

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Onesmus Twawana Tjikumisa</i>	Case No.: CR 38/2022 Oshakati: OSH-CRM-2734/2022
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 07 September 2022
Neutral citation: <i>S v Tjikumisa</i> (CR 38/2022) [2022] NAHCNLD 82 (07 September 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The matter is remitted to the Oshakati Magistrate's Court in terms of section 312 of the Criminal Procedure Act, 51 of 1977 to comply with the provisions of section 112 (1)(b) of the Act and bring this matter to its natural conclusion.3. In the event of a conviction, the magistrate must take into consideration the period which the accused has already served.4. The fine, if paid, is to be refunded to the lawful depositor.	
Reasons for the order:	
KESSLAU AJ (SALIONGA J concurring):	

[1] The matter comes before this court on automatic review in terms of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The accused, in the Magistrates Court of Oshakati plead guilty to a charge of robbery and, after questioning in terms of Section 112(1) (b) of the CPA, was convicted as charged. The accused was sentenced to a fine of N\$ 2 000 or twelve months imprisonment.

[3] I queried the learned Magistrate as follows:

‘1. The essential elements of Robbery are (1) theft, (2) violence/threats, (3) submission and (4) intention. Which questions by the learned Magistrate covered the elements of violence and submission to establish the causal link between the violence/threats of violence and the theft?

2. Why was the alleged place of the crime, name of the complainant and value of the property not covered by questions from the Magistrate?’

[4] The magistrate replied that:

‘Re first question, the accused admitted that he grabbed the cell phone from the complainant, which suggest that force was used to take it from the complainant’s pocket. This was done while the complainant saw the accused doing that, so this was a case of taking the item by using violence (grab) to overcome any resistance in case the complainant would offer any since the complainant could see what the intention and the conduct of the accused was. This case distinguishes itself from theft or pickpocketing as forced was used. This were covered by the second and the last question.

Re second question, magistrates concedes this was not done.’ (sic)

[5] The purpose of questioning by a magistrate was described in *S v Augustu*¹ as follows:

‘The primary purpose of questioning the accused in terms of s 112 (1) (b) of the CPA following a plea of guilty, is to safeguard the accused against the result of an unjustified plea of

¹ *S v Augustu* (CR 24/2021) [2021] NAHCMD 158 (15 April 2021)

guilty. Moreover, when the court questions the accused, it must ensure that he admits all elements of the offence in such way that it enables the court to conclude for itself whether the accused is guilty of the offence charged. The accused's answers must establish an unequivocal plea of guilty'.

[6] Furthermore in *S v Thomas*² it was said that:

'Section 112(1)(b) requires of a court in peremptory language to question the accused with reference to the alleged facts of the crime in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty'. (Emphasis added)

[7] *In casu* the accused admitted that he grabbed the phone of the complainant from her pocket and that she saw him doing it. No question was posed to the accused if the complainant resisted his action. If there was resistance, then the offence of robbery was committed.³ However from the questions on record it was not established. The element of force, intimidation or threats used could not be assumed from the information before court. As is, the questions only satisfied the offence of theft.

[8] The distinction between the offences of theft and robbery was discussed in *S v Tjivikua*⁴ when it was said that when an accused grab cash from a complainant's pocket he is using craftiness rather than force and it then amounts to theft. If however in the same scenario the complainant offer some sort of resistance, even to the slightest degree, which is addressed by force/intimidation/threats from the accused, it would amount to robbery. The question to be asked is not if the complainant saw the accused but rather if his actions, even to the slightest degree, forced the complainant into submission. Unfortunately this aspect was not covered by the magistrate's questions.

[9] After the questioning by the magistrate the accused was convicted without the prosecutor being asked if the plea, as tendered, was accepted. Section 112 (1) states that: 'Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea' (Emphasis added). Had that been complied with, the State would have had the

² *S v Thomas* 2006(1) NR 83 at p 84 Par E-F

³ *S v Alexander and Another* 1992 NR 88 (HC)

⁴ *S v Tjivikua* 2005 NR 252 (HC)

opportunity to indicate that all the elements and or allegations were not covered during the magistrate's questioning. Furthermore, if a plea of not guilty is entered, would have the opportunity to present evidence on the disputed details of the charge.

[10] The State alleged that the crime took place at or near Oshakati main road near Cashbuild, that the complainant was Nameya Valerie Embula and that the value of the phone was N\$ 1 500. These allegations are not elements of the offence however all the allegations forms part of the charge annexure and should be covered by questions.⁵ In conclusion if all the allegations are not covered by questions from the magistrate how could he be certain that the accused is admitting to the charge before court.

[11] Considering the above, the conviction and sentence cannot be confirmed to be in accordance with justice.

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

1. The conviction and sentence are set aside.
2. The matter is remitted to the Oshakati Magistrate's Court in terms of Section 312 of the Criminal Procedure Act, 51 of 1977 to comply with the provisions of section 112 (1)(b) of the Act and bring this matter to its natural conclusion.
3. In the event of a conviction, the magistrate must take into consideration the period which the accused has already served.
4. The fine, if paid, is to be refunded to the lawful depositor.

Judge(s) signature	Comments:
KESSLAU AJ	None
SALIONGA J	None

⁵ *S v Kudumo* (CR 81/2020) [2020] NAHCMD 483 (23 October 202