

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Penda Hangula</i>	Case no: CR 41/2023
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J <i>et</i> Honourable Mr Justice Kessler J	Delivered on: 9 November 2023
Neutral citation: <i>S v Hangula</i> (CR 41/2023) [2023] NAHCNLD 120 (9 November 2023)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction and the sentence are set aside.2. In terms of s 312 of the Criminal Procedure Act 51 of 1977 as amended, the matter is remitted to the magistrate to question the accused in terms of s 112(1)(b) pertaining to his intention whilst committing the offence and the manner in which he gained entrance.3. The period already spent in custody should be considered if the accused is convicted and sentenced afresh.	
Reasons for the order:	
KESSLAU J (SALIONGA J concurring)	

[1] The matter from the Magistrate's court of Eenhana is before this court for review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused was charged with one count of housebreaking with intent to steal and theft. He pleaded guilty and the court invoked the provisions of s 112 (1) (b) of the Criminal Procedure Act 51 of 1977, as amended (the CPA). Thereafter he was convicted and sentenced to 12 months imprisonment.

[3] A query was forwarded to the magistrate stating the following:

'It appears from the record of proceedings that firstly, the accused was not questioned regarding his intention before or at the time of breaking into the property and secondly, he was not questioned on how he gained entrance to the property. Was the magistrate satisfied that the accused admitted to all the elements of the offense considering the above omissions?'

[4] The magistrate responded as follows:

'1. The accused's intention is to steal and he did it with intention of selling and eat eatable goods.
2. The presiding officer was under the impression that since the charge flamed Housebreaking with the intent to steal, he might gained entrance by using force or not but the accused was not permitted to do what he did.' (sic)

From the reply by the magistrate it appears that she made certain assumptions and deductions from the answers given by the accused without covering the essential elements of the offences with proper questioning.

[5] It is trite law that questioning in terms of s 112 (1)(b) of the CPA has a twofold purpose, namely, to establish the factual basis for the plea of guilty and to establish the legal basis for such plea. From the admissions, the court must conclude whether the legal requirements for the commission of the offence have been met. These include questions of unlawfulness, *actus reus* and *mens rea*. The court can only satisfy itself if all the admissions adequately cover all the elements of the offence.

[6] Regarding the intention at the time of committing the said offense, Justice Shivute in *S v Kaninab*¹ stated as follows:

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S v Kaninab (CR 75/2016) [2016] NAHCMD 356 (11 November 2016).

'In the present case, the accused was charged with the offence of housebreaking with intent to steal and theft. The state alleges that the accused's intention when he entered the house was to steal. In this regard intent is an essential element of the offence which was not covered by the magistrate's questioning. The questions posed by the learned magistrate as to why he pleaded guilty and what he did inside the house cannot be accepted as a question attempting to establish the intention of the accused at the time of entering the house. The court could not have satisfied itself that the accused admits all the elements of the offence, if the questions posed to him did not cover all the elements of the offence particularly the element of intention.'

[7] Regarding the second part of the query, the breaking into or the removing of an obstacle to gain entrance into the property is an essential element of the offence of housebreaking and without asking questions to cover this aspect the magistrate could not have been satisfied that the accused admitted to all the elements of the offence.²

[8] In the result the following order is made.

1. The conviction and the sentence are set aside.
2. In terms of s 312 of the Criminal Procedure Act 51 of 1977 as amended, the matter is remitted to the magistrate to question the accused in terms of s 112(1)(b) pertaining to his intention whilst committing the offence and the manner in which he gained entrance.
3. The period already spent in custody should be considered if the accused is convicted and sentenced afresh.

Judge(s) signature	Comments:
KESSLAU J:	None
SALIONGA J:	None

² *S v Snyders* (CR 32/2020) [2020] NAHCMD 173 (12 May 2020); *S v David* 1994 NR 39 (HC); *S v Markus and Others* 1992 NR 230 (HC); *S v Haiduwa* (CR 39/2023) [2023] NAHCNLD 116 (2 November 2023).