

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	YES
Circulate to Regional Magistrates:	NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG**

HIGH COURT REF: HC 12 /2023

MAGISTRATE'S COURT CASE NO: RE 2781/2019

In the matter between:-

THE STATE

AND

TSHEPO ALFRED NTHAMA

Accused

Coram: DJAJE AJP et MFENYANA J

Heard: Matter disposed of without a hearing in terms of section 304(4) of the Criminal Procedure Act 51 of 1977.

Delivered: 01 November 2023

Summary: Criminal law and procedure – section 112(2) of the Criminal Procedure Act 51 of 1977– plea of guilty – elements of offence not admitted.

ORDER

- (i) The proceedings against the accused, Tshepo Alfred Nthama under case number RE2781/19 are reviewed and set aside.**
- (ii) The conviction and sentence are set aside.**

REVIEW JUDGMENT

Mfenyana J

[1] In this matter the accused, Mr Tshepo Alfred Nthama, appeared in the Ga-Rankuwa Magistrates Court on a charge of housebreaking with intent to commit an offence unknown to the State. The charge-sheet alleged that the accused:

"...did unlawfully and intentionally break open and enter the house of Thokozile Mnguni with the intent to commit a crime unknown to the state."

[2] On his appearance before the court on 20 February 2020, and when the charge was put to him, he pleaded guilty in accordance with section 112(a) of the Criminal Procedure Act 51 of 1977 (the CPA).

[3] The accused was legally represented during the proceedings. Having pleaded guilty to the charge, the accused handed in a written statement in terms of section 112(2). The following excerpt from the accused's statement is telling:

" ... I am the accused in this matter

I elect to plead freely and voluntarily, without being unduly influenced or coerced, guilty to the charge of housebreaking with intention to commit an offence unknown to the prosecutor.

I was walking in the streets, I passed a house I did not know and the members were sitting in the verando. I then went around and jumped fence to gain entry into the yard. I then proceeded to look around the yard for any metal scraps then a young girl saw me approaching the door and screamed. I was immediately apprehended and taken to jail.

I had no permission to enter the home, and had no intention to commit a crime. I was just looking for metal scrap."

[4] Following upon the accused's guilty plea and section 112(b) written statement, the trial magistrate proceeded to question the accused in terms of section 112(1)(b) of the CPA. The questioning went along the following lines:

"COURT TO THE ACCUSED:

Q: Do you confirm the contents of the statement?

A: Yes

COURT TO THE PROSECUTOR:

Q: Does the State accept the plea?

A: Yes

Statement is marked as Exhibit A.

The court is then satisfied that the accused admits all the allegations in the charge and the court is indeed convinced that the accused is guilty as charged."

The accused was thereafter convicted as charged in accordance with his plea and sentenced to pay a fine of R1000-00 or in default of payment thereof to undergo three months imprisonment wholly suspended for a period of five years "on condition that the accused was not found guilty of housebreaking with intent to commit a crime unknown to the State, committed during the period of suspension."

[5] The matter served before this court by way of a special review in terms of section 304(4)¹ of the CPA at the instance of the senior magistrate of Ga-Rankuwa. The referral, *inter alia*, contained the following comments:

“SPECIAL REVIEWS: CASE NUMBER – RE 2781 /2019

S V TSHEPO ALFRED NTHAMA

- 1) *The case send on special review is not reviewable*
- 2) *The presiding officer, Ms Maithufi convicted the accused person of house breaking with the intent to commit a crime unknown to the state even though the accused person did not admit all the elements of the offence.”*

[6] The senior magistrate’s commentary on the proceedings, *inter alia*, records that:

- “1) *Following an extensive investigation / quality assurance which was conducted by Mr Stapelberg on behalf of the Magistrates’ Commission I was directed to send a number of cases finalised by Ms Maithufi on special review.*
- 2) *In the attached case Presiding Office Ms Maithufi convicted the accused persons of house breaking after accepting a plea in terms of Section 112 (2) of the Criminal Procedure Act 51 of 1977.*

¹ Section 304(4) reads:

“If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section. ”

3) *The accused person in his Section 112 (2) statement alleges that he never entered the house.*

4) *This matter was brought under the attention of Ms Maithufi for her comments and her comments are attached hereto.”*

[7] In essence, the response from the trial magistrate, Ms Maithufi is that she made a mistake as a result of having to work in an environment that is not conducive for her health condition. She ultimately requested to be transferred to the Pretoria Magistrates' Court.

