

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case No: CR 12/2017

THE STATE

versus

ISAACK GANASEB

ACCUSED 1

NAFTALI GANASEB

ACCUSED 2

EBEN EISEB

ACCUSED 3

ANANIAS GOAGOSEB

ACCUSED 4

AMUKOSHI MWETUHANGA

ACCUSED 5

(HIGH COURT MAIN DIVISION REVIEW REF NO. 445/2016)

(MAGISTRATE'S SERIAL NO. 05/2016)

Neutral citation: *S v Ganaseb* (CR 12/2017) [2017] NAHCMD 21

(1 February 2017)

Coram: LIEBENBERG J and SHIVUTE J

Delivered: 1 February 2017

ORDER

- a) Convictions on counts 1 – 2 in respect of each accused and sentence are set aside.
- b) The record is returned to the magistrate in terms of s 312 of the Criminal Procedure Act 51 of 1977 and the magistrate is directed to comply with the provisions of s 112 (1) (b) by questioning the accused persons pertaining to time and place of the offences, as well as the element of unlawfulness.
- c) In the event of a conviction, the magistrate must in considering an appropriate sentence have regard to the fact that the accused have been serving a term of imprisonment since 25 January 2016, when the sentence was imposed.

REVIEW JUDGMENT

SHIVUTE J (LIEBENBERG J concurring):

[1] The accused persons were convicted of Stock Theft and sentenced to 30 months imprisonment on count 1 and convicted in respect of count 2 of Theft and sentenced to 6 months imprisonment to run concurrently with the 30 months' imprisonment in count 1.

[2] I directed the following query to the learned magistrate:

'1. How did the court satisfy itself that all accused persons admitted all the elements of the offences if there were no questions asked pertaining to the dates when the offences were committed and the places where the offences were committed?

2. Did the court satisfy itself that the accused persons were aware that what they were doing was wrong and that they could be punished if no questions were asked pertaining to that?'

[3] The learned magistrate replied as follows:

‘Ad para 1

Indeed there was an oversight on the part of the court. In future the trial Magistrate will try to ensure that those aspects are canvassed. The error is sincerely regretted. However, perhaps substantial justice was done as the questioning was done in relation to the charge sheet to which they pleaded such charge sheet clearly stated the date and place. Some of the accused alluded to time e.g. on the date in question or on any day in question and they were all referring to the same or said cow. The oversight is however sincerely regretted. I stand guided by the High Court.

Ad para 2

Again the trial magistrate concedes that no direct question was asked along those lines. It is believed however, that the aspects in question was covered because the accused understood the technical meaning of the offence Theft, it is the trial magistrate’s considered view that were a doli capax person says I stole, the word steal carries a technical meaning and an ordinary meaning. And in both senses, the aspects pointed out by her ladyship are covered. The words are then further clarified by the accused’s admission that they had no lawful right to do so and also that they cannot come up with any defence thereto. That is what satisfied the court that the accused admitted all the essential elements of the offence. I however defer to the viewpoint of the High Court if I am wrong.’

[4] Section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 was designed to protect an accused especially an uneducated and undefended accused from the adverse consequences of an ill – considered plea of guilty (See S v Basson 1978 (2) SA 51D (C) 512 G). It has also been rightly pointed out that questioning in terms of section 112 (1) (b) can also operate in favour of the accused. The questions and answers must at least cover all the essential elements of the offence which the State in the absence of a plea of guilty would have been required to prove (See S v Mhize 1978 (1) SA 264 (N) 267).

[5] In the case of *S v Valede and Others* 1990 NR 81 (HC) at pg. 84, Levy J made the following remarks:

'It is important to appreciate that a plea of guilty is nothing more than the legal opinion formulated by the accused himself. He draws a conclusion from certain facts that he is guilty. The magistrate's questioning must be directed at ascertaining those facts for him, the magistrate, to decide whether the conclusion of law or opinion of the accused is justified. The magistrate is fully aware of the elements of the crime with which the accused is charged and these elements must be pertinently put to an accused. The charge itself must not be rephrased by the magistrate and then put to the accused. Consequently, where an accused is charged with theft in that he stole certain goods and has pleaded guilty to such charge, it is purposeless to ask him again 'Did you steal those goods?.' If the accused answers that question in the affirmative, the magistrate is in no better position in ascertaining whether the accused admits the elements of the crime. Theft has two essential elements: a 'contrectatio' or 'taking', and an 'animus furandi' or 'mens rea'. The questions must be directed to ascertaining whether these two elements are present.'

[6] Questions in terms of s 112 (1) (b) is to ascertain whether the accused admits all the allegations in the charge, including the time and place of the offence. Therefore, the questioning of the presiding officer should not only focus on covering the alleged facts and elements of the crime, but also matters pertaining to place and time of the alleged crime.

[7] In view of the above, I am not satisfied that the accused admitted all the elements of the offence. Therefore, the conviction cannot be allowed to stand.

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

- a) Convictions on counts 1 – 2 in respect of each accused and sentence are set aside.
- b) The record is returned to the magistrate in terms of s 312 of the Criminal Procedure Act 51 of 1977 and the magistrate is directed to comply with the

provisions of s 112 (1) (b) by questioning the accused persons pertaining to time and place of the offences, as well as the element of unlawfulness.

- c) In the event of a conviction, the magistrate must in considering an appropriate sentence have regard to the fact that the accused have been serving a term of imprisonment since 25 January 2016, when the sentence was imposed.

N N SHIVUTE

Judge

J C LIEBENBERG

Judge