

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 04/2018

In the matter between

THE STATE

v

DEON SHAPATA

HIGH COURT MD REVIEW: CASE NO 1782/2017

Neutral citation: S v Shapata (CR 04/2018) [2018] NAHCMD 14 (05 February 2018)

CORAM: LIEBENBERG J *et* SHIVUTE J

DELIVERED: 05 February 2018

ORDER

1. The conviction and sentence are set aside.
 2. The matter is remitted to the same court in terms of s 312(1) of Act 51 of 1977 with the direction to comply with the provisions of s 112(1)(b) or to act in terms of s 113, as the case may be.
 3. In the event of a conviction, regard must be had to any portion of the sentence already served by the accused.
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JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was arraigned in the Windhoek Magistrate's Court on a charge of Housebreaking with intent to steal and theft, to which he pleaded guilty. He was questioned pursuant to the provisions of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 and, upon conviction, sentenced to 18 months' imprisonment.

[2] From the court's questioning it is evident that the accused was never asked about his intention for breaking into the complainant's office and although the accused admitted that he intended keeping the stolen items for his personal use, the court is not entitled to draw any inferences from an accused's answers; therefore it could not be inferred that his intention upon entering, was in order to steal. In *S v Naidoo*, 1989 (2) SA 114 (A) at 121A-B Botha JA said:

'The magistrate seems to have regarded the appellant's explanation as 'evidence', as appears from the extract from his written reasons for the convictions quoted earlier, and he seems to have drawn an inference from the 'evidence'. In my opinion that was an

unsound approach to adopt in applying the provisions of s 112 (1)(b) of Act 51 of 1977...'

See *S v Sylvia Alweendo* (unreported) Case No. CR 05/2010 delivered on 23.04.2010 where *Naidoo* (supra) was applied and *S v Nashapi* 2009 (2) NR 803 (HC).

[3] Thus, it has to be established by way of the court's questioning what the accused's intention was for committing the breaking (in this instance entering the office after breaking a window), and without the required intent to commit a crime (*mens rea*), no crime had been committed. The crime of housebreaking with intent to steal and theft is actually two crimes joined as one, each having the element of *mens rea*. It is trite law that housebreaking *per se* is not in itself a crime, unless accompanied by the intention of committing some other crime once the accused is inside the structure. This further offence which he commits once inside, constitutes a different one from the housebreaking itself. What the accused's intention was at the stage of breaking in, was not established in this instance; hence the court could not have been satisfied that the accused already had the intention to steal at the stage of the breaking. The conviction can therefore not be permitted to stand.

[4] From a reading of the magistrate's reasons in response to the query directed to him, it is evident that the magistrate does not fully comprehend the extent of the query addressed to him as he still proposes that the conviction be changed to that of housebreaking with intent to steal. For reasons set out above, that is not possible as the accused's intention had not been determined.

[5] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. The matter is remitted to the same court in terms of s 312(1) of Act 51 of 1977 with the direction to comply with the provisions of s 112(1)(b) or to act in terms of s 113, as the case may be.

3. In the event of a conviction, regard must be had to any portion of the sentence already served by the accused.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE