REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 23/2015

In the matter between

THE STATE

And

JOSEPH UIRAB

HIGH COURT MD REVIEW CASE NO 190/2010

Neutral citation: S v Uirab (CR 23-2015) [2015] NAHCMD 183 (06 August 2015)

CORAM: **LIEBENBERG J *et* SHIVUTE J**

DELIVERED: 06 August 2015

Flynote: — Plea — Guilty — Questioning in terms of s 112(1)(b) of Criminal Procedure Act 51 of 1977 — Leading questions not to be put to accused – Elements of offence covered by one leading question – Accused's answer not recorded – Improper questioning.

Criminal procedure — Housebreaking with intent to steal and theft – Plea — Guilty — Questioning in terms of s 112(1)(b) of Criminal Procedure Act 51 of 1977 — Intent of accused when entering not established — Elements of offence not admitted.

ORDER

The conviction and sentence are set aside.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] This is a review matter in which the accused was convicted on a plea of guilty of housebreaking with intent to steal and theft, and sentenced to one year imprisonment. When laid before Mainga J (as he then was) on 12 February 2010, he directed a query in which the magistrate was required to respond to the issues raised therein. The magistrate's reply was only received after more than five and a half years, accompanied

by an explanation that the matter was inadvertently misfiled and which was only discovered in June 2015. The magistrate expressed his doubts as to whether his reply would still be material. In view of the delay in responding to the query in time and the accused already having served his sentence, the outcome of this judgement is purely academic.

[2] Although the query *inter alia* called for reasons to show why the record did not reflect the extent of the explanation given to the unrepresented accused about his right to legal representation and the explanation of his right to appeal, it essentially relates to the court's questioning in terms of s 112 (1)*(b)* of the Criminal Procedure Act, 51 of 1977. Firstly, the record of proceedings does not reflect any answer on a question by the court, essentially capturing all the elements of the offence in that one question. Secondly, the accused was not asked as to what was his intention when he entered the house.

[3] In his reply the magistrate correctly concedes that the questioning in terms of s 112 (1)*(b),* as reflected in the record of the proceedings, was inadequate and the conviction therefore cannot stand. After the accused admitted having broken into the house, the following all-embracing question was put to him: 'Did u (sic) on the 6th day of January 2010 at or near Kapsfarm in the district of Windhoek wrongfully and unlawfully break and enter the house of Alpheus Neshuku with intent to steal and did (you) unlawfully steal clothes as read to you on the two lists valued at N$5 700, the property of or in the lawful possession of Alpheus Neshuku (?)'. The record does not reflect the accused's answer on the question.

[4] It is trite that in questioning the accused, the court should do more than simply restate the charge and ask the accused whether he or she admits the allegations in the charge. In this instance the court by way of a single leading question covered all the elements of the offence, including the unlawfulness of the accused's actions, which at

all times should be avoided (*S v Gwenya* 1995 (2) SACR 522 (EC)). The purpose of questioning is to safeguard the unrepresented accused against the result of an unjustified plea of guilty, something the magistrate in this case would not have realised from the way he had formulated his questions. By asking the accused whether his actions were 'wrongful and unlawful' presupposes that he had legal knowledge which, bearing in mind that the accused was a layperson, was probably lacking. From the afore-going it is evident that questioning of the accused must be applied with care and circumspection (*S v Naidoo* 1989 (2) SA 114 (A) at 121E).

[5] This court in *S v Pieters* 2014 (3) NR 825 (HC) considered the objectives when questioning the accused in terms of s 112 (1)*(b)* and stated the following at 828B – H:

> '[10] In *S v Baron* 1978 (2) SA 510 (C) at 512G it was held (per Van Winsen J) that the questioning under s 112(1)(b) is an important part of the legal process and was introduced to protect an accused — especially the unrepresented or illiterate accused — against an ill-considered plea of guilty and that in the application of s 112(1)(b) there is much room for misunderstanding which can result in prejudice to an accused person.
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> [11] In *S v Nyanga* 2004 (1) SACR 198 (C) at 201b – e Moosa J stated the purpose of s 112(1)(b) as follows:
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> "Section 112(1)(b) questioning has a twofold purpose: firstly, to establish the factual basis for the plea of guilty and, secondly, to establish the legal basis for such plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning (*S v Nkosi* 1986 (2) SA 261 (T) at 263H – I; *S v Mathe* 1981 (3) SA 664 (NC) at 669E – G; *S v Jacobs* (supra at 1117B)). The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, *actus reus* and *mens rea*. These are conclusions of law. If the court is satisfied that the admissions adequately cover all the elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty. (See *S v Lebokeng en 'n Ander* 1978 (2) SA 674 (O) at 675G – H; *S v Hendricks* (supra at

187b – e; *S v De Klerk* 1992 (1) SACR 181 (W) at 183a – b; *S v Diniso* 1999 (1) SACR 532 (C) at 533g – h.)" '

[6] When applying the aforesaid principles to the present matter it is evident that the questioning of the accused lacked substance, neither has the accused's answer to the all-embracing question been recorded. There is yet another short-coming in the court's questioning, relating to the accused's intent when he entered the house.

[7] It is settled law that housebreaking in itself is not an offence unless accompanied by the intention to commit some other offence and in *S v Maseko and Another* 2004 (1) SACR 22 (TPD) it was said that there exists no offence either at common law or in statute which consists of mere 'housebreaking' without some concomitant intent (22h-i). Although admitting that he had broken the lock on the door of the complainant's home before entering, he was not questioned on his intent at the time. Without the accused admitting that he entered the house with intent to steal, he could not have been convicted of the said offence. Accordingly, the conviction cannot be permitted to stand.

[8] Section 312 (1) of the Criminal Procedure Act 51 of 1977 is imperative that where a conviction and sentence under s 112 are set aside on review or appeal on the ground that any provision of that section was not complied with, the court *shall* remit the case to the court by which the sentence was imposed. In circumstances as the present where the accused had already completed serving his sentence in full more than five years ago, it would not be in the interest of justice to recall him in order to be dealt with as provided for in s 312 (2) of the Act. I accordingly decline to make such order.

[9] In the result, it is ordered:

The conviction and sentence are set aside.

J C LIEBENBERG

JUDGE

NN SHIVUTE

JUDGE