

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CR 26/2012

In the matter between:

**THE STATE**

and

**DAVID ASHIPALA**

**High Court NLD Review Case Ref No.: 183/2012**

**Neutral citation:** *The State v Ashipala* (CR 26/2012) [2012] NAHCNLD 08  
(15 November 2012)

**Coram:** LIEBENBERG J and TOMMASI J

**Delivered:** 15 November 2012

**Flynote:** **Criminal procedure** – Section 112 (1)(b) of the Criminal Procedure Act 51 of 1977 – Accused convicted on a charge of housebreaking with intent to steal and theft on his plea of guilty – When the court questioned

accused he denied breaking in – Material element of the crime not admitted – Provisions of s 113 should have been invoked.

**Summary:** The accused was convicted on his mere plea of guilty to a charge of housebreaking with intent to steal and theft. During the court's questioning pursuant to the provisions of s 112 (1) (b) of Act 51 of 1977 the accused denied breaking into complainant's house and admitted that entrance was obtained through an opening in the wall. Whereas all the elements of the crime charged with were not admitted, the court ought to have applied s 113 and noted a plea of not guilty. Conviction and sentence set aside and matter remitted to trial court.

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### ORDER

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1. The conviction and sentence are set aside.
2. The matter is remitted to the Magistrate's Court, Opuwo in terms of s 312 (1) of Act 51 of 1977 with the direction to act in terms of s 113 of the said Act.
3. In the event of a subsequent conviction the court, in sentencing, must take into consideration the sentence already served by the accused.

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### JUDGMENT

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LIEBENBERG J (TOMMASI J concurring):

[1] When the accused appeared in the Magistrate's Court for the district of Opuwo on a charge of housebreaking with intent to steal and theft, he pleaded guilty, and after being questioned pursuant to the provisions of s 112

(1)(b) of the Criminal Procedure Act 51 of 1977 ('the Act'), he was convicted and sentenced to a term of one (1) year imprisonment.

[2] The matter came before me as provided for by sections 302 and 303 of the Act, accompanied by a letter from the presiding magistrate in which she explains that the accused was erroneously convicted as one of the elements of the offence, namely, the breaking into the house, was not admitted by the accused. She concedes that in the circumstances she should have entered a plea of not guilty and proceeded to trial. The concession is properly made.

[3] During the court's questioning the accused admitted that, whilst doing some work at the complainant's house, he entered through an opening in the wall where a window frame or pane still had to be fitted, and thereafter took property from the house, belonging to the complainant, to the value of N\$10 381.

[4] The elements of the crime of housebreaking with intent to commit a crime are the following: (a) breaking and (b) entering (c) a building or structure (d) unlawfully and (e) intentionally. See *Snyman Criminal Law* 5 ed at 549. The law is well established that as far as it concerns the element of breaking, it is not required that actual damage to the structure is done and the mere removal or displacement of an obstacle which bars entry to the structure and being part thereof, will suffice. In the present instance there was no obstruction that barred the accused from entering which he first had to remove or displace, as he entered through an opening in a wall of the house due to be fitted with a window frame or pane (it is not clear which). In view thereof the accused could not have been convicted on his plea of guilty and in the circumstances the provisions of s 113 of the Act should have been invoked. Hence, the conviction on a charge of housebreaking with intent to steal and theft is not in accordance with justice and therefore cannot be permitted to stand.

[5] In the result, the court makes the following order:

- a. The conviction and sentence are set aside.
- b. The matter is remitted to the Magistrate's Court, Opuwo in terms of s 312 (1) of Act 51 of 1977 with the direction to act in terms of s 113 of the said Act.
- c. In the event of a subsequent conviction the court, in sentencing, must take into consideration the sentence already served by the accused.

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**JC LIEBENBERG**  
JUDGE

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**MA TOMMASI**  
JUDGE