

REPUBLIC OF NAMIBIA



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

Case Title: <i>S v ALWYN WILLEMSE</i>	CR NO: 15/2021
	Division of Court: Main Division
Heard before: Honourable Mrs Justice Shivute J et Honourable Mr Justice Miller AJ	Delivered on: 8 March 2021

Neutral citation: *S v Willemse* (CR 15/2021) [2021] NAHCMD 98 (8 March 2021)

IT IS ORDERED THAT:

- (a) The conviction and sentence are set aside.
- (b) The matter is remitted to the court a quo in terms of s 312 (1) of Act 51 of 1977 and the learned magistrate is directed to question the accused in terms of s 112 (1) (b) of the Criminal Procedure Act in order to determine the accused's intention at the time he was entering the premises.
- (c) When sentencing the accused, the court should take into account the sentence already served by him.

Reasons for the above order:

SHIVUTE J (MILLER AJ concurring):

[1] 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 36 months' imprisonment of which 12 months are suspended for 5 years on condition that accused is not convicted of housebreaking with intent to steal and theft, committed during the period of suspension. On review, the following query was sent to the magistrate:

1. The accused was charged with housebreaking with intent to steal and theft. He pleaded guilty to the charge and was convicted as charged.
2. On which basis did the court convict the accused as charged as there was no question asked pertaining to his intention at the time he was breaking into the premises?'

[2] In response to the query, the learned magistrate responded as follows :

- 2.1 During questioning in terms of section 112(1)(b) of Act 51 of 1977, as amended accused person informed the court on his own accord without being prompted that he is pleading guilty because he went to steal things without permission and as such when he went into detail explaining how he went about to steal the said things, the court was satisfied that his intention was indeed to steal.
- 2.2 In other words, I did not see the need to prompt the accused person further on his intention since he indicated to the court that, that is what he did.
- 2.3 Therefore, I believe I have not omitted anything in the questioning to vitiate the proceedings.
- 2.4 I pray for the honourable judge's indulgence and guidance in this regard.'

[3] There are several judgments in this jurisdiction that give guidance on the proper questioning in terms of s 112(1)(b) of the CPA and echo that magistrates should bear in mind the nature and purpose of the questioning to minimise the risk of an erroneous

conviction on a plea of guilty by an unsophisticated accused. In *S v Sindimba*¹ the court at para 9 stated that:

'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.² 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.³ 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 of the answers or draw inferences therefrom.⁴

[4] In applying the above principles to the present facts, 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 was breaking into the premises must be established for the court to satisfy itself that the accused admitted all the elements of the offence.

[5] Failure to establish the accused's intention at the time he was entering the premises amounts to a misdirection .It follows that the conviction and sentence cannot be allowed to stand.

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

(a) The conviction and sentence are set aside.

(b) The matter is remitted to the court a quo in terms of s 312 (1) of Act 51 of 1977 and the learned magistrate is directed to question the accused in terms of s 112 (1) (b) of the Criminal Procedure Act in order to determine the accused's intention at the time

¹ *S v Sindimba* (CR 86/2020) [2020] NAHCMD 492 (2 November 2020).

² *The State v Kandjimi Hiskia Mangundu* (CR 67/2016) [2016] NAHCMD 316 (17 October 2016).

³ *S v Combo and Another* 2007 (2) NR 619 (HC).

⁴ *S v Kaevarua* 2004 NR 144 (HC).

he was entering the premises.

(c) When sentencing the accused, the court should take into account the sentence already served by him.

**NN SHIVUTE
JUDGE**

**PJ MILLER
ACTING JUDGE**