

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

Case No: CR 26/2016

In the matter between:

THE STATE

And

KHAO HENDRIK**(HIGH COURT MAIN DIVISION REVIEW REF NO. 955/2015)****(MAGISTRATE'S REVIEW NO.: 06/2015)****Neutral citation:** *S v Khao* (CR 26/2016) [2016] NAHCMD 91 (4 April 2016)**Coram:** SHIVUTE, J *et* PARKER, AJ**Delivered:** 4 April 2016

ORDER

1. The conviction and sentence are set aside.
2. The matter is remitted to the magistrate in order for him to question the accused pertaining to the element of unlawfulness.

3. Should the magistrate be satisfied that the accused admitted all the allegations in the charge sheet, when sentencing the accused, the learned magistrate should take into account the sentence already served by the accused.

If the presiding magistrate is not so satisfied he should enter a plea of not guilty in terms of s113 of Act 51 of 1977 and conduct a trial to establish the element in issue.

REVIEW JUDGMENT

SHIVUTE J (PARKER, AJ concurring):

[1] The accused was improperly convicted of stock theft after he pleaded guilty in terms of s 112(1)(b) of Act 51 of 1977. There were no questions asked pertaining to whether at the time the accused was committing any offence he was aware that what he was doing was wrong and that if arrested he could be punished.

[2] When queried how the court satisfied itself whether the accused knew that what he was doing was wrong and that he could be punished, the learned magistrate responded that the accused was asked questions that covered both the physical and mental elements of the offence. The accused further told the court that he slaughtered the complainant's sheep and that he had no right to do so or any defence. It was on that basis that the court satisfied itself that factually and legally the accused had admitted committing the offence. The probing question was indirectly but adequately covered.

[3] The question whether the accused had the right to slaughter or take the complainant's sheep does not necessarily imply unlawfulness and particularly in view of the accused being undefended, the magistrate should have satisfied himself that

the accused had the necessary insight to understand the element of unlawfulness and the knowledge of unlawfulness. The court should further satisfy itself that the accused understood what it means to admit such an element and what the consequences thereof would be. Since the accused was unsophisticated and undefended the court was supposed to establish the accused's guilt through adequate questioning.

[4] The element of unlawfulness was not covered through questioning and it cannot be inferred from the accused's answer that he had no right to slaughter the complainant's sheep. Therefore, the conviction cannot be allowed to stand.

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

1. The conviction and sentence are set aside.
2. The matter is remitted to the magistrate in order for him to question the accused pertaining to the element of unlawfulness.
3. Should the magistrate be satisfied that the accused admitted all the allegations in the charge sheet when sentencing the accused, the learned magistrate should take into account the sentence already served by the accused.
4. If the presiding magistrate is not so satisfied he should enter a plea of not guilty in terms of s113 of Act 51 of 1977 and conduct a trial to establish the element in issue.

N N Shivute

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Judge

C Parker
Acting Judge