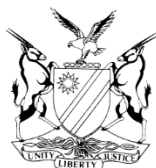


PRACTICE DIRECTIVE 61
REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: <i>The State v Evalistus Mukuve Sindimba</i>	Case No: CR 55//2021
High Court MD Review No: 862/2021	Division of Court: Main Division
Heard before: Judge Liebenberg <i>et</i> Judge January	Delivered on: 09 June 2021
Neutral citation: <i>S v Sindimba</i> (CR 55/2021) [2021] NAHCMD 287 (09 June 2021)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. In terms of s 312 of Act 51 of 1977 the matter is remitted to the presiding magistrate with the direction to question the accused in terms of s 112(1)(b) in order to determine what the accused person's intention was at the time he gained access to the complainant's home.3. When sentencing the accused, the court should take into consideration the portion of the sentence the accused had already served.	

Reasons for order:

Liebenberg, J (concurring January, J)

[1] This is a review matter which came before me in terms of section 302 (1) and section 303 of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The accused in this matter appeared before the Magistrate's Court in the district of Rundu where he face a charge of Housebreaking with intent to steal and theft. After he pleaded guilty, s 112(1)(b) of the CPA was invoked and the court subsequently convicted and sentenced him to 36 months' imprisonment.

[3] A query was directed to the magistrate as to whether the element of *intention to steal* was covered and admitted to by the accused during the court's questioning in terms of s 112(1)(b) of the CPA. The magistrate in her response correctly conceded that the said element was not covered, nor admitted to by the accused.

[4] It is trite that questioning in terms of s 112(1)(b) has a twofold purpose, namely to establish the factual basis of the plea of guilty and to establish the legal basis of such plea. The court must conclude whether the legal requirements for the commission of the offence have been met from the accused's admissions. These include questions of unlawfulness, *actus reus* and *mens rea*. The court *a quo* however omitted to question the accused on what his intent was at the time of the break in.

[5] The State alleges that the accused's intention at the time he entered the house was to steal, thus this is an essential element of the offence which was not canvassed by the magistrate's questioning. Despite the fact that the accused admitted to have unlawfully taken the goods from the house and had no permission, the intention at the time of entering the complainant's home must also be established.

[6] Consequently, I am not satisfied that the accused admitted all the elements of the offence thus the conviction and the sentence cannot be allowed to stand.

[7] In the result the following order is made:

1. The conviction and sentence are set aside.

2. In terms of s 312 of Act 51 of 1977 the matter is remitted to the presiding magistrate with the direction to question the accused in terms of s 112(1)(b) in order to determine what the accused person's intention was at the time he pushed open the door.
3. When sentencing the accused, the court should take into consideration the portion of the sentence the accused had already served.

J C LIEBENBERG
JUDGE

H JANUARY
JUDGE