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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: R04/2023

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

THE STATE

And

BANTAKILE PIET NZANZA

Accused

CORAM:

DANISO, J *et* MAHLANGU, AJ

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 15 March 2023.

- [1] This is a Special Review in terms of s304 (4) of the Criminal Procedure Act 51 of 1977 ("The CPA"). The accused was convicted by the Hertzogville district court on 1 September 2022 for theft of a cellular phone. He was subsequently sentenced to a fine of R2000.00 in default of payment of the fine, to undergo

thirty (30) months' imprisonment. The sentence was wholly suspended for a period of five (5) years with conditions.

- [2] The accused was convicted on the basis of his guilty plea tendered by means of a statement in terms s112(2) of the CPA ("the s112(2) statement") in which he made the following averments:

"I the undersigned, Piet Nzanza,

- 1. Admit that I am an accused person in this matter and I fully understand the allegations levelled against me as per charge sheet.*
- 2. I understand the nature, content and implications of this statement.*
- 3. I plead guilty to the charges freely, voluntarily and without undue influence whilst in sound and sober senses.*
- 4. I plead guilty to the charge of theft in that on or about the 6th of July 2022 and at or near 2[...] M[...], Hertzogville in the district of Boshoff, I did unlawfully and intentionally steal the following item to wit; a cellphone (mobicel) valued at R700.00. The property was in lawful possession of Mamosa Chaka.*
 - 4.1. I further admit that the incident took place in the jurisdiction of this honourable court. On the day of the incident I had gone to see my lady friend at her house which is next to my half- sister's house. My half-sister is the complainant in this matter. As I was sitting with my lady friend, she got up and went on about doing her chores around the house it was just after mid-day. I then decided to go visit my half-sister while my lady friend was busy in her house. When I got to the complainant's house I knocked but Immediately noticed that there was no one in the house. I then turned the door knob to*

check or to ensure that indeed no one is there. As I grabbed the door knob or handle and opened the door it opened and it was unlocked. I then walked into the house and called out the complainant's name but no one answered. I then noticed a cell phone on the table. I decided to take the cell phone and I did take it and immediately left the house. I went back to my lady friend's house and remained there until I left. The complainant was not back at her house when I left my lady friend's place. The next day at about 08:00 I went back to my sister's house and I gave her, her cell phone and told her that I took it yesterday when I came looking for her and I took it for safekeeping as I thought anyone could enter her house and take it as it was just lying on the table and the door was not locked. She then told me to wait for bit inside the house and she walked out. A short while later while we were sitting in the house, police officers arrived and I was taken to the police station where I was charged for theft of a cell phone..."

- [3] Pursuant to the conviction and sentencing of the accused, the senior magistrate forwarded the record of the proceedings for special review on the basis that in the s112(2) statement, it is not clear:

"whether it was admitted that the accused had the intention to permanently deprive the owner of the cell phone as per averment in the charge. It is well founded law that such element is essential to constitute the offence of theft..." and although it was admitted that the accused person had the intent to steal, the facts upon which the admission is based is set out in the 2nd last and last paragraph of the section 112(2) statement in which it is indicated that the cell phone was taken for safekeeping and returned the next day as it was left unattended to. The complainant is the sister to the accused person."

[4] Based on these reasons, it is submitted by the senior magistrate that the s112 (2) statement discloses a defence therefore, a conviction should not have ensued.

[5] From the record of the proceedings it can be established that the presiding magistrate's comments were requested by the senior magistrate and in his response, the presiding magistrate stated that:

"...as to whether the accused had the intention to deprive the complainant my view is that the offence of theft was committed when he took the cell phone and left the intention may not have been to deprive permanently the accused ought not to have been convicted even though the prosecutor accepted the plea..."

[6] The senior magistrate's contentions are supported by the Director of Public Prosecutions ("the DPP"). I am sincerely grateful to Advocates Mkhabela and Chalale for their prompt and well-reasoned response to my request for their invaluable inputs.

[7] The issue that arises in these proceedings is whether the conviction of the accused based on the acceptance of the s112 (2) statement was in accordance with justice.

[8] In terms s112(2), an accused may be convicted based on the written statement handed in by his legal representative if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty in that, all the elements of the offence to which the accused has pleaded guilty have been established in the statement. As correctly pointed out by the senior magistrate and the DPP, theft involves the unlawful and intentional appropriation of property with the intention of permanently depriving the owner of ownership.¹

¹ CR Snyman, *Criminal Law* in the 7th edition 2020 at page 429.

- [9] The examination of the s112(2) statement reveals that the essential element of the theft offence namely, intention to permanently deprive the complainant of the ownership of the cell phone was not admitted instead, the accused explained that his intention for taking the cell phone was merely to keep it safe for the complainant after he found the complainant's house unlocked and the cell phone lying on the table. He was concerned that anyone could enter the house and take it. He returned it the next day as by the time he left, the complainant was still not back home.
- [10] Lack of intention can be a defence to the offence of theft. The provisions of s112(2) requires a court to question an accused with reference to the lack of an admission to any allegations in the charge and the defence raised to the charge in order establish that the accused was indeed guilty of the offence in question.
- [11] I am aligning myself with Liebenberg, J's conclusions in *S Kondo*² namely that: the s112(2) statement should not be a simple regurgitation of what appears in charge sheet. The facts and the basis on which the plea is tendered must be clearly set out, if they are not, the presiding officer should put questions to the accused in order to satisfy himself that the accused admits the facts of the case which underlie the criminal charge, whether or not the accused is assisted by a legal representative in preparing the statement.
- [12] From the s112(2) statement, it is not clear beyond a reasonable doubt that the accused's action in taking the cell phone was intended to permanently deprive the complainant of the ownership thereof thus guilty of theft and where there is doubt that the accused is guilty of the crime he had pleaded guilty to, the provisions of s113 of the CPA come into play in that, the court must record a plea of not guilty and require the prosecutor to proceed with the prosecution.³

² **2012 JDR 0553** (Nm).

³ *S v Tshumi & others* **1978 (1) SA 128** (N); **[1978] 1 ALL SA 273** (N); *Shiburi v S* **[2018] ZASCA 101; 2018 (2) SACR 485** (SCA) at para 19F-G.

[13] Having regard to the facts of this matter, I am of the view that the presiding magistrate misdirected himself by convicting the accused based on a s112(2) statement which raises a defence to the charge. Accordingly, the proceedings in this matter were not in accordance with justice. The conviction and sentence cannot stand. The proceedings must be set aside.

[14] In the circumstances, the following order is made:

1. The conviction and sentence is set aside.
2. The matter is remitted to the magistrate's court to start *de novo* before another magistrate.

NS DANISO, J

I concur and it is so ordered.

EM MAHLANGU, AJ