



**CASE NO.: CR 14/2011**

**IN THE HIGH COURT OF NAMIBIA**

**HELD AT OSHAKATI**

In the matter between:

**THE STATE**

**and**

**MOONGELA BENJAMIN**

**CORAM:                               LIEBENBERG J & TOMMASI J**

*High Court Review ref no: 185/2010*

Delivered on:    18 May 2011

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**REVIEW JUDGEMENT**

**TOMMASI J:**    [1]    The accused was charged with housebreaking with the intent to steal and theft in the magistrate's court for the district of Outapi. He pleaded guilty and was questioned in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977. He was hereafter convicted of housebreaking with the intent to steal and theft and theft. He was sentenced to eight months imprisonment on the charge of housebreaking

with intent to steal and theft and fined N\$1000.00 (one thousand Namibian Dollars) or twelve months imprisonment on the conviction of theft.

[2] When the matter came before me on review, I directed a query to the magistrate to ascertain why the accused who was charged with one count of housebreaking with intent to steal and theft was convicted and sentenced on two separate counts i.e housebreaking with intent to steal and theft and a further count of theft. The magistrate replied as follow:

*“During questioning of the accused in terms of section 112(1)(b) the accused told the Court that his specific intention of breaking was to take money only.*

*He then completed his intention by first taking the money and then formed a different intent of taking other goods and this is clear from his answer when he was asked as to when he decided to take the other goods.*

*The court was therefore satisfied that the accused had committed two crimes that is housebreaking with intent to steal and theft of the cash and secondly theft of the other goods.*

*Theft being a competent verdict in this regard the court found it proper to convict him accordingly even though he was not charged with theft as a separate charge.”*

[3] As is apparent from the above response the magistrate relied on the fact that theft is a competent verdict on the charge of housebreaking with intent to steal and theft to convict the accused of theft that he was not

charged with. Section 262(1) of the Criminal Procedure Act provides as follow:

*“If the evidence on a charge of housebreaking with intent to commit an offence specified in the charge, ... does not prove the offence of housebreaking with the intent to commit the offence so specified but the offence housebreaking with the intent to commit an offence other than the offence so specified or the offence of housebreaking with intent to commit an offence unknown or the offence of malicious injury to property, the accused may be found guilty of the offence so proved”*

[4] The view taken by the concerned judicial officer is, with respect, flawed for two reasons. As can be seen from the above section, housebreaking with intent to commit a crime is an offence on its own and so is theft. These two have been, as a rule of practice, charged as a single offence. Theft is therefore not a competent verdict on housebreaking with intent to steal, as is evident from the provisions of section 262, but a completely separate offence. Secondly the issue of a competent verdict only arises *“if the evidence on a charge does not prove the offence”*.

[5] What transpired in this matter is that the accused has been convicted and sentenced on a charge that was never put to him from the outset. This is contrary to the provisions of section 84 of the Criminal Procedure Act, which requires that the accused should be placed in a position to be reasonably informed of the nature of the charge(s). It is furthermore

contrary to the concept of a fair trial for the accused to have been informed only of one count and then convicted of two offences. (See S v MPONDA 2007 (2) SACR 245 (C))

[6] The State is *dominitus litus* and can decide to institute prosecution. It decides the number of charges to prefer against the accused and the function of the judicial officer is to adjudicate those charges preferred against the accused. The court could not, of its own accord, convict the accused of a charge, the details whereof he was never informed of, and to which he has not had the opportunity to plead to and to defend. This was completely irregular.

[7] In the premises the conviction of housebreaking with the intent to steal and theft and the sentence are confirmed; the conviction and the sentence of theft are set aside.

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**TOMMASI J**

**I concur**

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**LIEBENBERG J**