



CASE NO.: CR 17/2012

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

APOLLUS JAHRS

HIGH COURT REVIEW CASE NO.: 1706/2009

CORAM: HOFF, J *et* SIBOLEKA, J

Delivered on: 29 February 2012

REVIEW JUDGMENT

HOFF, J: [1] The accused was convicted of the crime of housebreaking with intent to steal and theft and sentenced to four years imprisonment of which one year imprisonment was suspended for a period of 2 years on condition that the accused is not convicted of the crime of housebreaking with intent to steal and theft committed during the period of suspension.

[2] The accused had plead guilty and was questioned by the magistrate in terms of section 112 (1)(b) of Act 51 of 1977.

[3] One of the questions directed to the magistrate was as follows:

“Why was the element of *mens rea* (intention) not covered by the s. 112 (1)(b) questioning ?”

[4] The magistrate replied as follows:

“Upon reflection I concede that the question did not include the word ‘unlawful’ to establish *mens rea*. And more importantly the question, “why he did it ?” should have been asked. I therefore concede that *mens rea* was not covered and pray that the honourable reviewing judge set aside both conviction and sentence and remit the case back to establish *mens rea*.”

[5] This concession was correctly made by the magistrate.

[6] In the result the conviction and sentence are set aside and the matter is remitted to the presiding magistrate who is instructed to have the accused person brought before court for questioning in respect of the element of *mens rea only* and depending on the answer given by the accused person either to enter a plea of not guilty in terms of section 113 of Act 51 of 1977 and proceed with the trial or to convict the accused person and sentence him afresh with due regard to the term of imprisonment the accused had already served.

HOFF, J

I agree

SIBOLEKA, J