



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 31/2017

THE STATE

versus

JOHANNES NAIB

(HIGH COURT MAIN DIVISION REVIEW REF NO 632/2017)
(MAGISTRATE'S SERIAL NO.11/2017)

Neutral citation: *S v Naib* (CR 31/2017) [2017] NAHCMD 135 (12 May 2017)

Coram: LIEBENBERG J et SHIVUTE J

Delivered: 12 May 2017

Fly note: Criminal Procedure - Plea of guilty – Questioning in terms of s 112 (1) (b) of the Criminal Procedure Act – Purpose of questioning under s 112 (1) (b) to safe guard unrepresented accused against the result of unjustified conviction on plea of guilty – Accused charged with housebreaking with intent to steal and theft – Accused not asked questions pertaining to his intention at the time he broke into the premises – The court a quo could not have been satisfied that accused admitted all the elements of the offence – Accused was supposed to be asked questions pertaining his intention at the time he was breaking and entering the premises.

ORDER

- (a) The conviction and sentence are set aside.
- (b) The matter is remitted to the court a quo in terms of s 312 (1) of Act 51 of 1977 and the learned magistrate is directed to question the accused in terms of s 112 (1) (b) of the Criminal Procedure Act in order to determine the accused's intention at the time he was entering the premises.
- (c) When sentencing the accused the court should take into account the sentence already served by the accused.

REVIEW JUDGMENT

SHIVUTE J, (LIEBENBERG J CONCURRING)

[1] The accused was charged and convicted on his plea of guilty of housebreaking with intent to steal and theft. I raised a query with the magistrate how he satisfied himself that the accused, when he broke into the house, he intended to steal, because there was no question asked pertaining to the accused's intention at the time he was breaking into the premises.

[2] The learned magistrate responded that the accused's intention at the time of entering the premises ought to have been asked and it was an oversight by the learned magistrate. However, he explained further that the accused's intention at the time of breaking into the premises was covered by his actions when he entered the house by taking the goods and leaving with them. According to the learned magistrate, this is an indication that he wanted to steal upon entering.

[3] It is trite that the purpose of questioning under s 112(1) (b) is to safeguard the unrepresented accused against the result of a conviction on an unjustified plea of

guilty. Although the accused took the goods when he entered the premises, it was not established through questioning by the court that at the time he was entering the premises, his intention was to steal. Since the accused was charged with housebreaking with intent to steal and theft, the intention of the accused at the time he was breaking into the premises must be established for the court to satisfy itself that accused intended to steal at the time he was entering.

[4] The accused's intention at the time he was entering was not established therefore, the conviction cannot be allowed to stand. It also follows that the sentence must be set aside.

[5] In the result the following orders are made:

- (a) The conviction and sentence are set aside.
- (b) The matter is remitted to the court a quo in terms of s 312 (1) of Act 51 of 1977 and the learned magistrate is directed to question the accused in terms of s 112 (1) (b) of the Criminal Procedure Act in order to determine the accused's intention at the time he was entering the premises.
- (c) When sentencing the accused the court should take into account the sentence already served by the accused.

NN SHIVUTE
Judge

JC LIEBENBERG
Judge