

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

CR No: 17/2021

In the matter between:

THE STATE

v

PAULU PAKO

(HIGH COURT MD REVIEW CASE NO. 16/2021)

Neutral citation: *S v Pako* (CR 17/2021) [2021] NAHCMD 100 (8 March 2021)

Coram: SHIVUTE, J and MILLER, AJ

Delivered: 8 March 2021

Flynote: Criminal Procedure - Plea of guilty – Section 112(1) (b) questioning – Offence – Housebreaking with intent to steal and theft – Accused not asked questions pertaining to his intention at the time he broke into the premises – Accused raising defence of drunkenness – The court *a quo* could not have been satisfied that accused admitted all elements of the offence – 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 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.
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JUDGMENT

SHIVUTE J (Concurring Miller AJ)

[1] This is an automatic review brought in terms of section 302(1) of the Criminal Procedure Act 51 of 1977. The accused was convicted on the strength of his guilty plea on one count of housebreaking with intent to steal and theft. He was thereafter sentenced to 3 years' imprisonment. On review, the following query was sent to the magistrate:

- '1. The accused was convicted of housebreaking with intent to steal and theft after the court invoked the provisions of s 112(1) (b) of the Criminal Procedure Act 51 of 1977.
2. How did the court satisfy itself that the accused at the time he was breaking into the room had an intention to steal, if he was not asked any question pertaining to such intention?
3. Furthermore, the accused was asked why he reconciled with the wrongfulness, unlawfulness and punishable conduct. The accused said he was drunk. When he was asked how drunk he was, he said he was very drunk. Did the accused not raise a defence? Why was a plea of not guilty entered?'

[2] The presiding magistrate responded to the query by conceding that the failure to ascertain the accused person's intention of breaking into the house, excludes vital information which renders the conviction bad in law .She further confirmed that the accused raised a defence of drunkenness and explained that at the time, she was

convinced that the accused could understand his act and its consequence hence his conviction without applying the provisions of section 113 of the Act. The learned magistrate requested that the conviction and sentence be set aside and the matter remitted to the court *a quo* to apply section 113 of the Act.

[3] The issue to be determined by this court is whether all the elements of the offence had been admitted by the accused, sufficiently, for the learned magistrate to find that the offence has been proven beyond reasonable doubt and return a guilty verdict thereon?

[4] Liebenberg J stated the following in *S v Pretorius*¹

'It is trite that when an accused pleads guilty to a charge, a court is under a duty to satisfy itself that the accused admits the definitional elements of an offence. The invoking of s 112 (1) (b) of the CPA, following a plea of guilty, acts as a safeguard against the result of an unjustified plea of guilty. The accused's answers must establish an explicit plea of guilty. Moreover, where a court finds any doubt in the answers that an accused gives during s 112 (1) (b) questioning, a plea of not guilty should be entered. It should further be noted that during this stage of proceedings the court cannot evaluate, decide the truthfulness of, or draw inferences from the accused's answers. The court is duty bound to enter a plea of not guilty where the accused's answers suggest a possible defence.'

[5] Questioning in terms of section 112 (1) (b) of the Act, has a twofold purpose, namely, to establish the factual basis for the plea of guilty and to establish the legal basis for such plea. From the accused's admission, the court must conclude whether the legal requirements for the commission of the offence have been met. These include questions of unlawfulness, *actus reus and mens rea*. The court however omitted to question the accused in order to determine his intent at the time of breaking into the house. The test is what the accused has said and not what the court thinks of it.²

[6] In the present case, although the accused took the goods when he entered the premises, it was not established through questioning by the court that at the time he was entering the premises, his intention was to steal. Since the accused was charged with housebreaking with intent to steal and theft, the intention of the accused at the time he

¹ *S v Pretorius* (CR 45/2019) [2020] NAHCMD 258 (29 June 2020)

² *S v Khamseb* (CR 37/2018) [2018] NAHCMD 144 (29 May 2018)

was breaking into the premises must be established for the court to satisfy itself that accused intended to steal at the time he was entering.

[7] It follows that, the accused raised a possible defence, namely drunkardness in that he lacked the required criminal capacity to commit the offence. The court continued to convict the accused on his plea of guilty, notwithstanding the defence he raised. The court is duty bound to enter a plea of not guilty where the accused's answers suggest a possible defence. The court could thus, not have satisfied itself that the accused admitted all the elements of the offence as a result of the possible defence raised and the failure to establish the accused's intention at the time of breaking in. Such a failure amounts to a misdirection. The conviction and sentence can thus, not be allowed to stand.

[8] As a result,

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.

NN SHIVUTE
JUDGE

PJ MILLER
ACTING JUDGE