

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION

HELD AT WINDHOEK

REVIEW JUDGMENT

Case No.: CR51/2022

In the matters between:

THE STATE

v

FRANS @ KOLO KATJOZE

HIGH COURT MD REVIEW CASE REF NO.: (486/2022)

THE STATE

v

ETHOL TJIRIMONGUA

ACCUSED 1

FILLIP ZAHANGANA

ACCUSED 2

HIGH COURT MD REVIEW CASE REF NO: (487/2022)

Neutral citation: *S v Katjoze; S v Tjirimongua & Another* (CR51/2022) [2022] NAHCMD 285 (10 June 2022)

Coram: SHIVUTE J and JANUARY J

Delivered: 10 June 2022

Flynote: Criminal Procedure-Guilty Plea- Section 112 (1) (a) of the Criminal Procedure Act 51 of 1977 intended for the disposal of “trivial”, “minor” or not “serious” offences- possession of suspected stolen stock contravening section 2 of Act 12 of 1990 cannot be regarded as a minor offence. The magistrate incorrectly applied the section. The convictions and sentences are set aside.

Summary: The accused were charged with possession of suspected stolen stock contravening section 2 of Act 12 of 1990 in the Magistrate’s Court Otjinene. The accused pleaded guilty and the magistrate applied section 112 (1) (a) of the CPA upon the request of the prosecutor. The accused were convicted and sentenced to a fine of N\$ 1500.00 or 6 months’ imprisonment each. The magistrate misdirected herself in applying section 112 (1) (a) because the offence of possession of suspected stolen stock contravening section 2 of Act 12 of 1990 cannot be regarded as a minor offence. The Court should have invoked section 112 (1) (b). The convictions and sentences are set aside in respect of each accused.

ORDER

- (1) The conviction and sentence in the State v Frans @ Kolo Katjoze are set aside.
- (2) The matter is remitted to the trial court in terms of s 312(1) of the Criminal Procedure Act 51 of 1977 (as amended) with the direction to question the accused in terms of s 112 (1) (b) to satisfy itself that the accused is admitting all the elements of the offence.
- (3) When sentencing the accused, the court should take into consideration the portion of the sentence the accused had already served.
- (4) The fine, if paid, is to be refunded to the accused.
- (5) The conviction and sentence in the State v Ethol Tjirimongua and Phillip Zahangana are set aside in respect of each accused.
- (6) The matter is remitted to the trial court in terms of of s 312(1) of the Criminal Procedure Act 51 of 1977 (as amended) with the direction to question each

accused in terms of s 112 (1) (b) in order to determine that each accused is admitting all the elements of the offence and to bring the matter to its natural conclusion.

(7) When sentencing each accused, the court should take into consideration the portion of the sentence the accused had already served.

(8) The fine, if paid, is to be refunded to the accused.

JUDGMENT

SHIVUTE J (JANUARY J concurring):

[1] The abovementioned matters came before this court on automatic review in terms of S 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused persons were charged with possession of suspected stolen stock contravening section 2 of the Stock Theft Act 12 of 1990. The accused persons pleaded guilty to the charge. The magistrate disposed of the matters in terms of section 112 (1) (a) on request of the public prosecutor. The accused were convicted and sentenced to a fine of N\$ 1500.00 or 6 months' imprisonment in respect of each accused.

[3] A query was directed to the magistrate as to how the court satisfied itself that the accused persons were unable to give a satisfactory explanation for their possession of the stock.

[4] The magistrate conceded that section 112 (1) (a) should not have been applied to the charge and that the court should have invoked section 112 (1) (b) of the CPA to satisfy itself that the accused admitted to all the elements of the offence.

[5] Section 112 (1) (a) of the CPA should only be applied where the crimes are "trivial", "minor" or not "serious".¹ Presiding judicial officers should not lose sight of the objective of s 112 (1) (a) which is to dispose of trivial offences and only if the offence

¹ *S v Onesmus, S v Amukoto, S v Shipange* 2011 (2) NR 461.

does not merit punishment of imprisonment or any other form of detention. The provision confers a discretionary power to the presiding judicial officer that must be exercised judiciously.²

[6] Although a public prosecutor is *dominus litus* in the prosecution of the case, once the case is before court and the accused has pleaded, the invoking of section 112 (1) (a) of the CPA after a plea of guilty, falls within the discretion of the court. The prosecutor may be invited to address the court as regards to the charge(s) but the court must exercise its discretion judiciously on the way forward. The court is guided by the nature and seriousness of the offence to form an opinion if the offence does not merit a fine in excess of N\$6000 or punishment of imprisonment or any other form of detention without the option of a fine.³

[7] Furthermore, when the crimes are not trivial, magistrates should question accused in terms of section 112(1) (b) of the CPA. It is trite that questioning in terms of s 112(1) (b) has a twofold purpose, namely to establish the factual basis of the plea of guilty and to establish the legal basis of such plea. The court must conclude whether the legal requirements for the commission of the offence have been met from the accused's admissions.⁴

[8] In these cases, considering the nature of the offence alleged, wherein the accused persons were found in possession of suspected stolen stock, it cannot be regarded as a minor offence. Furthermore, the accused has the opportunity to explain his account how he came to possess the suspected stolen property up to the trial stage. The magistrate incorrectly applied the provision upon the request of the prosecutor, thus did not exercise her discretion judiciously. The convictions and sentences cannot be allowed to stand in respect of both cases.

[9] In the result, it is ordered that:

² *S v Onesmus, S v Amukoto, S v Shipange* 2011 (2) NR 461.

³ See: Commentary on the Criminal Procedure Act, *Du Toit et al*, Original Service 1987 at 17-2; Conviction solely on a plea of guilty.

⁴ *S v Kalongo* (CR 100/2021) [2021] NAHCMD 510 (01 November 2021).

- (1) The conviction and sentence in the State v Frans @ Kolo Katjoze are set aside.
- (2) The matter is remitted to the trial court in terms of s 312(1) of the Criminal Procedure Act 51 of 1977 (as amended) with the direction to question the accused in terms of s 112 (1) (b) to satisfy itself that the accused is admitting all the elements of the offence.
- (3) When sentencing the accused, the court should take into consideration the portion of the sentence the accused had already served.
- (4) The fine, if paid, is to be refunded to the accused.
- (5) The conviction and sentence in the State v Ethol Tjirimongua and Fillip Zahangana are set aside in respect of each accused.
- (6) The matter is remitted to the trial court in terms of of s 312(1) of the Criminal Procedure Act 51 of 1977 (as amended) with the direction to question each accused in terms of s 112 (1) (b) in order to determine that each accused is admitting all the elements of the offence and to bring the matter to its natural conclusion.
- (7) When sentencing each accused, the court should take into consideration the portion of the sentence the accused had already served.
- (8) The fine, if paid, is to be refunded to the accused.

N N SHIVUTE
JUDGE

H C JANUARY

JUDGE