

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT
PRACTICE DIRECTION 61

Case Title: The State v Immanuel Uirab	Case No: CR 121/2023
High Court MD Review No: 1726/2023	Division of Court: High Court, Main Division
Coram: Liebenberg J <i>et</i> Shivute J	Delivered: 13 November 2023
Neutral citation: <i>S v Uirab</i> (CR 121/2023) [2023] NAHCMD 730 (13 November 2023)	
ORDER: <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 in order for her to question the accused in terms of s 112(1)(b) pertaining to his intention prior to committing the offence.3. In sentencing the accused afresh, the period already served in custody must be taken into account.	
REASONS:	

LIEBENBERG J (SHIVUTE J concurring):

[1] Before court is a review judgment emanating from the Magistrate's Court of Keetmanshoop where the accused was arraigned on a charge of housebreaking with intent to steal and theft. The accused pleaded guilty and was convicted on his guilty plea and sentenced to 24 months' imprisonment.

[2] When the matter came before me on review, I directed the following query to the trial court: 'Having failed during the court's questioning in terms of s 112(1)(b) of the Criminal Procedure Act to establish whether the accused had the intent to steal when entering the house, on what basis was the accused convicted as charged?'

[3] In response, the magistrate gives a protracted account of why according to her, the accused was so convicted, the gist of it being that the accused's intention to steal existed from the time he entered the complainant's house, until such time that he reached his home. It would appear the explanation by the magistrate essentially amounts to an analysis of the accused's response as though he had been tried and now his evidence was being evaluated.

[4] It is trite law that questioning in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) is twofold, namely, to establish the factual basis for the plea of guilty and to establish the legal basis for such plea. The accused, who was a worker at the complainant's house, intimates that when he entered the house to return tools, it was then that he saw the pistol and subsequently, the phone, which he proceeded to appropriate. The authorities make it clear that from the admissions made by the accused during a court's questioning in terms of s 112(1)(b) of the CPA, the requirements of the offence ie, unlawfulness, *actus reus* and *mens rea* must be established.¹

[5] Intention is an essential element of the offence of housebreaking with *intent* to steal and theft and it goes without saying that it must be clearly established before a conviction can follow. In the present instance, the intention of the accused to steal, prior

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

to or whilst breaking into the house was not clearly covered during the court's questioning. It is not for the court during its questioning to draw inferences or speculate as to the intention of the accused. What is evident from the record is that the questioning by the trial court points towards the intention of the accused whilst already inside the house, which intention, pertains to the second part of the offense, ie theft and not that of the first part, which is to steal. The conviction, and consequently, the sentence, fall to be set aside.

[6] In the result, it is ordered:

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 in order for her to question the accused in terms of s 112(1)(b) pertaining to his intention prior to committing the offence.
3. In sentencing the accused afresh, the period already served in custody must be taken into account.

J C LIEBENBERG
JUDGE

N N SHIVUTE
JUDGE