

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Frans Valombola Haiduwa</i>	Case no: CR 39/2023
	Division of Court: High court Northern Local Division
Heard before: Honourable Lady Justice Salionga <i>et</i> Honourable Mr Justice Kessler	Delivered on: 2 November 2023
Neutral citation: <i>S v Haiduwa</i> (CR 39/2023) [2023] NAHCNLD 116 (2 November 2023)	
The order: <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 confirmed.	
SALIONGA, J and KESSLAU, J (concurring)	
[1] This matter came on review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA). The Magistrate did not explain why it took him/her more than a year and 2 months' to reply to my query.	

[2] The accused appeared in the magistrate's court for the district of Eenhana charged with the offence of housebreaking with intent to steal and theft as follows:

'In that upon or about the 20th day of November 2021 at Eenyika village in the district of Eenhana, the said accused intentionally and unlawfully broke into and entered Ndinela Fillemon's sleeping room, with intent to steal and intentionally and unlawfully stole property of or in the lawful possession of Ndinela Fillemon to wit: a mattress, 2 pillows and 2 blankets. The total value of the property is N\$ 800.00. (SIC)

[3] The accused pleaded guilty to the charge and after questioning in terms of s 112(1) (b) of the CPA, he was convicted as charged and sentenced to 12 Months' imprisonment.

[4] During the questioning, the magistrate failed to ask the accused person to explain how or in what manner he broke into the complainant's room as alleged in the annexure to the charge. That was necessary in order to clearly establish that there was a breaking in.

[5] Consequent to the above, a query was directed to the presiding magistrate in the following terms:

'The manner in which the undefended accused broke in was not established during questioning in terms of section 112((1)(b) of Act 51 of 1977 as amended apart from a leading and compound question asked; how was the Magistrate satisfied that all the elements of the offence charged including break in were admitted?'

[6] The magistrate responded to the query as follows:

'The fifth question accused responded to the state's allegations that he did broke into sleeping room of the complainant and further confirmed that he was not permitted by the owner.'

[7] From the above reply by the presiding officer, it is clear that he/she does not appreciate the importance of a court having to satisfy itself with one of the very important

components that constitutes the offence charged i.e. break-in. It is trite that a mere admission of breaking-in without establishing how or in what manner such break-in occurred is insufficient proof of the offence involving housebreaking. This is so especially where legal terminologies/jargon such as this are used and where an accused is unrepresented. It should be mentioned here that an accused person needs to admit facts (in terms of s 112 (1) (b) of the CPA) that constitutes the offence which the court needs to rely on in order to satisfy itself that he/she is in fact guilty before convicting him on his own guilty plea. The purpose here is also to protect an accused from an ill-conceived plea of guilty. (own emphasis)

[8] The importance of establishing how an accused broke-in was highlighted in *S v Snyders*¹ where the following was stated:

'It is trite law that a charge of housebreaking with intent to steal and theft has a component of a 'breaking' consisting of the removal or displacement of some obstacle which prevents the offender from entering the house or structure and which forms part of the house or structure itself. For the said offence to be committed, it should be clear that there was a breaking in. The manner in which the breaking occurred should be apparent from the record as that is the process in which it will be ascertained that indeed there was a breaking. As opposed to whether for example the entry is gained through a broken window pane or an open door, which act falls short of breaking in *legalis sensu*. See: *S v David*² and *S v Markus and Others*.³

[9] We therefore find that it was incumbent upon the Magistrate in this matter to determine not only how the complainant's room was broken-into but also whether there was an obstacle fixed to the house which had to be moved or broken in order to enable the accused to gain entry to the house or whether the accused could enter the house without embarking on any of the aforesaid acts.

[10] It should be noted that accused in this matter was sentenced on 10 February 2022, a

¹ *S v Snyders* (CR 32/2020) [2020] NAHCMD 173 (12 May 2020).

² *S v David* 1994 NR 39 (HC).

³ *S v Markus and Others* 1992 NR 230 (HC).

query was sent to the Magistrate on 14 June 2022. However without explanation, the Magistrate only responded to the query after a year and 2 months'. That defeats the purpose of review and magistrates are sternly cautioned to desist from not complying with the provisions of the law. Since the accused has already served his sentence, there is no need to remit this matter in terms of s 312(1) of the Criminal Procedure Act.

[11] With the aforesaid not having been determined by the Magistrate, the conviction of the accused on a charge of housebreaking with intent to steal and theft cannot be allowed to stand. It has to be set aside and be substituted with a conviction on a competent verdict of theft. However when regard is had that accused had previous conviction, in our view the sentence imposed is in order and has to be confirmed.

[12] In the result, it is ordered that:

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 confirmed.

J. T. SALIONGA JUDGE	E. E. KESSLAU JUDGE