

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

REVIEW JUDGMENT

CR NO.: 14/2019

In the matter between:

THE STATE

v

FIKAMENI FRIEDRICK

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: **18/2019**

Neutral citation: *S v Friedrich* (CR 14/2019) [2019] NAHCNLD 23 (28 February 2019)

Coram: JANUARY J and SALIONGA J

Delivered: **28 February 2019**

Flynote: Criminal Procedure — Plea — Plea of guilty in terms of s 112(1) (a) of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Procedure Amendment Act 13 of 2010 — Procedure intended for “minor” or “trivial” offences— Theft of a cell phone not minor or trivial offence.

Summary: The accused in this matter was convicted in the magistrates’ court Oshakati for theft. The accused pleaded guilty to the charge. The magistrate applied section 112(1) (a) of the Act, was satisfied and convicted the accused upon his own admission. The crime cannot be regarded as minor or trivial. The magistrate misdirected

herself. The conviction and sentence are set aside. The matter is remitted to the magistrate to apply section 112(1) (b) of the Criminal Procedure Act.

ORDER

1. The conviction and sentence are set aside;
2. This case is remitted to the magistrate with a direction that the matter be dealt with afresh from the stage of plea.

JUDGMENT

SALIONGA J (JANUARYJ concurring):

[1] The accused in this matter was charged in the magistrate's court, Oshakati with an offence, theft of a cellphone.

[2] He pleaded guilty to the charge and the court applied s 112(1) (a) of the Act. He was convicted as charged.

[3] When the matter came before me on automatic review, I requested reasons from the magistrate why s 112(1) (b) of the Act was not applied. In her reply the magistrate stated that the court was guided by the provisions of s 7 of the Criminal Procedure Act, Act 13 of 2010 that empowers the court to impose a fine up to N\$6000. She further stated that she was guided by the prosecutor who had an insight of the contents of the docket to apply s 112(1) (a). In her opinion the offence does not merit a sentence of direct imprisonment.

[4] This court has pronounced itself on numerous occasions in the past on the application of section 112(1) (a) of the Criminal Procedure Act. The section should only be applied where the crimes are "trivial", "minor" or not "serious".¹ It still however

¹ *S v Onesmus*; *S v Amukoto*; *S v Mweshipange 2011 (2) NR 461 (HC)*; *S v Mostert 1994 NR 83 (HC)*; *S v Aniseb & another 1991 NR 203 (HC)*.

happens that matters are disposed of by applying section 112(1) (a) of the Criminal Procedure Act when the crimes are serious.

[5] This case is another example where the magistrate applied section 112(1) (a) of the Criminal Procedure Act in a matter where she undoubtedly had doubt to the seriousness of the relevant charge. Theft of a cell phone is not a “minor” or “trivial” offence. In my view proper questioning in terms of section 112(1) (b) would in all probability have put any doubt to rest especially where a cell phone was stolen. It could be that the accused applied force in taking the phone.

[6] The presiding officer has a discretion to apply section 112(1) (a) or not. The discretion however needs to be exercised judicially. Although the prosecutor *in casu* requested the matter to be disposed off in terms of section 112(1)(a) I echo and endorse what Liebenberg J said in *S v Onesmus; S v Amukoto; S v Mweshipange* 2011 (2) NR 461 (HC);

[5] From the wording of ss (1) of s 112 it is clear that the presiding officer is authorised to convict an accused on his bare plea of guilty where he or she is of the opinion that the offence in question does not merit certain kinds of punishment; or a fine exceeding N\$6000. The presiding officer therefore has a discretion which must be exercised judicially. This discretion will mainly be influenced and determined by the circumstances of any particular case and the information available to the presiding officer, allowing him or her to form an opinion. It seems to me that in order to make a judicial discretion at all possible, there has to be sufficient information before the court to rely on, which would enable it to reach a decision as to the procedure to be followed. Whereas the court in most instances would have very little information to decide on, besides what is alleged in the charge, it would be useful for the presiding officer to request the prosecutor to give a short summary of the State's case if the court is uncertain whether or not it should question the accused in terms of s 112(1) (b). At the plea stage the prosecutor has more information of the offence allegedly committed and the circumstances surrounding the commission of the crime than the court would have; therefore the court is obliged to question the accused about the alleged facts, if the prosecutor directs such request to the court in terms of s 112(1) (b). This would normally occur when the case involves a serious offence or when the accused has previous convictions, obviously, unknown to the court. Although the courts often would be guided

by the prosecutor's attitude to the appropriateness of summary disposal of a case, it must be borne in mind that it ultimately remains the court's decision, a discretion that must be exercised judiciously. This decision should not be made lightly — more so, where a heavy fine of up to N\$6000 can now be imposed upon an accused's bare plea of guilty. Therefore, when the court is in doubt about the seriousness of the transgression, questioning about the alleged facts in the charge should be done.² (my emphasis)

[7] In my view the conviction and sentence must be set aside and the matter should be remitted to the magistrates' court to deal with it in accordance with the order herein.

[8] In the result:

1. The conviction and sentence are set aside;
2. This case is remitted to the magistrates' court with a direction that matter be dealt with afresh from the stage of plea.

J T SALIONGA
Judge

I agree

H C JANUARY
Judge

² At 463 B-H.