

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Phillipus Benjamin</i>	Case no: CR 42/2023
	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 Benjamin</i> (CR 42/2023) [2023] NAHCNLD 121 (9 November 2023)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction of housebreaking with intent to steal and theft is set aside and is substituted with a conviction of theft.2. The sentence is set aside and substituted with 12 months' imprisonment, antedated to 25 October 2021.	
Reasons for the order: KESSLAU J (SALIONGA J concurring)	
<p>[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).</p>	

[2] The accused was charged with the offense of housebreaking with intent to steal and theft. He pleaded guilty to the charge and after questioning by the Magistrate in terms of s 112(1)(b) of the CPA was convicted and sentenced on 25 October 2021 to '18 months direct imprisonment of which 6 months are suspended on condition that accused is not convicted of housebreaking or theft during the period of 3 years'.

[3] More than two months later, on 10 January 2022, the matter was received for review. On 18 January 2022 a query was sent to the Magistrate regarding the explanation of the accused's right to legal aid. The magistrate in her reply to the query gave a satisfactory explanation. The reply however was received a little over one year and eight months after the query was sent. There was no explanation from the Magistrate on why it took her that long to prepare such a simple reply. The accused has since completed his sentence. Delaying reviewable matters does not serve the administration of justice and is a negative reflection on the commitment of this magistrate.

[4] On closer inspection of this matter it appears that there are additional concerns with the proceedings. Considering that the first query took that long to reply to it serves no purpose to return the record for the magistrate's input.

[5] The first concern is that the intention at the time of breaking into the house was not covered in the magistrate's questioning. The accused was questioned on how he broke into the property but was never asked why he decided to break into the property in the first place. The crime of housebreaking with the intent to steal was thus not proved. The magistrate could only have convicted of theft on the admissions made by the accused during questioning.¹

[6] Secondly the condition of suspension is confusing in its formulation in that it can lead to misinterpretation as to which three years the magistrate is referring to as it does not indicate that the offense should not be 'committed' within the period of suspension. Additionally the sentence refers to the offense of 'housebreaking' which does not independently exist in our law.²

¹ *S v Shipena* (CR 36/2023) [2023] NAHCNLD 105 (11 October 2023); *S v Kaninab* (CR 75/2016) [2016] NAHCMD 356 (11 November 2016).

² *S v Joseph* (CR 28/2022) [2022] NAHCMD 181 (11 April 2022).

[7] In *S v Joseph* (supra) it was explained as follows:

'It is trite that an essential requirement of a suspensive condition is that it must be formulated in such a way that it does not cause future unfairness or injustice; neither must it be too wide or vague. The reason for the required unequivocal formulation of a suspensive condition is because the non-compliance with a condition of a suspended sentence has grave consequences for an accused. The primary object is, after all, that the accused must understand what he or she has to do or avoid in order to ensure that the sentence is not put into operation. If the condition of suspension is too wide, it is bound to lead to uncertainty and misinterpretation.'³

[8] Considering the above errors made by the Magistrate it follows that this court should interfere with the outcome. Normally the matter would have been remitted in terms of s 312 of the CPA for additional questioning however, considering that the accused served his sentence by now, such outcome will be severely prejudicial to the accused.

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

1. The conviction of housebreaking with intent to steal and theft is set aside and is substituted with a conviction of theft.
2. The sentence is set aside and substituted with 12 months' imprisonment antedated to 25 October 2021.

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

³ *S v Simon* 1991 NR 104 (HC).