[8] As it emerges from the record, in convicting the accused the trial magistrate did not ascertain that the accused admitted all the elements of the crime of housebreaking. Housebreaking consists in unlawfully, intentionally breaking and entering premises with intent to commit a crime.

[9] It will be helpful at this stage to make reference to section 112(2) of the CPA. It reads:

“112. Plea of guilty

(1) ...

(2) *If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the*

court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement. ”

[10] There is a long line of cases in our courts to the effect that the manifest purpose of section 112 is to ascertain whether the accused truly admits all the elements of the offence with which he or she is charged, and, in particular, whether the accused admits the allegations in the charge to which he or she has pleaded guilty. Thus, the trial court may convict the accused of the offence charged, on his or her plea of guilty, only “if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty.”²

[11] I pause here to mention that section 112(b) must be read with section 113 of the CPA. To the extent here relevant, section 113(1) reads:

“113. Correction of plea of guilty

(1) *If the court at any stage of the proceedings under section 112(1)(a) or (b) or 112(2) and before sentence is passed is in doubt whether the*

² See in this regard: section 112(b) of the CPA.

accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation."

[12] As already indicated, before convicting an accused on a plea of guilty in terms of section 112(2), the court has a responsibility to ascertain that the accused admits all the elements with which he/she is charged. This, the court does by putting to the accused, questions which elicit information which tends to prove the elements of the offence.

[13] If after a number of questions, it appears that the accused in fact wishes to advance a defence or justification for his or her conduct, a plea of not guilty must be entered.³ In *S v Naidoo* 1989 (2) SA 114 (A)⁴ the court stated that:

“(W)here an accused’s responses to the questioning suggest a possible defence or leave room for a reasonable explanation other than the accused’s guilt, a plea of not guilty should be entered and the clarified by evidence.”

[14] In this case, the accused stated that he had no intention of committing a crime. He was ‘just looking for scrap metal’. In these circumstances the accused’s explanation fell short of an admission of the essential elements of the offence charged, to sustain a conviction. His answers suggest that the accused may not have appreciated the wrongfulness of his actions. It raises a number of possibilities which ought to have been clarified by evidence. Ultimately, it calls into question whether the accused admitted all the elements of the crime of housebreaking.

³See in this regard; *S v Somyali* 1979(2) SA 274 (EC).

⁴Paragraph 18.

[15] A court faced with an accused person's section 112(2) statement, ought not, in my view, merely deal with such as a mere administrative function. It ought to be alive to the fact that it is performing a judicial function which impacts on the rights of the accused person before it.

[16] As to the judicial duty of the magistrate in this case, and in general, it is trite that she ought to have satisfied herself that all of the elements of the offence charged were established before convicting the accused. Her role was, broadly speaking, that of an inquisitor and not an umpire.

[17] On this score, it bears mentioning that in determining whether the accused's answers in response to the trial court's questions are adequate for purposes of section 112(b), the trial court is not required to evaluate such answers as if it were weighing evidence to decide on the guilt or innocence of the accused. Rather, its task is simply to interpret them "to see whether they substantiate the [guilty] plea". As Didcott J aptly put it in *S v Mkhize* 1978 (1) SA

264 (NPD) “[T]he test, in short, is what the accused person said, not what the court thinks of it.”⁵

[18] The foregoing ineluctably leads to one conclusion that the proceedings in the trial court were irregular and therefore not in accordance with justice. They fall to be set aside. This equally applies to the resultant conviction and sentence.

[19] This then raises the question whether it would be appropriate, in the present circumstances, to remit the matter to the magistrates’ court for a retrial. I am of the view that this would not serve any practical purpose and would in fact be prejudicial to the accused. In view of the fact that the accused’s conviction and sentence have been set aside, any amount paid by the accused, if any, in respect of the fine imposed, that amount should be refunded to the accused.

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

⁵ At 268 A-B.

- (i) The proceedings against the accused, Tshepo Alfred Nthama under case number RE2781/19 are reviewed and set aside.**
- (ii) The conviction and sentence are set aside.**

S MFENYANA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

I agree.

J T DJAJE

**ACTING JUDGE PRESIDENT OF THE HIGH
COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG**