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**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
APPEAL JUDGMENT**

**CASE NO: CA 102/2013**

In the matter between:

**RAINTO NGIYELELWA LUBENI LUKAS SHOOMBE**

**APPELLANT**

**VS**

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Shoombe v State* (CA 102/2013) [2014] NAHCMD 62 (21 February 2014)

**Coram:**              HOFF J and SIBOLEKA J

**Heard on:**          15 November 2013

**Delivered on:**    21 February 2014

**Flynote:** Criminal Law: A misdirection on a point of law or that of fact must exist in order for this court to interfere with the trial court's decision on conviction or sentence.

**Summary:** This incident took place on the 31<sup>st</sup> of December 2012 at Erf 49, Nangolo Mbumba Street, Meersig, Walvis Bay. It was on a recently bought house wherein the owner was not residing due to electricity that was stopped. The appellant broke in through the back door that was locked and re-enforced with nailed planks. Doors were removed from their frame hinges, with other items loaded on to a taxi wherein the appellant was also riding. The attention of a police officer on patrol was attracted by the boot of the taxi that could not be closed due to the doors that were sticking out.

Held: There was a fresh breaking into the premises and the appellant was found with items from the premises. His various conflicting versions as to how he acquired the property was correctly rejected by the trial court.

Held: There were no misdirections committed by the Magistrate regarding the conviction and sentence.

Held: The appeal is dismissed.

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**ORDER**

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The appeal is dismissed.

The conviction and sentence are confirmed.

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## APPEAL JUDGMENT

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SIBOLEKA J (HOFF J concurring):

[1] The appellant and another appeared before the Magistrate's Court at Walvis Bay on the charge of housebreaking with intent to steal and theft, alternatively Possession of suspected stolen property in contravention of section 6 of the General Law Amendment Ordinance 12 of 1956.

[2] They pleaded not guilty and after trial only the appellant was convicted on housebreaking with intent to steal and theft and was sentenced to three (3) years imprisonment of which one (1) year was suspended for five (5) years on the usual conditions of good behavior. He now appeals against both conviction and sentence. The second accused was discharged in terms of section 174 of Act 51 of 1977.

[3] At the hearing of the matter Mr Kenny appeared for the appellant *amicus curiae* and Ms Esterhuizen for the respondent. The court appreciates both counsel's valuable arguments in this regard.

[4] The grounds of appeal on both conviction and sentence as amplified by the appellant's counsel are as follows:

- “(a) That the learned Magistrate “failed” to answer the Appellant as to the evidence the learned Magistrate relied on in convicting the Appellant on the charge of Housebreaking with the intent to steal and theft.

(b) That the learned Magistrate failed to establish the submitting of evidence by the investigating officer pertaining to the ownership of property found in Appellant's possession.

(c) That the state prosecutor failed to present the "truth" to the Court.

(d) That the witness, (complainant) failed to submit proof over ownership of the property stolen and furthermore failed to indicate to the Court "which side of the property was broken into".

(e) That the sentence imposed upon the Appellant is "unjustified".

[5] I will now look at the prosecution witnesses' evidence.

[6] Cletus Kabaku testified he is the investigating officer of the matter. He only came to know the accused persons when he arrested them on the 31 December 2012. On that day between 15h00 and 16h00 during the day he was on standby duties, patrolling in Meersig when he saw a taxi with two persons inside. It was loaded with doors such that its boot could not close. He became suspicious because a case involving the stealing of doors had already been reported, and he followed the taxi. He flickered his lights and the driver stopped. Inside the boot were four doors plus an oven. The driver told him he was Frans (accused 2) and the passenger said he was Rainto Lubeni (accused 1).

[6.1] The officer asked who was the owner of the property and where did he get it. Accused 1 said it was his, and further he said the following:

"... he (accused 1) was a private security at that house and the owner of the house left him to guard the house. In the process the house was also under renovations is what he said. He declared that he and the boss agreed that he should take off all the doors and take it to where he was staying because there were people stealing doors."

