

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

“ANNEXURE 11”

<b>Case Title:</b> <i>The State v Marcellinus Lotovicus Nero</i>	<b>Case No:</b> CR 47/2020
	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Honourable Mr. Justice Unengu AJ <i>et</i> Honourable Ms. Justice Usiku J	<b>Delivered on:</b> 17 July 2020
(HIGH COURT MAIN DIVISION REVIEW REF NO. 851/2020)	
<b>Neutral citation:</b> <i>S v Nero</i> (CR 47/2020) [2020] NAHCMD 296 (17 July 2020)	
<b>The order:</b> a) The conviction and sentence are hereby set aside. b) The matter is remitted to the magistrate to question the accused in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 properly and thereafter deal with the matter in accordance with the law.	
<b>Reasons for order:</b> UNENGU, AJ (USIKU, J concurring): [1] The accused in the matter was charged with, convicted of the crime of Housebreaking with intent to steal and theft and thereafter sentenced to the following sentence:  ‘18 (Eighteen) months imprisonment of which 12 (12) months are suspended for 5 (five) years on condition accused is not convicted of Housebreaking and theft which is committed during the period of suspension.’ [2] When the matter was submitted before me for automatic review following the	

provisions of s 302 of the Criminal Procedure Act 51 of 1977,<sup>1</sup> I addressed a query to the presiding magistrate because I found the conviction and the sentence not to be in accordance with justice and asked whether the accused did admit the intention for breaking into the house; whether the sentence imposed by the learned magistrate is competent and if it is – what type of a crime is housebreaking and theft which the accused was prohibited to commit during the period of suspension.

[3] In response to the query, the magistrate conceded that the accused did not admit the element of intention for breaking into the house, however, he said that he concluded that he had the intention due to the fact that he broke the window to gain entry to the house and stole the properties.

[4] The magistrate has correctly conceded that the accused did not admit the intention for breaking into the house because the accused was not asked what he wanted to do in the house when breaking into. It is very crucial to verify the intention for breaking into the house through questioning to establish what the accused intended to do in the house at the time of breaking into. Answers emanating from questioning in terms of s 112(1)(b) are not evidence under oath from where a conclusion of intent to commit a crime could be deduced.

[5] They are mere admissions which could be corrected by recording a plea of not guilty, at any stage of the proceedings under s 112 (1) (b) before sentence is passed, if the court is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused did not admit an allegation in the charge or that the accused has incorrectly admitted to any such allegation or that the accused has a valid defence to the charge. Section 113 of the Criminal Procedure Act should be invoked forthwith.

[6] With regard to the condition of the suspended sentence, the learned magistrate also conceded that he made an error and suggested that the crime the accused is prohibited to commit during the period of suspension should be changed to read housebreaking with intent to steal and theft and not housebreaking and theft as indicated in the record. That will be done.

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<sup>1</sup> Act 51 of 1977.

[7] That said, and if regard is had to what is hereinbefore, I am of the view that the learned magistrate committed material irregularities having the effect of vitiating the conviction and sentence in the proceedings. Therefore, both the conviction and sentence cannot be allowed to stand as a result.

E P UNENGU ACTING JUDGE	D N USIKU JUDGE