



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case No: CR 38/2017

In the matters of:

THE STATE versus **KATJIUIUE KUHAIJIWA**

(HIGH COURT MAIN DIVISION REVIEW REF NO 446/2016)
(MAGISTRATE'S SERIAL NO. 02/2016)

(HIGH COURT MAIN DIVISION REVIEW REF NO 448/2016)
(MAGISTRATE'S SERIAL NO. 03/2016)

(HIGH COURT MAIN DIVISION REVIEW REF NO 449/2016)
(MAGISTRATE'S SERIAL NO. 01/2016)

Neutral citation: *S v Kuhaijiwa* (CR 38 /2017) [2017] NAHCMD 158 (9 June 2017)

Coram: NDAUENDAPO J et SHIVUTE J

Delivered: 9 June 2017

ORDER

The conviction and sentence in the above matters are set aside.

REVIEW JUDGMENT

SHIVUTE J (NDAUENDAPO J concurring):

[1] The accused person was convicted of house breaking with intent to steal and theft and was sentenced to twelve (12) months' imprisonment.

[2] I directed the following query:

'How did the court satisfy itself in the above cases that the accused had admitted all the elements of the offence as charged if there were no questions asked pertaining to the date when and place where the offence was committed?'

[3] The learned magistrate replied as follows:

'It is observed that indeed no direct questions were put to the accused on the aspect of date and place.

However, when the accused's answers are read with the charge sheet to which accused pleaded, it is submitted that the accused's reference to

- i) The complainant's house
- ii) Tjimbundu's house
- iii) Complainant's house. That can satisfy the court that we are referring to a particular complainant mentioned in the charge sheet to which accused pleaded guilty.

The trial court was further satisfied that accused was aware of the offence he was pleading to because he used phrases like "on the day in question", referring to the particular date mentioned in the charge sheet.

It is noted that in the last case High Court Serial No: 449/16 there was no such reference. The oversight is sincerely regretted. What however convinced the court that accused was referring to the particular complainant in the charge sheet to which he pleaded

is the fact that he said he is the one who went and broke into the complainant's premises and stole the items listed in the charge sheet. In view of the above, perhaps substantial justice was done. The trial court may be wrong in its view and therefore stand to be directed by the High Court.'

[4] In *S v Mkhize* 1981 (3) SA 585 (N) at 586H, Broome J states that the accused should be invited to explain what happened and that the questioning of the court should, as far as possible, elucidate what the accused has volunteered to say and to canvass allegations in the charge sheet not mentioned by the accused and confine the accused to the relevant details. Therefore, the questions of the presiding officer should not only cover the alleged facts and elements of the crime, but also matters pertaining to place and time of the alleged crimes. The questions and answers must at least cover all the essential elements of the offence which the State in the absence of a plea of guilty, would have been required to prove. *S v Mkhize* 1978 (1) SA 264 (N) at 267.

[5] It was held in *S v Naidoo* 1985 (2) SA 32 (N) at 37D-F:

'Section 112(1) (b) provides that the court has to "question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty" and that the court may "if satisfied that the accused is guilty of the offence to which he has pleaded guilty, convict the accused on his plea of guilty of that offence".'

[6] In view of the above, the accused was not asked questions pertaining to the date when the offence was committed and where the offence took place. I am not satisfied that the accused admitted all the elements of the offence. Therefore, the conviction cannot be allowed to stand. However, seeing that the accused has already served the sentence, I see no reason to remit the matter to the learned magistrate for questioning in terms of section 112 (1) (b).

[7] In the result, the following order is made:

The conviction and sentence in the above matters are set aside.

N N Shivute

Judge

G N Ndauendapo

Judge