

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

“ANNEXURE 11”

Case Title: <i>The State v Paulus Nghiningwesha Kashidulika; The State v Linea Kaungodi Kalingodi</i>	CR No.: 38/2020 Case No.: EENHANA 25/2020 Case No.: EENHANA 29/2020 Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice January J <i>et</i> Honourable Ms. Justice Diergaardt AJ	Delivered on: 30 June 2020
Neutral citation: <i>S v Kashidulika; S v Kalingodi</i> (CR 38/2020) [2020] NAHCNLD 79 (30 June 2020)	
The order: <ol style="list-style-type: none">1. The conviction and sentence of Housebreaking with intent to steal and theft in both cases are set aside;2. The matter is remitted to the magistrate to question the accused properly and correctly in terms of section 112(1)(b) of Act no 51 of 1977 without suggesting any answers to the accused;3. If the magistrate is satisfied that the accused in both cases admits to all elements of the offence the magistrate should convict and sentence the accused accordingly. If magistrate is not satisfied to enter a plea of not guilty in terms of section 113 of Act no 51 of 1977 and proceed with the trial;	

4. As a result of the frequent occurrence of errors of this nature The Registrar of the High Court is directed to forward this judgment to the Division/Magistrate of Ohangwena Region. .

Reasons for the order

Diergaardt AJ (January J concurring):

[1] The matter came before me as automatic review in terms of section 304 of Act no 51 of 1977.

[2] The accused was charged with Housebreaking with intent to steal and theft in both cases and the magistrate correctly proceeded to question the accused in terms of section 112(1) (b) of Act 51 of 1977.

[3] Despite the fact that the magistrate have been cautioned on various occasions by this court to refrain from asking suggestive questions she proceeded to ask suggestive questions to the accused in both cases and convinced herself that the accused admits to all elements of the offence.

[4] I will highlight a few of the questions. In question no1 she starts off in both cases by suggesting the date when the allegedly offence was committed. In the matter of Paulus Nghiningwesha Kashidulika, she proceeds to suggest that the accused was not influenced to plead guilty.

[5] In both cases in question no 2 she further suggests the particulars as per the charge sheet.

[6] In S v Paulus Nghiningwesha Kashidulika in question no 3 the accused answers that he cut the zink, but the magistrate does not inquire further to satisfy herself as to how entrance was gained.

[7] I am of the view that the magistrate can surely not say that she was satisfied that the accused persons pleaded guilty freely and voluntarily in both cases and that she was satisfied that the accused indeed admitted to all the elements of the offence. I am of the view that on review a convicted accused is a “fortiori” entitled to the benefit of doubt where reasonable grounds exist for a belief that a recorded admission, necessary for a conviction, was not made at all. In the case of *S v Valedo and Others* 1990 NR 81 (HC) Levy J (as he was then) pointed out the following:

‘The magistrate is fully aware of the elements of the crime with which the accused is charged and these elements must be pertinently put to an accused. **The charge itself must not be rephrased by the magistrate and then put to the accused.** Consequently, where an accused is charged with theft in that he stole certain goods and has pleaded guilty to such charge, it is purposeless to ask him again ‘Did you steal those goods?’ If the accused answers that question in the affirmative, the magistrate is in no better position in ascertaining whether the accused admits the elements of the crime.

[8] I am of the view in both cases that certain procedural irregularities had occurred in the court *a quo* when the magistrate Mrs Shilemba suggested answers to the accused whilst purported to question the accused in terms of section 112(1) (b). When questioning an accused the questions must be directed to ascertaining whether the elements of the offence are present without suggesting anything.

[9] I further noticed in mitigation in both cases the magistrate only asked the accused a few questions that seemed to satisfy her. In *S v Kundiataka* 2018 (3) NR 699 (NLD) Cheda J stated:

‘The object of mitigation is to persuade the court to exercise its leniency. It is for that reason that they should be relevant to the aspects of the case. It is the personal circumstances of the accused which should persuade the court to impose a lenient sentence. Further it is for that reason that the court must ensure that such evidence is placed before it in order for it to pass a realistic sentence. It is not enough for the court to state that I have taken into account the accused’s mitigating features when in fact there is nothing in the record to show for it.’

Cheda J further state:

‘ To enable the court to arrive at an appropriate sentence, the court must invite the accused to submit such features or at least ask the accused relevant questions relating to his/her personal

circumstances. This is even more important where the accused is a self-actor.'

[10] I concur that if the accused is not invited to submit mitigating factors the court is necessitated to question him/her about personal circumstances to pass appropriate and realistic sentence. I respectfully submit that no reasonable court will be satisfied with such insufficient mitigating factors, more specifically the level of education of the accused when such court intends to impose a custodial sentence on and accused.

[11] The conviction and sentences in relation to the charge can therefore not be allowed to stand.

Judge(s) signature	Comments:
Diergaardt AJ:	
January J:	