CASE NO.: CR 11/2012

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

THE STATE

and

THOMAS SHEELEKENI PATRIC

(HIGH COURT REVIEW CASE NO.: 364/2010)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 16 March 2012

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused appeared in the Magistrate's Court Okahao on a charge of theft of a firearm; a magazine; a 'head cover' and a cell phone charger, together valued at N$2 659.95. He was convicted on his

plea of guilty and sentenced to a fine of N$1 000 or 10 months' imprisonment. The review cover sheet reflects that the fine was not paid.

[2] The reviewing judge directed a query to the trial magistrate enquiring from him whether it was appropriate for this matter to have been dealt with in terms of s 112 (1)(a) of the Criminal Procedure Act, 1977.[1] The magistrate correctly conceded that in the light of judgments recently delivered by this Court, he was of the view that it was inappropriate to have finalised the matter in terms of this section.

[3] This Court to date delivered several judgments in which the appropriateness of the application of s 112 (1)(a) in cases involving serious crimes was discussed; and where it was decided that the subsection should not be invoked in cases where the accused faces serious charges, but should be reserved for cases considered to be 'minor', 'trivial' or 'not serious'.[2] The presiding officer has a discretion to convict an accused on his mere plea of guilty, but this discretion must be exercised judiciously, having full regard to the nature and seriousness of the offence; the possibility of compulsory sentences; and the particulars of the charge.

[4] The concession made by the magistrate is proper and given the circumstances of this case where the accused is eighteen years of age and is charged with theft *inter alia* of a firearm, the court should have questioned the accused in terms of s 112 (1)(b) in order to satisfy itself that an offence was

[1] Act No 51 of 1977
[2] *The State v Shikale Onesmus and 2 Other Cases*, (unreported) Case No CR 08/2011 delivered on 30.03.2011

committed, and that the accused was indeed guilty thereof. Failure to do so constituted a misdirection, justifying interference by this Court.

[5] The accused was unable to pay the fine and by now would have served the alternative imprisonment of ten months. Whereas compliance was not given to the provisions of s 112 (1)(b), the Court *must* remit the case to the trial court under s 312 and direct that court to comply with the provision. In essence this means that the court, after questioning the accused and having been satisfied that he admits all the elements of the offence, may convict and sentence afresh. Alternatively, to enter a plea of not guilty in terms of s 113 and to hear evidence. In the event of a conviction, sentence must be imposed in circumstances where the accused has already served his sentence on the same charge. In the circumstances of this case and if the Court were to give effect to the provisions of s 312 and remit the case to the trial court, it seems to me that the accused would be unduly punished (twice) upon conviction – even if a totally suspended sentence would be imposed – which I do not consider to be in the interest of justice.

[6] In *S v Arendse and Another*[3] the Court refused to comply with the mandatory provision relating to remittal in terms of s 312 since the remittal would have amounted to a fatuity and Rose-Innes, J said the following at 108E-F:

[3] 1985 (2) SA 103 (CPD)

> "It seems to me that, notwithstanding the provisions of s 312 (1), that section does not compel this Court to commit a fatuity. The Act cannot intend that this Court must remit, in a case where all are ad idem, ie the State is ad idem and the Court agrees with the State and that is also the attitude of the appellants' representative that no conviction can accrue in this case. It seems to me that in those circumstances no Court is even compelled to follow a course and give an order that certain proceedings must now take place which are pointless, can have no purpose and can have no outcome, other than the acquittal of the accused."

Although the circumstances of that case is different from the case under review in that a remittal in this instance would not amount to a fatuity, but an injustice, it seems to me that, on the same basis it can be argued that this Court is not compelled to remit the case to the trial court when it would result in an injustice being committed against the accused who has already served a sentence imposed on him for the same offence. I accordingly refuse to do so.

[7] In the result, the Court makes the following order:

1. The conviction and sentence are set aside.
2. The matter is not remitted to the trial court.

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LIEBENBERG, J

I concur.

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TOMMASI, J