



NOT REPORTABLE

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

**REVIEW JUDGMENT**

**CR NO: 61/2018**

**THE STATE**

v

**ALOISUS SOMAEB**

**ACCUSED**

**(HIGH COURT MAIN DIVISION REVIEW REF NO. 794/2018)**

**(MAGISTRATE'S SERIAL NO. 8/2018)**

**Neutral citation:** *S v Somaeb* (CR 61/2018) [2018] NAHCMD 242 (14 August 2018)

**Coram:** LIEBENBERG J et SHIVUTE J

**Delivered:** 14 August 2018

**Flynote:** Section 112 (1)(b) Act 51 of 1977 – Court applying s112 (1)(b) – Accused raising defence – Court should immediately enter a plea of not guilty – Section 113 to apply - Allow prosecutor to lead evidence on the charge.

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**ORDER**

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a) The conviction and sentence are set aside.

- b) The record is returned to the magistrate in terms of s 312 of the Criminal Procedure Act and ordered to enter a plea of not guilty in terms of s 113 of Act 51 of 1977 and ask the prosecutor to proceed with the prosecution.
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### REVIEW JUDGMENT

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SHIVUTE J (LIEBENBERG J, concurring):

[1] The accused person was convicted of contravening section 83(2) of the Road Traffic and Transportation Act 22 of 1999 - use of a vehicle without owner's consent. He was sentenced to a fine of N\$3000 (three thousand Namibia dollars) or 12 months imprisonment in default of payment.

[2] I directed the following query to the learned magistrate:

'The accused pleaded guilty to the charge and the court invoked the provisions of s 112(1)(b) of the Criminal Procedure Act 51 of 1977. The accused in response to the question whether he pleaded guilty freely and voluntarily, stated that he was forced by the police to plead guilty. Was the accused not raising a defence? Why did the court not enter a plea of not guilty in terms of s 113 of the Act?'

[3] The learned magistrate replied as follows:

'The accused indeed responded that the police forced him to plead guilty and upon explanation by court that the proceedings are independent from the events that transpired at the time of arrest or any other event, he changed his mind and indicated otherwise. I then proceeded with the questioning, however omitted to correct his subsequent response. I concede to the view of the Honourable Review Judge as the test applied in questioning in terms of s 112(1)(b) of Act 51 of 1977 is what the accused has said and not what the court thinks of his answers.'

[4] The magistrate could not have been satisfied that the accused admitted to all the elements of the offence as charged, because the accused stated that he was forced to plead guilty by the police. Furthermore, there is no explanation by the court as it claims, as such explanation is not borne out by the evidence on record. Without further ado, as soon as the accused raised a defence, the court was supposed to

enter a plea of not guilty in terms of s 113 of Act 51 of 1977 and inform the accused that all allegations admitted so far would still stand as proof of such allegations and call upon the prosecution to lead evidence.

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

- a) The conviction and sentence are set aside.
  
- b) The record is returned to the magistrate in terms of s 312 of the Criminal Procedure Act and ordered to enter a plea of not guilty in terms of s 113 and ask the prosecutor to proceed with the prosecution.

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NN SHIVUTE

Judge

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JC LIEBENBERG

Judge