



**CASE NO.: CR 10/2012**

**IN THE HIGH COURT OF NAMIBIA:  
NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI**

In the matter between:

**THE STATE**

and

**RISTO MICHAEL**

*(HIGH COURT REVIEW CASE NO.: 106/2011)*

**CORAM:** LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 16 March 2012

---

**REVIEW JUDGMENT**

---

**LIEBENBERG, J.:** [1] The mistakes made by the magistrate who presided over the present proceedings not only bear testimony of remissness on the part of the magistrate, but also of her complete ignorance of the law; something I find most disturbing.

[2] On 16 August 2010 accused persons Jacob Awala (accused no 1) and Risto Michael (accused no 2) appeared in the Magistrate's Court Oshakati on a charge of housebreaking with intent to steal and theft of goods valued at N\$3 622. On 20 October of that year only accused no 1 was brought before court and required to plead to the charge. He pleaded guilty and after convicted on his plea in terms of s 112 (1)(a) of the Criminal Procedure Act, 1977<sup>1</sup> ('the Act'), sentenced to: *"6 months imprisonment wholly suspended for a period of 2 years upon the condition that you do not commit the offence of possession of suspected stolen property within the prescribed 2 years."* (sic)

[3] There is nothing on record explaining the absence of accused no 2 in court if the matter was not withdrawn against him, or possibly a separation of trial ordered, why he was not brought before court together with accused no 1.

[4] Despite the sentence of six months' imprisonment imposed by the court being reviewable in terms of s 302 of the Act, compliance was not given thereto. It appears from the (continued) record of proceedings held on 09 December 2010 (almost two months later), that accused no 2 was then brought before court and the matter was set down for trial. Several postponements followed until 24 March 2011 when the charge was put to the accused and he also pleaded guilty. Again the matter was finalised in terms of s 112 (1)(a) and the same sentence of six months' imprisonment was imposed.

---

<sup>1</sup> Act No 51 of 1977

[5] When the matter eventually came on review a query was directed enquiring from the magistrate whether, given the seriousness of the charge, it was appropriate for the court to have dealt with the matter in terms of s 112 (1)(a) as she did. The magistrate replied in the following terms:

“With the new amendments to the fines imposed in terms of Section 112 (1) (a) the court was of the opinion that the charge of possession of suspected stolen property which was wholly recovered could be dealt with in terms of this Section. Sentence must be individualized depending upon the circumstances of each case, under no circumstances should sentencing be standardized.” (*sic*)

[6] From the reply it is evident that the magistrate clearly misses the point she was required to address; furthermore, she labours under the misconception that the accused persons were convicted of having been found in possession of suspected stolen property, whereas in fact they stand convicted of the charge of housebreaking with intent to steal and theft, following their pleas of guilty on the charge. How the magistrate came to the conclusion that the accused were convicted of the lesser charge, remains a mystery. The review cover sheet bears the name of Risto Michael only, whereas the sentence imposed on first accused Jacob Awala, is also reviewable. On the original charge sheet the name of this accused is deleted and next to it, in the magistrate’s handwriting, appears the word “sentenced”. I suspect this came about when proceedings later continued against second accused after the case had been finalised against first accused.

[7] The magistrate, in order to finalise the case against the accused persons, committed the most basic errors, and in my mind, raises the inevitable question whether she is at all fit to preside over criminal matters. The ineptitude demonstrated by the magistrate in this case, together with the magistrate's ignorance of the law, should be a serious concern to the Magistrates' Commission and, in my view, deserves further scrutiny.

[8] This Court in *The State v Shikale Onesmus and 2 Other Cases*<sup>2</sup> laid down guidelines on how the courts, in view of the latest amendment of s 112 (1)(a) of the Act, should apply the section and there is no need to repeat what has already been said in the judgment. Suffice it to say that the subsection should not be invoked where the charge is serious in nature – as in the present instance – and should be reserved for cases considered to be 'minor', 'trivial' or 'not serious'. I do not consider a charge of housebreaking with the intent to steal and theft of goods to the value of N\$3 622 to fall under this category of cases. For reasons unknown, the magistrate seems to be of the view that the accused persons are not guilty of the charge of housebreaking with intent to steal and theft but of being found in possession of suspected stolen property. In itself, this seems to show that they did not intend pleading guilty to the offence charged with, but to a lesser offence (though the record does not reflect this). This underscores the need for the court to question an accused person in terms of s 112 (1)(b), thereby preventing the situation where the accused erroneously pleads guilty to an offence he did not commit. If the magistrate in this instance was not satisfied (for whatever reason) that the

---

<sup>2</sup>Unreported Case No CR 08/2011 delivered on 30.03.2011

accused persons were not guilty of the offence charged, then a plea of not guilty ought to have been entered in terms of s 113.

[9] There can be no doubt that the magistrate failed to exercise her discretion judiciously by failing to properly apply her mind to the provisions of the subsection and the convictions in respect of both the accused must be set aside.

[10] Concerning the magistrate's remark about the individualisation of sentences which should not be standardised, I share the view. However, in this instance she clearly lost sight of the import of s 112 (1)(a) which only provides for punishment other than "*imprisonment or any other form of detention without the option of a fine ....*". After invoking the provisions of s 112 (1)(a) the court was not entitled to impose a sentence of imprisonment, albeit wholly suspended, without the option of a fine. This constituted a further misdirection by the magistrate.

[11] Whereas the magistrate who presided over proceedings in this case is currently on suspension pending a criminal investigation, the matter cannot be remitted to the same court. In the circumstances another magistrate should preside over the continued proceedings.

[12] In the result, the Court makes the following order:

1. The convictions and sentences in respect of the accused persons Jacob Awala and Risto Michael are set aside.
2. The matter is remitted to the Magistrate's Court Oshakati with the direction that it is brought before a different magistrate to be dealt with afresh from the stage of plea.
3. The Deputy-Registrar of this Court is directed to send a copy of the judgment to the Chairperson: Magistrates' Commission.

---

**LIEBENBERG, J**

I concur.

---

**TOMMASI, J**