

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CR 02/2014

In the matter between:

THE STATE

and

JOHANNES HILENI

High Court NLD Review Case Ref No.: CR321/2013

Neutral citation: *S v Hileni* (CR 02/2014) [2014] NAHCNLD 07 (04 February 2014)

Coram: DAMASEB JP and LIEBENBERG J

Delivered: 04 February 2014

Flynote: **Criminal procedure** – Evidence – Evidence adduced not proving the offence charged – Notwithstanding court convicted accused ‘as charged’.

Summary: The accused was charged with theft of N\$3 600 in cash and after evidence was heard convicted her of theft ‘as charged’. The evidence adduced does not sustain a conviction of theft of the specified amount but of a lesser amount (N\$725.10). Conviction corrected accordingly.

ORDER

1. The conviction is set aside and substituted with a finding of guilty of theft of N\$725.10.
2. The sentence imposed is confirmed.

JUDGMENT

LIEBENBERG J (DAMASEB JP concurring):

[1] The accused appeared in the magistrate’s court Ondangwa and pleaded guilty to a charge of theft of cash in the amount of N\$3 600. When questioned by the court pursuant to the provisions of s 112 (1)(b) of the Criminal Procedure Act, 51 of 1977 she admitted having misappropriated the complainant’s money but only to the sum of N\$725.10 and not the amount charged. The court correctly entered a plea of not guilty after the State declined to accept the plea on the lesser amount.

[2] The State led the evidence of the complainant and the accused testified in her defence. In the *ex tempore* judgment at the end of a trial the magistrate, in my view correctly, expressed his misgivings concerning the veracity of the complainant and the reliability of his evidence about the amount in cash the accused took. Despite the court not being convinced that the accused had stolen the amount of N\$3 600 but only N\$725.10 as admitted, it still convicted the accused 'as charged'.

[3] In response to a query directed to the magistrate explaining the conviction, he concedes that when pronouncing the verdict he failed to state the (lesser) amount the accused was guilty of but, as could be gleaned from the judgment, this was what he intended doing. I find the learned magistrate's explanation plausible as the omission was an obvious oversight on his part. The conviction cannot be permitted to stand and must be corrected.

[4] The accused was sentenced to a period of six (6) months' imprisonment wholly suspended on condition of good behaviour and the completion of 210 hours community service within 12 weeks of the date of sentence. The performance of community service by the accused must have been completed by now and there is no need to interfere with the sentence imposed.

[5] In the result, it is ordered:

1. The conviction is set aside and substituted with a finding of guilty of theft of N\$725.10.
2. The sentence imposed is confirmed.

JC LIEBENBERG
JUDGE

P DAMASEB
JUDGE-PRESIDENT