[6.2] The accused failed to provide the telephone number of the owner of the house to confirm that the doors were given to him. Other officers came and they

drove to the scene. Accused 1 had said he had the keys to the front door of the house but it could not open and he did not give the actual key to the officers. They went to the back door where the officer noticed that the house has been broken into. There was a poster saying 'the house has been sold'. They went inside and the officer found two more doors removed from the frames and set

against the wall. Accused 1 said he was also coming to fetch them as well. According to the officer nobody was staying in that house. Accused 1 had a key but it could not open the door. After inquiries it surfaced that a certain Mr Swart bought the house but had not yet moved in due to lack of power. Mr Swart identified all these items as his, and added that the cable of the oven was cut and its plate was missing.

[7] Jacobus Johannes Swarts Nicolas testified he owns a house, erf 4..., N M Street, M, W Bay. He does not know the two accused. On 31 December 2012 he was called to the police station, and on arrival he was shown 4 doors and one oven. He identified the items as his, and he observed how they were damaged in the process of removing them from the hinges. The doors were fixed to the rooms of the house. The house was broken into and forced open through the back door which was locked and reinforced by planks. A stove, oven plate and two bedroom carpets are still missing. He denied the accused's allegation that the items were thrown away at a dump site.

[8] I will now look at the appellant's case.

[8.1] Rainto Ngiyelelwa Lubeni testified that on the day of the incident he came from the lagoon at about the time the municipality workers remove garbage. He came to erf no. 49 and found four doors and an oven without a plug laying next to the dustbin by the roadside. He tried to go into the house to find out if the items were indeed thrown away but there was nobody there. He knocked at the neighbors house but there was no response. All the items were used, the font

wooden parts of the doors were removed. The oven was dusty, a sign he found to mean they were being used. He thought the items have been thrown away, he stopped a taxi and loaded them on. As they drove off from the robots, they saw a police vehicle signaling them to stop, which they did.

[8.2] The officer asked where they were taking the things, and he answered saying he picked them up next to the dustbin, and he took the officer to house no. 49 near the dustbin. At the house was a poster 'the house is for sale'. The officer called the number he saw thereon, thereafter he told them to go to the police station. A man found them there and said the items were his property, and were not thrown away. At the time he found the doors and an oven the backdoor was not broken, he asked the police to take him there and take photos to prove the doors were broken and they refused. He worked for the owner of the house who owes him three months salary, but he ignored the money because of the items he picked up. He then decided to ask for his money for causing him to be locked up.

[8.3] In his plea explanation the appellant told the trial court that he picked up the items at the dumpsite. Later he changed to say the complainant gave him the items. He changed his story again and told the investigating officer that he was only keeping the items on behalf of the owner. The appellant put it to the complainant in cross-examination that he only took the items because he owed him N\$1000 which was denied. However, this story was again changed when he put it to the complainant that he owes him N\$1.200 for security guard work that he did for him. In his evidence in chief he said he took the items for himself because he found them next to the dustbin.

[9] In its reasons for convicting the appellant the trial court found that there was a fresh burglary perpetrated by the appellant, and that his various conflicting versions of how he got the items were all proved wrong by the prosecution

witnesses. It is therefore my considered view that the appellant was correctly convicted for housebreaking with intent to steal and theft.

[10] As regards sentence, the record clearly shows that the trial court carefully looked at the personal circumstances of the appellant; that he was a first offender who had not shown any remorse. He has a child as well as other family members in his care. The items were recovered although the plate of the oven was never found thereby rendering it useless. Two floor carpets were never recovered.

[11] The trial court also correctly noted that lenient sentences on this type of offences may only undermine the justice system. It found that housebreaking with intent to steal and theft was a serious offence that called for a custodial sentence to serve as a general deterrent. The appellant was sentenced to three (3) years imprisonment of which one (1) year was suspended for five (5) years on the usual condition of good behavior.

[12] I find no reason to interfere with this sentence.

[13] In the result I make the following order:

The appeal is dismissed.

The conviction and sentence are confirmed.

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A M SIBOLEKA

Judge

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E P B HOFF  
Judge

APPEARANCES

APPELLANT:

Mr Kenny  
*Amicus Curiae*

RESPONDENT:

Ms K Esterhuizen  
Office of the Prosecutor-General, Windhoek