

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTH LOCAL DIVISION  
HELD AT OSHAKATI

REVIEW JUDGMENT

Case no: CR 10/2019

In the matter between:

**THE STATE**

v

**TEGELELA WILHELMINA JOHANNES**  
**SHINGENGE AUGUSTE**

**1<sup>ST</sup> ACCUSED**  
**2<sup>ND</sup> ACCUSED**

(HIGH COURT NLD REVIEW CASE REF NO: (77/2019))

**Neutral citation:** *S v Johannes* (CR 10/2019) [2019] NAHCNLD 20 (25 February 2019)

**Coram:** JANUARY J *et* SALIONGA J

**Delivered:** 25 February 2019

**Flynote:** Criminal Procedure — Questioning in terms of s 112(1)(b) of the Criminal Procedure Act, 51 of 1977 (The CPA)—Simultaneously questioning the accused

persons—Grossly irregular—Conviction and sentence set aside as a result — Matter remitted to the magistrates' court to question each accused independently.

**Summary:** The two accused were jointly charged with fraud alternatively theft. It was alleged that the accused persons acting with common purpose did unlawfully, falsely and with intent to defraud give, act and pretend to FNB that they were authorized to withdraw money from an account and by means of false pretence induced the bank to pay out the money to the total amount of N\$6900 to the actual prejudice of Amushila Serafia. They pleaded guilty to the charge against them and the magistrate questioned both accused persons simultaneously in terms of s 112(1) (b) of the CPA causing the questioning to be grossly irregular. In the result, the conviction and sentence are set aside and the matter is remitted to the magistrates' court for the magistrate to question each accused independently.

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### ORDER

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- (a) The conviction and sentence are set aside.
  - (b) The matter is remitted to the magistrates' Court Outapi to question the accused properly and independently in terms of section 112(1) (b) of the Act and since the presiding magistrate had in the meantime resigned, any other available magistrate can finalise the matter.
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### JUDGMENT

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SALIONGA J (JANUARY J concurring):

[1] This is a review matter emanating from the Outapi Magistrates' Court wherein the two accused were charged with the offence of fraud alternatively theft. They pleaded guilty to the charge against them and as such the learned magistrate invoked the provisions of section of 112(1) (b) of the Criminal Procedure Act, 51 of 1977 (the CPA). The learned magistrate, when questioning the accused persons, did not question each

accused individually but posed one question at a time which was answered by both the accused.

[2] When the matter was submitted before me on automatic review, I did not raise a query with the magistrate to explain why he did not question each accused individually in terms of section 112(1) (b) of the Criminal Procedure Act. The reason being I was informed the presiding Magistrate has since resigned. In view of several earlier judgements on the same issue I decided to write the judgement without referring the matter back to the magistrate's court with a query.

[3] One of the said several judgements referred to above is the *S v Valede & others* 1990 NR 81 where, the magistrate followed the same method of questioning the accused persons as was done in this matter. Levy, J, at 831-J in the *Valede* case said the following: 'Furthermore, and in any event, his questioning of all the accused was grossly irregular. Where there are co-accused the magistrate is required to question each accused independently even if this involves laboriously repeating the same questions.' (See also *Mweemba v S* (CA 56/2013) [2013] NAHCMD 344 (20 November 2013) unreported).

[4] That being the case, the questioning in this review matter is also grossly irregular and as such the proceedings do not appear to me to be in accordance with justice. Accordingly, the conviction and sentence cannot be allowed to stand.

[5] The following order is therefore made:

- (a) The conviction and sentence are set aside.
- (b) The matter is remitted to the magistrates Court Outapi to question the accused independently in terms of section 112(1) (b) of the Act and since the presiding Magistrate had in the meantime resigned, any available magistrate can finalise the matter.

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J T SALIONGA  
JUDGE

I agree

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H C JANUARY  
JUDGE