

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State</i> v <i>Johannes Samuel</i> and <i>Kondjashili David</i>	Case no: CR 26/2022
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 9 June 2022
Neutral citation: <i>S v Samuel</i> (CR 26/2022) [2022] NAHCNLD 59 (9 June 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction and sentence in respect of both accused are set aside.2. In terms of s 312 of the CPA, the accused persons should be brought before the court and the magistrate is directed to properly question the accused in terms of section 112(1) (b) of the CPA, and to bring the matter to its natural conclusion.3. In the event of a conviction, the magistrate is to consider the period of imprisonment that the accused have already served.	
Reasons for the order:	
KESSLAU AJ (SALIONGA J concurring):	

[1] The matter comes before this court in terms of section 304(2) of the Criminal Procedure Act 51 of 1977 as amended, (the CPA).

[2] The accused persons appeared in the Magistrate Court in the district of Ondangwa charged with the offense of the housebreaking with the intent to steal and theft.

[3] Both the undefended accused plead guilty to the charge, were questioned in terms of Section 112(1) (b) of the CPA and subsequently convicted and sentenced.

[4] A threefold query was directed to the magistrate to wit:

(1) The review cover sheet, certified by the learned Magistrate, noted the sentence as "N\$ 2000 or in default of payment seven months imprisonment" while the record indicates "Both accused 1 and 2: 18 months imprisonment". Which is correct? Should it not rather read "each accused"?

(2) The following compounded question was asked by the learned Magistrate to both accused: "Accused, the state alleges that you wrongfully and unlawfully broke into and entered the shebeen of Fernando Maria with intent to steal and did unlawfully steal the following items: 1. Various stock sale The total value being N\$1105.08 the property of or in the lawful possession of Fernando Maria. Do you admit or deny this?" The accused admitted. The question is to which of the many allegations in this leading statement did they admit to?

(3) Which question by the learned Magistrate covers the intention of the accused to steal at the time of breaking and entering the property?

[5] The magistrate apologized for her oversight and her reply on the first query is that the sentence should read 'Each accused is sentenced to 18 months imprisonment'. The record of proceedings did reflect the correct sentence. The ultimate and final duty rest with the magistrate to ensure that the review cover sheet is correct before certifying it. Unfortunately the failure to proofread records and supporting documents is a frequent occurrence and results in unnecessary review queries.¹

¹ *S v John; S v Joao; S v Tjekulile* (CR 9/2021) [2022] NAHCNLD 26 (28 March 2022)

[6] Turning to the second part of the query the learned magistrate concurred that the compounded question asked was leading and 'left the accused with no room to answer'. The question asked to the accused persons contained almost the entirety of the elements of the offence and it is therefore unclear to which of the many allegations put to the accused they admitted to. The question furthermore consisted of legal terms that the unsophisticated accused in many instances would not comprehend.

[7] The basic principles to be followed by magistrates, when questioning an accused in terms of Section 112(1) (b) of the CPA, were outlined in *S v Pieters*² which *inter alia* include that leading questions should be avoided as far as possible and that each element of the offense should preferably be covered with a separate question to the accused. The purpose of this approach is to protect an unrepresented and illiterate accused against an ill-considered plea of guilty.³

[8] In *S v Chipupu*⁴ the court ruled that an accused should be given the opportunity to tell the court in his own words and at his own accord what happened or why he is pleading guilty. Referring to *S v Awa-Eiseb*,⁵ the court furthermore pointed out that it amounts to an irregularity in proceedings if during questioning the magistrate merely repeat the allegations contained in the charge in the form of leading questions.

[9] In *S v Valede and others* 1990 NR 81 at page 84 par D-E⁶ it was stated that: 'the charge itself must not be rephrased by the magistrate and then put to the accused'. Furthermore that the elements of the offense must be put pertinently to an accused in order for the magistrate to ascertain for himself the guilt of an accused and not to rely on the opinion of an accused of his guilt.

[10] Proper questioning is a skill that is often developed with experience and even though it is not always possible for a magistrate to avoid leading questions it is important to allow an accused to explain in his own words his guilt. The mere repetition of the

² *S v Pieters* (CR 58/2013) [2013] NAHCMD 272 (04 October 2013)

³ *S v Gaseb* (CR 79-2014) [2014] NAHCMD 356 (26 November 2014)

⁴ *S v Chipupu* (CR 90/2020) [2020] NAHCMD 512 (9 November 2020)

⁵ *S v Awa-Eiseb* (CR 03/2015) [2015] NAHCMD 12 (30 January 2015).

⁶ *S v Valede and others* (1990) NR 81.

charge allegations in the form of questions will not establish if an accused truly are admitting to each and every element of an offense.

[11] The third part of the query to the magistrate concerned the intention of the accused persons at the time of breaking into the premises. The magistrate replied that she asked the following question to cover that aspect to wit: '*are you admitting that you intentionally broke entered and stole the above mentioned items?*' This is another leading and compounded question asking the accused if they admit the intention to breaking into, enter the premise and steal items. It would be better to ask 'What was your intention at the time of breaking into the property?' or in simpler terms 'Why did you break and enter the property?' The offense consist of two parts being (a) Housebreaking with the intent to steal and (b) theft. The intention to steal, before breaking and entering the premises, is part of the allegations made by the State and should be covered independently from the intention to permanently deprive the owner of the property.⁷

[12] Considering the mentioned irregularities it cannot be said that the proceedings were in accordance with justice and will be set aside.

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

1. The conviction and sentence in respect of both accused are set aside.
2. In terms of s 312 of the CPA, the accused persons should be brought before the court and the magistrate is directed to properly question the accused in terms of section 112(1) (b) of the CPA, and to bring the matter to its natural conclusion.
3. In the event of a conviction, the magistrate is to consider the period of imprisonment that the accused have already served.

Judge(s) signature	Comments:
KESSLAU AJ:	
SALIONGA J:	

⁷ See *S v Amunyela* (CR 66/2021) [2021] NAHCMD 356 (05 August 2021)

