REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION WINDHOEK

REVIEW JUDGMENT

Case Title: The State vs Justin Hartung The State v Luciano Ortman	**Case No:** CR 56/2022 **Division of Court:** Main Division
Heard before: Hon Judge Usiku J et Hon Judge Claasen J	**Delivered on:** 20 June 2022
3 **Neutral citation:** *S v Hartung; S v Ortman* (CR 56/2022) [2022] NAHCMD 309 (20 June 2022)	
Order: *1.* In *S v Hartung* the conviction and sentence are set aside. *2.* In *S v Ortman* the conviction and sentence are set aside.	
Claasen J (Usiku J concurring): [1] These criminal review matters, both from the district court of Keetmanshoop, were finalized by the same magistrate and turns on the same issue.	

[2] In *S v Hartung,* the accused was convicted of the common law offence of escape from lawful custody, being an alternative charge, in the district court of Keetmanshoop. The main charge was that of escaping before being locked up in contravention of s 51(1) of Act 51 of 1977. He was sentenced to 18 months imprisonment of which 6 (six) months are suspended for five years on the condition that the accused is not convicted of escaping from lawful custody committed during the period of suspension.

[3] In *S v Ortman,* the accused was convicted of theft by false pretenses and given a fine of N$ 2500 or ten months' imprisonment.

[4] It took three months from the date of conviction for the cases to arrive at the High Court in Windhoek. It might take the same period to return it with a query to the station and another three months before the reply to the queries arrives here. Such delay will cause prejudice to the accused persons and therefore the matters are reviewed without having addressed queries to the magistrate who presided over the matters.

[5] In both matters the accused were convicted on the basis of purported formal admissions in terms of s 220 of the Criminal Procedure Act, Act 51 of 1977 as amended (the CPA). The convictions were done through irregular procedures, which will become clear later in the judgment.

[6] In *S v Hartung,* the accused elected to conduct his own defense and was asked to plead to the charges. The record indicates that he pleaded guilty to both the main and the alternative charge. The court *a quo* did not spell out to the unrepresented accused that he must decide on which of the main charge or the alternative charge he pleads guilty as he cannot be convicted on both at the same time. The record also shows that the questions in terms of s 112(1)(*b*) of the CPA for both the main and the alternative charge were lumped together instead of separate questions being posed on the main charge and thereafter, if he did not admit all the elements on the main count, then questioning will follow on the alternative charge. During this questioning the accused answered that he

did not know it was unlawful to leave the police station and a plea in terms of s 113 of the CPA was entered, presumably for both main and the alternative count. The matter was remanded for trial.

[7] On a subsequent date the prosecutor told the magistrate that the accused wants to make formal admissions. That is as opposed to the accused who stated that he wants to 'plead guilty'. The *court a quo* asked the accused if he is speaking to the court voluntarily and he answered in the affirmative. The court *a quo* proceeded to question the accused along the lines of s 112(1)(*b*) of the CPA about the charge allegations. At the end of the questions and answers by the accused, the court stated that it appears from what the accused had just told the court that he does not dispute the charge allegations, namely that he admits that he on 18 December 2021 at the Keetmanshoop Police station wrongfully and unlawfully escaped from lawful custody by leaving the charge office without the consent of the officers.

[8] Thereafter, the court *a quo* advanced an explanation regarding the consequences of formal admissions, which in paraphrased terms were that those allegations which he admits, become proven facts which the state no longer need to prove. He was also told and asked that with his consent, which he is not forced to give, whether it can be entered as a formal admission that he on 18 December 2021 at the Keetmanshoop Police station wrongfully and unlawfully escaped from lawful custody by leaving the charge office without the consent of the officers. The accused answered in the affirmative. After that, the prosecutor stated that he accepts the admissions on the alternative charge and the court recorded that the formal admissions are entered and accepted on the alternative charge. The matter continued with the state closing its case and the accused being put on his defense, but the latter is not relevant for the outcome of this matter.

