

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CR No: CR 45/2019

In the matter between:

THE STATE

v

JOSEF JOHAN HENDRICKS

(HIGH COURT MAIN DIVISION REVIEW REF NO. 799/2018)

Neutral citation: *S v Hendricks* (CR 45/2019) [2019] NAHCMD 210 (26 June 2019)

Coram: NDAUENDAPO J et SHIVUTE, J

Delivered: 26 June 2019

Flynote: Criminal procedure – Review – Plea – Section 112(1)(b) questioning – Offence – Housebreaking with intent to steal and theft – Accused raised defence of intoxication– Court should have noted plea of not guilty.

ORDER

1. The conviction and sentence are set aside.
 2. The case is remitted to the trial court in terms of s 312 of Act 51 of 1977 with the direction to act in terms of s 113(1) and to bring proceedings to its natural conclusion.
 3. In the event of a conviction, the sentence already served by the accused must be taken into account.
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JUDGMENT

SHIVUTE J:

[1] This is an automatic review brought in terms of section 302(1) of the Criminal Procedure Act 51 of 1971. On review a query was sent to the presiding magistrate enquiring as to how the court satisfied itself that the accused had an intention to commit the offence of house breaking with intent to steal and theft if he said he was under the influence of alcohol.

[2] The accused was convicted on the strength of his guilty plea on one count of house breaking with intent to steal and theft, and thereafter he was sentenced to twenty four (24) months' imprisonment of which twelve (12) months' are suspended for a period of five (5) years on condition that the accused is not convicted of the offence of housebreaking with intent to steal and theft and/or house breaking with intent to commit a crime unknown to the State, committed during the period of suspension.

[3] The presiding magistrate responded to the query by stating that the court did not satisfy itself that the accused had the intention to break in as he indicated that he was under the influence of alcohol. The Magistrate further indicated that he leaves the matter in the reviewing Judge's hands.

[4] The accused was charged with house breaking with intent to steal and theft. The presiding magistrate questioned the accused in terms of s 112 (1) (b) of the CPA after he pleaded guilty. The relevant part of the record is quoted hereunder verbatim.

'Q: Can you tell the court, what happened there that led to your arrest?

A: I committed this offence that is why I arrested. (sic)

Q: What did you do wrong and why do you plead guilty?

A: I took the owners items without consent.

Q: How did take the owners items without consent? (sic)

A: On top of the premises, the roof's corrugated iron was just tied with a wire, I opened up and that is how I gained entrance through the roof and when I was inside, I opened the door from the inside. After that I took the items and I went with the items. And the following day, the next day, the police came and they arrested me. They arrested me and took me to the charge office and they detained me there. The items were also recovered. (sic)

Q: Did you have intention to go into the premises without the owner's consent?

A: That intention only came that night.

Q: Why did you go inside the premises and what did you aim to do inside the premises?

A: I was already under the influence of alcohol and I wanted to drink further and that is why I went inside the premises to take some of the liquor. '

Before convicting the accused, the court made the following ruling:

‘. . .the court is satisfied that you have admitted all the elements of the offense and the court finds you guilty as charged.’

[5] The primary purpose of questioning the accused in terms of s 112 (1) (b) of the CPA following a plea of guilty, is to safeguard the accused against the result of an unjustified plea of guilty.¹ Moreover, when the court questions the accused it must ensure that s/he admits all elements of the offence in such way that it enables the court to conclude for itself whether the accused is guilty of the offence charged. The accused’s answers must establish an unequivocal plea of guilty. If there is any doubt, a plea of not guilty should be entered.² The function of the court is not to evaluate the answers as if it were weighing evidence, neither does it have to decide the truthfulness of the answers or draw inferences therefrom.³ If the accused’s answers suggest a possible defence, a plea of not guilty should be recorded.⁴

[6] In application of the law to the facts herein, it is evident that the accused raised a possible defence of intoxication, this is evidenced by his statement that he was intoxicated on the evening in question.

[7] From the facts, it is further clear that the accused may have raised the defence of lacking the required criminal capacity to commit the offence as charged. Notwithstanding the aforesaid, the court proceeded to question the accused and from the answers provided by the accused evaluated the truthfulness thereof and came to the conclusion that the defence of drunkenness was unjustified. The following was stated by the court during sentencing;

‘The accused was under the influence of alcohol and it is correctly submitted that intoxication is not a defense but may act as a mitigating factor’

¹ *The State v Kandjimi Hiskia Mangundu* (CR 67/2016) [2016] NAHCMD 316 (17 October 2016)).

² *S v Combo and Another* 2007 (2) NR 619 (HC).

³ *S v Kaevarua* 2004 NR 144 (HC).

⁴ *The State v Kandjimi Hiskia Mangunda* at para 4.

[8] It is important to note that the Magistrate came to the above conclusion without establishing the following:

a) the extent or degree of intoxication – which could have been elicited by asking questions such as ; what type of liquor did the accused consume, what quantity was consumed ,what time did accused consume the liquor and what is the time frame between the consuming of liquor and the commission of the offense.

b) The intention of the accused at the time of breaking into the premises. Intention is an essential element of the crime of housebreaking with intent to steal and theft and the court should have satisfied itself with the type of intention present in the accused's mind at the time of breaking into the premises in question.

[9] The questioning by the learned magistrate does not cover all the elements of house breaking with intent to steal and theft as the accused had raised a defense .Therefore, the conviction and sentence cannot be allowed to stand. As a result of the aforesaid, the case stands to be remitted to the trial court for the entering of a plea of not guilty in terms of section 113 of the CPA.

[10] As a result of the above:

1. The conviction and sentence are set aside.
 2. The case is remitted to the trial court in terms of s 312 of Act 51 of 1977 with the direction to act in terms of s 113(1) and to bring proceedings to its natural conclusion.
 3. In the event of a conviction, the sentence already served by the accused must be taken into account.
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N N SHIVUTE
JUDGE

G N NDAUENDAPO
JUDGE