REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: *The State v Nico Tiboth*	**Case No:** CR 130/2022
	Division of Court: High Court Main Division
Heard before: Honourable Justice Usiku Honourable Justice Claasen	**Delivered on:** 28 November 2022
Neutral citation: *S v Tiboth* (CR 130/2022) [2022] NAHCMD 645 (28 November 2022)	

Order:

1. The conviction and sentence are set aside.
2. The matter is remitted to the court a quo with a direction that it be dealt with afresh from the plea stage.
3. In the event of a conviction, the sentencing court must have regard to the sentence already served.

CLAASEN J (USIKU J concurring)

[1] This is a review of a criminal case that hails from the district court of Aranos where the accused was charged with theft from the employer of items to the value of N$ 10 500. He was convicted in terms of s 112(1)*(a)* of the Criminal Procedure Act 51 of 1977 (CPA) and sentenced to N$ 1500 or 3 months' imprisonment.

[2] In considering the proceedings, this court has identified a serious irregularity. In view of the time it will take to address a query and obtain a reply, the matter is reviewed without having obtained a statement from the presiding officer in terms of s 304(2)*(a)* of the CPA.

[3] The problem pertains to the conviction, which was done in terms of s 112(1)*(a)* of the CPA. There are numerous review judgments that explain the procedure under that provision is reserved for minor, trivial or not serious offences. The applicable principles are fully explained in these judgments[1]. In *S v Michael*[2] at para 3 it was stated that:

'Despite these reported judgments and several other unreported judgments, State Prosecutors continue requesting magistrates to dispose of serious offences in terms of s 112(1)*(a)* of Act 51 of 1977 as amended by the Criminal Procedure Act 13 of 2020 and magistrates continue to do so without applying his/her judicial discretion to determine whether it is a proper procedure to adopt.'

It is evident from the large number of review cases that still suffer from this error, that many magistrates and prosecutors continue to ignore these judgments, which places an unnecessary burden on the review system.

[4] This matter involved theft of a Speroni pump of N$7000, a sub-cable of N$3000 and a cable joint of N$500, which was stolen from the farm owner, where the accused was employed. By looking at the particulars of the charge, this court is unable to regard it as a trivial or minor offence. Therefore, the court a quo should have invoked s 112(1)*(b)* of the CPA when the undefended accused indicated that he intends to pleads guilty.

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[1] *S v Aniseb and Another* 1991 NR 203 HC; *S v Onesmus, S v Amukoto, S v Shipange* 2011 (2) NR 461; *S v Friedrick* (CR 14/2019) [2019] NAHCNLD 23 (28 February 2019); *S v Nyumba* (CR 31/2019)[2019] NAHCMD 97 (12 April 2019); *S v Jona* (CR 39/2021) [2021] NAHCMD 225 (12 May 2021).

[2] *S v Michael (*CR 1 /2017) [2017] NAHCNLD 17 (3 March 2017).

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

1. The conviction and sentence are set aside.
2. The matter is remitted to the court a quo with a direction that it be dealt with afresh from the plea stage.
3. In the event of a conviction, the sentencing court must have regard to the sentence already served.

C CLAASEN JUDGE	D USIKU JUDGE