

PRACTICE DIRECTION 61

REPUBLIC OF NAMIBIA



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

Case Title: <i>The State v Aloisius Hendriks</i>	Case No: CR 15/2022
High Court MD Review No: 243/2022	Division of Court: High court Main Division
Heard before: Honourable Mr. Justice Liebenberg <i>et</i> Honourable Lady Justice Claasen	Delivered on: 24 March 2022
Neutral citation: <i>S v Hendriks</i> (CR 15/2022) [2022] NAHCMD 134 (24 March 2022)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The matter is remitted to the magistrate in terms of section 312 of the Criminal Procedure Act 51 of 1977, with the direction to question the accused in terms of section 112(1)(b) of the Act and to bring the proceedings to its natural conclusion.3. In the event of a conviction, any term of imprisonment already served must be taken into consideration in sentencing.	

Liebenberg, J (Claasen, J concurring)

[1] The accused appeared in the magistrate's court in the district of Karasburg on a charge of housebreaking with intent to steal and theft.

[2] The proceedings of 21 January 2022 when the accused's plea was taken, reveal that the court *a quo* invoked the provisions of s 112(1)(a) and convicted the accused on his mere plea of guilty. The review cover sheet further indicates that the accused was sentenced to a custodial sentence of 12 months' imprisonment of which 6 months are suspended for a period of 5 years.

[3] When the matter came before me on automatic review, I queried the magistrate in the following terms:

'1. With just short of seven (7) years' experience on the bench is the magistrate of the view that it is in the interest of justice to invoke the provisions of section 112(1)(a) of the Criminal Procedure Act in a matter of Theft involving goods to the value of over N\$ 10 000?

2. Having convicted in terms of section 112(1)(a), is the imposition of a custodial sentence permitted?'

[4] The magistrate in her reply explained that there was a mix up between two cases which appeared on the same date in question. She mistakenly attached the court record of a different case, where another accused was charged of the offence of common assault, and where the court invoked s 112(1)(a) and imposed a fine. She further attached the proceedings of the latter matter to the record to demonstrate to this court where she made the mistake.

[5] The explanation of the magistrate is appreciated. However, after perusal of the record of proceedings, it is evident that the magistrate's explanation does not reflect the true state of affairs. The NAMCIS proceedings of the matter in question, on the date when the plea was taken, reflects the name of the accused (Aloisius Hendriks) and the court officials who were present on 21 January 2022. The proceedings further reflect the following on record:

'PP: Accused is in custody.

Matter is on the roll for Possible Plea.

State is ready to proceed with the plea

Charge put to the accused person as per the charge annexure.

CRT: Do you understand the charge against you?

ACCD: Yes

CRT: How do you plead?

ACCD: Guilty

PP: May court apply S 112(1)(a) of the CPA 51 of 1977

Court: Section 112(1)(a) of the CPA applies. The accused person is found guilty on his own plea of guilty.'

[6] From the above quoted extract, it is evident that this is not an instance where the record of another case was merely attached to the record of the present proceedings. It is evident that from the inception of the proceedings, when the accused pleaded to the charge of housebreaking with intent to steal and theft, the court invoked s 112(1)(a), convicted and sentenced the accused to a custodial sentence.

[7] With that being said, it is settled law that s 112(1)(a) provides for the disposal of trivial offences, and only if the offence does not merit punishment of imprisonment of any other form of detention.¹ I need not regurgitate the legal principles set out in the application of sections 112(1)(a) and s 112(1)(b), but find it necessary to stipulate that, 'presiding officers should guard against the indiscretionary summary disposal of cases whilst rightly acting within the law in terms of s 112(1)(a), but at the same time, compromising an accused person's constitutional right to a fair trial.'²

[8] From the foregoing, it is apparent that the presiding magistrate (a) did not exercise her discretion judiciously and (b) imposed an incompetent sentence. As a result the conviction and sentence cannot be permitted to stand.

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

1. The conviction and sentence are set aside.
2. The matter is remitted to the magistrate in terms of section 312 of the Criminal Procedure Act 51 of 1977, with the direction to question the accused in terms of section 112(1)(b) of the Act and to bring the proceedings to its natural conclusion.
3. In the event of a conviction, any term of imprisonment already served must be taken into consideration in sentencing.

J C Liebenberg JUDGE	CM Claasen JUDGE

¹ *S v Aniseb and Another* 1991 (2) SACR 413 (NM).

² *S v Onesmus, S v Amukoto, S v Shipange* 2011 (2) NR 461.