REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION WINDHOEK

REVIEW JUDGMENT

Case Title: *The State v Joseph Mouton*	**Case No:** CR 120 /2022
High Court MD Review No: 1882/2022	**Division of Court:** Main Division
Heard before: Usiku J et Claasen J	**Delivered on:** 11 November 2022
Neutral citation: *S v Mouton* (CR 120/2022) [2022] NAHCMD 612 (11 November 2022)	
The conviction and sentence are set aside.	
Reasons for order:	
CLAASEN J (concurring USIKU J) [1] This matter is from the district court of Keetmanshoop and was referred to this court by way of automatic review in terms of s 302(1) of the Criminal Procedure Act, Act 51 of 1977 (CPA).	

[2] The accused and his co-accused were charged with one count of housebreaking with intent to steal and theft. They both pleaded not guilty. Accused 1 was convicted after he purportedly made admissions in terms of s 220 of the CPA, whereas his co-accused was discharged in terms of s 174 of the CPA. The accused was 'sentenced to 24 months' imprisonment of which 6 months are suspended for a period of 5 years on condition that he is not convicted of housebreaking with intent to steal and theft committed during the period of suspension.

[3] It took 4 months from the date of conviction for this case to arrive at this court and may take longer, should a query be directed to the magistrate as the matter has to travel back and forth. Such delay will be prejudicial to the accused. Consequently, this matter is reviewed without querying the magistrate who presided over the matter.

[4] From the record of proceedings, it is evident that the accused pleaded not guilty on 22 March 2022 and did not disclose the basis of his defence. The matter was thereafter postponed for trial. After the first state witness testified and was cross examined by the accused, the matter was further postponed for continuation of trial.

[5] On 13 June 2022, the prosecutor informed the magistrate that the accused intends to make formal admissions. The court *a quo* then invoked a procedure that resembles questioning under s112 (1)(*b*) of the CPA. In answering the questions posed by the magistrate about the elements and details of the offence, the accused ended up admitting that he broke into the complainant's house and took half a carcass and 9 beers, as opposed to a full goat carcass, 25 beers and 1 juke box as alleged in the charge sheet.

[6] At the end of the questioning, the magistrate informed him that 'the consequence of formal admissions in terms of s 220 of Act 51 of 1977 are that all the allegations which you admit to the court will become proven facts which are no longer in dispute with you and the state at trial and the state will no longer need to proof such formal admissions as they will be common cause at trial.' The magistrate further asked the accused if he

consents to the court noting as a formal admission that on 21 September 2021 at Tses the accused wrongly, unlawfully and intentionally broke into the house of Melvin Swartbooi and took and removed 9 beers and half a carcass of meat the property of Melvin Swartbooi, to which the accused consented. The accused was convicted on the strength of these proceedings.

[7] The headnote of *S v Mavundla*[1] 1976 (4) SA 731 (N) succinctly explains the relevant principle as follows:

> 'When an accused person proposes to admit a fact under section 284 (1) of Act 56 of 1955,[2] but he lacks legal representation, the judicial officer trying him must satisfy himself before accepting the admission in evidence, that the accused's decision to make it has been taken with full understanding of its meaning and effect, and under no misapprehension that he is obliged or expected to supply the state or the court with it. It must also appear to be truly voluntary in all other respects.'

[8] The appropriate procedure for recording of formal admissions by an unrepresented accused has been dealt with in our jurisdiction[3] which judgments endorsed the above principle. As such, for purposes of this judgment, we will not repeat them. Incidentally, several of these review matters emanated from the same station and resulted in judgments which clearly have not been read and applied accordingly as expected.

[9] In applying the principle to the case at hand, it does not help to explain the nature and effect of formal admissions only at the end of the proceedings, after the court elicited the elements of the offence from the accused. If the explanation is not given at the beginning, before the accused starts to volunteer all the incriminating facts, it can hardly be called an informed decision by an unrepresented accused.[4] Furthermore, the accused must volunteer the facts instead of the court invoking s 112(1)*(b)* of the CPA as a strategy to extract the relevant information.

In these circumstances, it cannot be concluded that the accused volunteered the incriminating facts on his own accord.

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[1] S v Mavundla 1976 (4) SA 731 (N).
[2] This provision is equivalent of s 220 of the current Criminal Procedure Act 51 of 1977.
[3] See: *S v Manyuwa* (CR91/2020) [2020] NAHCMD 513 (11 November 2020); *S v Tsei-Tseib* (CR 29 /2022 [2022] NAHCMD 183 (11 April 2022), par.14; *S v Hartung*; *S v Ortman* (CR 56/2022) [2022] NAHCMD 309 (20 June 2022); *S v Witbooi* (CR 62/2022) [2022] NAHCMD 324 (29 June 2022).
[4] *S v Tsei-Tseib* (CR 29 /2022 [2022] NAHCMD 183 (11 April 2022), par.14.

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

The conviction and sentence are set aside.

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