW CASE NO. 721/2018)

Neutral citation: *S v Hoabeb* (CR 36/2018) [2018] NAHCMD 140 (24 May 2018)

Coram: LIEBENBERG, J and SHIVUTE, J

Delivered: 24 May 2018

Flynote: Criminal procedure – Review – Plea – Section 112(1)(b) questioning – Offence – Housebreaking with intent to steal and theft – Accused raised defence of drunkenness – Court should have noted plea of not guilty.

ORDER

1. The conviction and sentence are set aside.
 2. The case is remitted to the trial court in terms of s 312 of Act 51 of 1977 with the direction to act in terms of s 113(1) and to bring proceedings to its natural conclusion.
 3. In the event of a conviction the sentence already served by the accused must be taken into account.
-

JUDGMENT

LIEBENBERG J:

[1] This is an automatic review brought in terms of section 302(1) of the Criminal Procedure Act 51 of 1971. On review a query was sent to the presiding magistrate enquiring whether the conviction was proper as the accused appeared to have raised the defence of criminal incapacity due to intoxication.

[2] The accused was convicted on the strength of his guilty plea on one count of housebreaking with intent to steal and theft, and thereafter he was sentenced to twelve (12) months imprisonment.

[3] The presiding magistrate responded to the query and explained that she questioned the accused to ascertain the degree of his intoxication when committing the offence. The magistrate explained that after questioning the accused on his ability to

recall his commission of the offence in some detail, the court was convinced that the defence of drunkenness was not justified and therefore disregarded his defence of intoxication.

[4] The accused was charged with housebreaking with intent to steal and theft. The presiding magistrate questioned the accused in terms of s 112 (1) (b) of the CPA after he pleaded guilty. The relevant part of the record is quoted hereunder verbatim.

‘Q: what happened that led to your arrest and appearance?’

A: on that morning I was very drunk and I do accept that I did it...

Q: how did you enter the house?’

A: the house was locked but the keys was in the lock so I opened the lock and went into the house, but it was really not my intention to go into the house because I was not in my right mind, I was drunk.’

The court then before convicting the accused made the following ruling:

‘. . .the court is satisfied that accused 1 has met all the elements of the offence and thus the accused 1 is found guilty as charged.’

[5] The primary purpose of questioning the accused in terms of s 112 (1) (b) of the CPA following a plea of guilty, is to safeguard the accused against the result of an unjustified plea of guilty.¹ Moreover, when the court questions the accused it must ensure that s/he admits all elements of the offence in such way that it enables the court to conclude for itself whether the accused is guilty of the offence charged. The accused’s answers must establish an unequivocal plea of guilty. If there is any doubt, a plea of not guilty should be entered.² The function of the court is not to evaluate the answers as if it were weighing evidence, neither does it have to decide the truthfulness

¹ *The State v Kandjimi Hiskia Mangundu* (CR 67/2016) [2016] NAHCMD 316 (17 October 2016)).

² *S v Combo and Another* 2007 (2) NR 619 (HC).

of the answers or draw inferences therefrom.³ If the accused's answers suggest a possible defence, a plea of not guilty should be recorded.⁴

[6] To apply the principles stated above to the present facts it is evident that the accused raised a possible defence, namely, that he lacked the required criminal capacity. Especially when he stated that he did not have the intention to go into the complainant's house due to the fact that he was not in his right mind. This notwithstanding the court continued questioning the accused and from the answers provided by the accused evaluated the truthfulness thereof and came to the conclusion that the defence of drunkenness was unjustified. This the court was not entitled to do and committed a misdirection. The conviction cannot be permitted to stand.

[7] As a result of the aforesaid, the conviction and sentence has to be set aside and the following order is made:

1. The conviction and sentence are set aside.
2. The case is remitted to the trial court in terms of s 312 of Act 51 of 1977 with the direction to act in terms of s 113(1) and to bring proceedings to its natural conclusion.
3. In the event of a conviction the sentence already served by the accused must be taken into account.

³ *S v Kaevarua* 2004 NR 144 (HC).

⁴ *The State v Kandjimi Hiskia Mangunda* at para 4.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE