

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: <i>S v ELVIS TJIVINDE</i>	CR NO: 23/2021
	Division of Court: Main Division
Heard before: Honourable Mr Justice Liebenberg et Honourable Mrs Justice Shivute J	Delivered on: 15 April 2021
Neutral citation: <i>S v Tjivinde</i> (CR 23/2021) [2021] NAHCMD 157 (15 April 2021)	
IT IS ORDERED THAT: (a) The conviction and sentence are set aside. (b) The matter is remitted to the court <i>a quo</i> 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 (c) When sentencing the accused, the court should take into account the sentence already served by him.	
Reasons for the above order:	

SHIVUTE J (Liebenberg J concurring):

[1] The accused was convicted on the strength of his guilty plea on one count of Contravening section 14(a) of the Combating of Immoral Practices Act 21 of 1980 as amended read with section 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003, committing or attempting to commit sexual carnal intercourse with a female child below 16 years. He was thereafter sentenced to 36 months' imprisonment of which 12 months are suspended for 5 years on condition that accused is not convicted of any offence in violation of the Combating of Immoral Practice Act, committed during the period of suspension.

[2] On review, a query was sent to the magistrate enquiring as to why the review cover sheet reflects a charge of stock theft whereas the accused was charged with a different offence as mentioned above. In response, the magistrate apologised for the oversight and rectified the problem by attaching the correct coversheet to the review bundle.

[3] However , upon receipt of the amended review sheet and further perusal thereof, we noticed the following issues:

[3.1] During the section 112(1) (b) questioning, the accused admitted that he wanted to sleep with the victim but he did not manage to do so as he merely attempted. The court did not however establish the physical actions of the accused which constituted an attempt to commit sexual carnal intercourse with a female child below 16 years.

[3.2] The accused was convicted of both committing and attempting to commit sexual carnal intercourse with a female child below 16 years in contravention of section 14(a) of the Combating of Immoral Practices Act 21 of 1980 (as amended), read with section 1,3 and 21 of the Combating of Domestic Violence Act 4 of 2003.

[4] We are of the opinion that it will be in the interest of justice to deal with the abovementioned issues without a query being sent to the learned magistrate, in order to

avoid further delay in finalising this matter and prejudice to the accused.

[5] In view of the above, we will now deal with the first issue where the accused admitted that he attempted to commit sexual carnal intercourse with the victim however no questions were posed to the accused to establish the physical actions performed in what he alleges to be an attempt to commit sexual carnal intercourse with the victim.

[6] It was held in *S v September* 1999 NR 334 (HC) at 336H – 337A citing *R v Schoombie* 1945 AD 541 at 546 as follows”

‘Attempts seem to fall naturally in two classes:

- (a) Those in which the wrongdoer intending to commit a crime, has done everything which he set out to do but has failed in his purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise.
- (b) Those in which the wrongdoer has not completed all that he set out to do, because the completion of his unlawful acts has been prevented by the intervention of some outside agency. It seems, therefore, that in the case of interrupted crimes an attempt to commit such crime is proved when the court is satisfied from all the circumstances of the case that the wrongdoer at the time when he was interrupted, intended to complete the crime and that he had at least carried his purpose through to the stage at which he was “commencing the consummation.”

[7] In applying the above principles to the present facts, although the accused admitted that he attempted to commit sexual carnal intercourse with the victim, his actions during the commission of the offence were not established. The court could therefore, not have satisfied itself that his actions amounted to an attempt to commit an offence.

[8] Moving to the second issue whereby the accused has been convicted of both committing and attempting to commit sexual carnal intercourse with a female child below 16 years of age, the court was supposed to question the accused person in order to

determine whether he committed sexual carnal intercourse with a child below the age of 16 years or he attempted to do so.

[9] It is common cause that, committing an offence and attempting to commit an offence involves separate elements. One can therefore not be convicted of both committing and attempting to commit sexual carnal intercourse with a female child below 16 years. From the record of proceedings, the accused admitted to attempting to commit sexual carnal intercourse with the victim. If the court had questioned him regarding his actions during the commission of the offence and satisfied itself that an attempt had in fact taken place, then the accused could have been convicted of attempting to commit sexual carnal intercourse with a female child below 16 years. This is however not the case because the court did not satisfy itself that the accused admitted all the elements of the offence.

[10] 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 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

[11] In applying the above principles to the present facts, the court misdirected itself by convicting the accused of committing and attempting to commit sexual carnal intercourse with a female child below 16 years of age. It follows that the conviction and sentence cannot be allowed to stand.

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

¹ *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).

- (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
- (c) When sentencing the accused, the court should take into account the sentence already served by him.

NN SHIVUTE
JUDGE

J C LIEBENBERG
JUDGE