[9] A similar procedure was adopted in *S v Ortman*. At the outset the unrepresented accused pleaded guilty and he was questioned in terms of s 112(1)(*b*) of the CPA. The accused was inter alia asked about a representation that he made to the complainant, but he denied, that and the plea was altered to one of not guilty in terms of s 113 of the CPA. The matter was remanded for further investigations.

[10] On the next court date the prosecutor said that the accused wanted to make an admission on the charge. The court asked the accused if he was forced or influenced to speak to the court, and he answered in the negative. The court enquired from the accused what he wants to tell the court. The accused answered that: 'I want to plead guilty and finish the case because I am a youth member and want to go back to my youth activities so I want to plead guilty to the charge'. The court informed the accused that he already pleaded and denied the allegations and enquired what he wants to tell the court today. The accused said he wants to admit that he asked the phone from the complainant to make a call and did not return the phone. The court proceeded to question the accused about the various charge allegations and the accused answered these questions.

[11] At the end of the questions and answers, the court stated that it appears from what the accused had just told the court that he does not dispute the charge allegations. The accused was told that he seems to admit that he unlawfully and intentionally took the cellphone of Greglan Vries, by representing to him that, he intended to make a call which representation he knew was false at the time and induced the taking of the cellphone from the complainant. The accused was told of the consequences of formal admissions and that with his consent, which consent he was not forced to give, these allegations may be entered as formal admissions. The accused gave his consent. The state then said it accepted the formal admissions and the record stated that the court also accepted the formal admissions in terms of s 220 of the CPA.

[12] In terms of section 220 of the CPA, an accused or his/her legal counsel may admit facts that are in dispute between the parties. In the event of a self-actor, which is the case herein, the court should explain the effect of doing so and also that the accused is not compelled to assist the state in proving its case.

[13] The problems in these convictions are twofold. Firstly, the accused did not come forward with these so-called admissions in terms of s 220 of the CPA by himself but each of these admissions were solicited by questions from the magistrate on the charge

allegations, tantamount to questions being posed in terms of s 112(1)(*b*) of the CPA. The same irregular method was employed in *S v Tsei-Tseib*[1] and it was stated at para 14:

'...Instead after the learned magistrate was informed that the accused wanted to make a formal admission she proceeded to question the accused in the manner s 112(1)(b) of the Act is being applied. The accused did not volunteer himself to advance formal admissions as required by s 220 of Act 51 of 1977. The Court a quo questioned him and extracted answers from him. In some instances, such admissions were advanced by the Court a quo'.

[14] Secondly, it does not help for the magistrate to advance an explanation about the effect of making formal admissions and that an accused is not compelled to assist the state with proving its case, at the tail end of the proceedings, namely after the court trapped the accused by putting the questions about the charge allegations to him. The explanations should be given at the outset, so that an accused can make an informed decision as to whether to give formal admissions or not.

[15] Section 115 of the CPA provides that a presiding officer may ask an accused, who pleaded not guilty, to indicate the basis of his defense. The presiding officer may question an accused to establish which allegations are in dispute and also ask an accused whether allegations which are not in dispute, may be recorded as admission(s). If the accused consents thereto, it may be recorded and will be deemed to be admission(s) under s 220 of the CPA. It is not clear whether the magistrate may have erroneously invoked this questioning format, which is allowed for <u>in the event of a not guilty plea by an accused</u>. (Our emphasis.)

[16] At the end of the day, the procedures utilised by the magistrate in both matters are flawed. Given that the magistrate utilised s 112(1)(*b*) questioning for a second time to extract the relevant facts from the undefended accused, it cannot be said that the accused, of own accord, made these formal admissions which the court relied on for conviction purposes. Therefore, the convictions in both cases cannot be confirmed as being in accordance with justice.

[1] *S v Tsei-Tseib* (CR 29/2022) [2022] NAHCMD 183 (11 April 2022).

[17] In the premises the following orders are made:

1. In *S v Hartung* the conviction and sentence are set aside.
2. In *S v Ortman* the conviction and sentence are set aside.

C M CLAASEN **JUDGE**	**D N USIKU** **JUDGE**