VERSLAGWAARDIG:JA/NEE
SIRKULEER ONDER LANDDROSTE:JA/NEE
SIRKULEER ONDER REGTERS:JA/NEE

IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE DIVISION)

KIMBERLEY
CASE NO.:221/2001
DATE:04-05-2001

Review judgment:

THE STATE

versus

JAN OLYN **ACCUSED 1**

KERNEELS CORNELIUS WITBOOI **ACCUSED 2**

CORAM: KGOMO J et MAJIEDT J

J U D G M E N T

MAJIEDT J:

1. The two accused were charged with stock theft, it being alleged that they had unlawfully and intentionally stolen two goats.

2. They pleaded guilty and were convicted as charged after the Magistrate had questioned them in terms of section 112(1)(b)

of Act 51 of 1977 (*"the Act"*) and were each sentenced to a fine of R4000.00 or one year imprisonment half of which was conditionally suspended for 5 years.

3. On review I queried the following with the Magistrate:

> "2. *Is the section 112(1)(b) questioning sufficient to establish the guilt of the accused?*
> *More particularly: - does the Magistrate's questioning of both accused elicit sufficient acknowledgement from the accused as to:*
>
> *(a) unlawfulness (i.e. absence of consent from the owner to remove and slaughter the goats); and*
>
> *(b) knowledge of unlawfulness (i.e. whether they knew that it was a punishable criminal offence to remove and slaughter the goats).*
>
> *3. Why were the accused not informed of the possibility of payment of the fine in instalments in terms of section 297(5)(b) of Act 51 of 1977?*
> *See: S v Motlaung 1993(2) SACR 214 (NC);*
> *S v Dandiso 1995(2) SACR 573(W);*
> *S v Zwane 1997(1) SACR 326(W)."*

4. The Magistrate's response to the aforementioned is that:

4.1 he was of the view that, since both accused had said that they were not *"entitled to slaughter the goats"* and since they had pleaded guilty to theft, their guilt had been properly established; and

4.2 he had noted the judgments on the application of the

provisions of section 297(5)(b) of the Act and would avoid the recurrence of such an error in future.

5. The Magistrate put the following question to accused one, in the course of the section 112(1)(b) questioning:

> *"Were you entitled to slaughter them (the goats) for your own consumption?"*

To this question accused one replied in the negative.
Accused two was simply asked what had happened, after he had admitted being present on the complainant's farm on the date in question. He furnished a brief narrative which included, *inter alia,* the following: *"I was not entitled to slaughter the goats of Thomas".*

6. I am of the view that the aforementioned explanations fall well short of establishing the accused's knowledge of unlawfulness. It is certainly not sufficient to establish beyond reasonable doubt that an accused person knew that he was committing a criminal offence by removing and slaughter the goats belonging to another if he simply says that he was not "*entitled"* to do so.

7. The objective of questioning by a Court in terms of section 112(1)(b) of the Act is to determine whether an accused person admits all the essential elements of the offence and if

he is in fact guilty of the offence as charged;

S v Matlabeng & 'n ander 1983(4) SA 431(O) at 434 A;

S v Nkosi & 'n ander 1984(3) SA 345(A) at 353D.

Any reasonable doubt as to whether an accused unequivocally admits all the material elements of the offence should accrue to the benefit of the accused.

See: ***S v Naidoo*** 1989(2) SA 114(A) at 120J-121E;

S v Nagel 1998(1) SACR 218(o) at 220c-220i.
S v W & andere 1999(2) SACR 640 (C) at 644b.

8. In imposing a sentence of a fine the object of the exercise is to keep the offender out of prison. Such objective is defeated if the offender is not granted an opportunity to make deferred payments in terms of section 297(5)(b) of the Act.

See: ***S v Motlaung*** 1993(2) SACR 214 (NC).

9. In the premises, the conviction and sentence of both accused are set aside and the matter is remitted to the Magistrate for the proper compliance of the provisions contained in section 112(1)(b) and to act in accordance with the provisions contained in section 312(2) of Act 51 of 1977, if necessary.

In the event that a conviction follows and the Magistrate imposes a sentence of a fine which is not wholly suspended, the Magistrate should apply the provisions contained in section 297(5)(b) of Act 51 of 1977.

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S.A. MAJIEDT

JUDGE

I agree.

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F.D. KGOMO
JUDGE