

HIGH COURT OF
WINDHOEK
REVIEW JUDGMENT



NAMIBIA MAIN DIVISION,

<p>Case Title: The State vs Michael Tjongwa</p>	<p>h Court Case No: 536/2022 CR 40/2022</p> <p>Division of Court: High Court Main Division</p>
<p>Heard before: Hon. Judge Shivute et Hon. Judge January</p>	<p>Delivered on: 20 May 2022</p>
<p>Neutral citation: <i>S v Tjongwa</i> (Cr 40/2022) [2022] NAHCM 255 (20 May 2022)</p>	
<p>The order:</p> <p>(a) The conviction and sentence are set aside.</p> <p>(b) The matter is remitted to the Court <i>a quo</i> in terms of s 312 (1) of the Criminal Procedure Act 51 of 1977 and the learned magistrate is directed to question the accused in terms of s 112 (1) (b) in order to establish the intention of the accused at the time he was entering the premises.</p> <p>(c) The magistrate must however, take into consideration the period which the accused spent in custody, in the event of a conviction.</p>	
<p>Reasons for order:</p>	
<p>SHIVUTE J (Concurring January J)</p> <p>[1] The matter came before this court on automatic review in terms of section 304 of the Criminal Procedure Act 51 of 1977. Accused 2 was jointly charged with accused 1. Accused 2 pleaded guilty to a charge of housebreaking with intent to steal and theft. The</p>	

court invoked the provisions of s112 (1) (b) of the Criminal Procedure Act and convicted accused 2 as charged. Accused 1 was separated from the trial as he pleaded not guilty.

[2] I directed a query to the court *a quo* as to how it satisfied itself that accused 2 had an intention to steal at the time he broke into the premises if there were no questions asked pertaining to such intention.

[3] The magistrate correctly conceded that accused 2 was not asked to his intention when he was breaking and entering the premises.

[4] Questioning in terms of section 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 pleas. 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) 267.

[5] The Court invoking section 112 (1) (b) should satisfy itself that the accused is admitting all the factual basis as well as the legal basis. In order to establish that the accused had admitted all the elements of the offence the court should establish through questioning the elements of unlawfulness, *actus reus* and *mens rea*. In the present matter, the Court *a quo* omitted to question the accused in order to determine his intent at the time of breaking and entering into the premises.

[6] Although the accused took the goods from the premises, it was not established by the court that the accused intended to steal at the time he was entering. It follows that the Court could not have satisfied itself that the accused admitted all the elements of the offence of housebreaking with intent to steal and theft. In view of this, the conviction and sentence cannot be allowed to stand.

[7] In the premise, it is ordered that:

(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 the Criminal

Procedure Act 51 of 1977 and the learned magistrate is directed to question the accused in terms of s 112 (1) (b) in order to establish the intention of the accused at the time he was entering the premises.

(c) The magistrate must however, take into consideration the period which the accused spent in custody, in the event of a conviction.

**N N SHIVUTE
JUDGE**

**H C JANUARY
JUDGE**