

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Prince Eiseb</i>	<b>Case No:</b> CR 50/2021
<b>High Court MD Review No:</b> 870/2021	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Mr Justice Liebenberg <i>et</i> Lady Justice Shivute	<b>Delivered on:</b> 31 May 2021
<b>Neutral citation:</b> <i>S v Prince Eiseb</i> (CR 50/2021) [2021] NAHCMD 267 (31 May 2021)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction and the sentence are set aside.</li><li>2. In terms of s 312 of Act 51 of 1977 the matter is remitted to the presiding magistrate with the direction to question the accused in terms of s 112(1)(b) in order to determine whether there was a break-in and his intention at the time of entering the house.</li><li>3. When sentencing the accused, the court should take into consideration the portion of the sentence the accused had already served.</li></ol>	

**Reasons for the order:**

[1] This is a review matter which came before me in terms of section 302 (1) and section 303 of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The accused in this matter appeared before the Magistrate's Court for the district of Walvis Bay where he faced a charge of housebreaking with intent to steal and theft. He pleaded guilty and the court invoked the provision of s 112(1)(b) of the Act. He was convicted and sentenced to 18 months' imprisonment.

[3] I directed a query to the magistrate as to what satisfied the court *a quo* that the accused committed housebreaking with *intent to steal* in view of the fact that the magistrate omitted to question the accused on whether his actions constituted a break-in and further omitted to establish what the accused's intention was at the time of the alleged break-in.

[4] The magistrate's response in short was that the offence of housebreaking with intent to steal is an offence where lay persons does not know what constitutes 'breaking in to a house', as it does not require the accused to break or damage property in order to gain entrance into the property. Furthermore that the accused in his answers admitted that he climbed through a window to gain entrance and appropriated two watches inside.

[5] As regards the issue of intent, the magistrate further reasoned that, in his understanding, it is appropriate to infer intention from the conduct of the accused person. Thus the court *a quo* inferred from the accused's explanation that it was his intention to steal when he appropriated the watches from the said house, fled from the scene and sold it. He furthermore explained that the intention element was covered by the affirmative answer by the accused to the question: 'Did you know that you were committing an offence when you climbed through the window and took two watches?'

[6] It is common cause that s 112(1)(b) of the Act has a twofold purpose, namely, to establish the factual basis for the plea of guilty and to establish the legal basis for such plea. From the accused's admission, the court must conclude whether the legal requirements for the commission of the offence have been met. These include questions

of unlawfulness, *actus reus* and *mens rea*. The court *a quo* however omitted to question the accused on (a) whether the accused committed an act that would constitute 'housebreaking' and (b) what his intent was at the time of such break in. I pause to observe that it is not for the accused to 'understand the technical meaning of the breaking into the house' as the magistrate reasoned, but for the court, through its questioning, to satisfy itself that the accused admits the elements of the offence charged.

[7] In *S v Kamangoti*<sup>1</sup> the court endorsed the sentiments in *S v Hlongwane*<sup>2</sup> as to what constitutes housebreaking and held as follows:

'In order to constitute a breaking the conduct complained of must have created a way into the complainant's premises 'by displacing some obstruction which forms part of those premises.'

The magistrate in his reply to the query of whether the act constituted a housebreaking explained that '...the accused on his own admissions observed a bathroom door open. He scaled a window to gain entrance...' What is evident is that the accused jumped through a window. In this instance no questions were asked on whether he displaced anything as assumed by the magistrate. All we know from the accused's answers is that the window was open. Consequently, the omission by the magistrate to ascertain the latter means that the accused did not admit to all the elements of the offence.

[8] The magistrate is further misguided if he opines that the court *a quo* may infer during s 112(1)(b) questioning, what the intention of the accused was at the time of the commission of the offence if not a single question was posed to the accused in that regard. In *S v Thomas*<sup>3</sup> it was held that:

'The answers given in an enquiry in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 do not constitute 'evidence' under oath from which the court can draw inferences regarding

the guilt of the accused. Section 112(1)(b) requires of a court in peremptory language to question

<sup>1</sup> *S v Kamangoti* (CR 05/2012) [2012] NAHC 47 (02 March 2012).

<sup>2</sup> *S v Hlongwane* 1992 (2) SACR 484 (N).

<sup>3</sup> *S v Thomas* 2006 (1) NR 83 (HC).

the accused with reference to the alleged facts of the crime in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty. It may only convict the accused on account of such a plea if it is satisfied on the basis of such answers that the accused is indeed guilty. Unless the accused has admitted to all the elements of the offence, he or she may not be convicted merely on account of his or her plea - except, of course, in the case where s 112(1)(a) applies.'

[9] The magistrate could thus not have been satisfied on the strength of the accused's admission that he admitted all the elements of the offence of housebreaking with intent to steal. Despite the fact that the accused admitted to have unlawfully taken the goods from the house, the intention at the time of entering must also be established.

[10] In view of the omission by the magistrate to question the accused on the element of intention, the conviction and sentence cannot stand. The proceedings are not in accordance with justice and the matter should be remitted to the district court in terms of s 312 of the CPA.

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

1. The conviction and the sentence are set aside.
2. In terms of s 312 of Act 51 of 1977 the matter is remitted to the presiding magistrate with the direction to question the accused in terms of s 112(1)(b) in order to determine whether there was a break-in and his intention at the time of entering the house.
3. When sentencing the accused, the court should take into consideration the portion of the sentence the accused had already served.

<b>J C LIEBENBERG</b> <b>JUDGE</b>	<b>N SHIVUTE</b> <b>JUDGE</b>