

“ANNEXURE 11”  
IN THE HIGH COURT OF NAMIBIA  
(TO THE SUPREME COURT OF NAMIBIA)

<b>Case Title:</b> <i>The State v Jack Smetley</i>	<b>Case No:</b> CR 62/2020
<b>High Court MD Review No:</b> 1017/2020	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Mr Justice Liebenberg <i>et</i> Mr Justice Miller (Acting)	<b>Delivered on:</b> 31 August 2020
<b>Neutral citation:</b> <i>S v Smetley</i> (CR 62/2020) [2020] NAHCMD 382 (31 August 2020)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The conviction and sentence are set aside.</li> <li>2. The matter is remitted to the same court in terms of s 312 (1) of the Criminal Procedure Act 51 of 1977 with the direction to further question the accused in terms of s 112 (1)(b) of the Act.</li> <li>3. In the event of a conviction, the court, in sentencing, must have regard to the sentence already served by the accused.</li></ol>	
<b>Reasons for order:</b>	

LIEBENBERG J (concurring MILLER AJ)

[1] The accused was convicted on his plea of guilty to a charge of Housebreaking with intent to steal and theft, and sentenced to 12 months' imprisonment of which 6 months imprisonment is suspended for a period of four years on condition the accused is not convicted of the offence of housebreaking with intent to steal and theft during the period of suspension.

[2] On review a query was directed to the presiding magistrate, enquiring whether the conviction was proper in view of the court, during its questioning of the accused in terms of s 112 (1) (b) of the Criminal Procedure Act, 51 of 1977 (hereafter referred to as the CPA), having omitted to determine what the accused's intentions were at the time of the breaking and entering of the complainant's premises.

[3] In the magistrate's reply it was submitted that the accused indicated that 'he stole and hid items', his 'deliberate act of breaking a window and entering is a clear indication of the accused's intention on the one hand and secondly, the entering and taking of the items from the shop and hiding the said items as he indicated to the court'. The learned magistrate further submitted that 'his intention was complete in that he had no permission to break and enter complainant's place, secondly he had stolen items that he hid'.

[4] From the reasoning advanced, it is clear that the magistrate made inferences during the s 112 (1) (b) questioning. With deference, this approach is entirely amiss as it is now settled law that the court is not entitled to draw inferences from the answers given by the accused during the court's questioning in terms of the said section of the CPA.<sup>1</sup>

[5] Crucial to the s 112 (1) (b) questioning is that the court establish what the intention of the accused was at the time of the breaking and entering as the accused must already have formed the intention to commit some other crime once inside the house. The

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<sup>1</sup> *S v Nashapi* 2009 (2) NR 793 (HC); *S v Kaevarua* 2004 NR 144 (HC).

offence of 'housebreaking' with the absence of an intention to commit another crime is *per se* no offence.<sup>2</sup> Moreover, if the accused breaks into someone's house for reasons other than to steal, and forms the intention to steal only after being inside the house, the offence of housebreaking with intent to steal is not committed. This does not mean that the accused goes unpunished for his actions as he may either be convicted for, malicious damage to property and/or theft or both, depending on the facts before the court.

[6] It is clear that the learned magistrate did not heed to the element of intention during his questioning. The court was further not entitled to draw inferences from the answers of the accused. To this end the court misdirected itself and the conviction falls to be set aside.

[7] 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 further question the accused in terms of s 112 (1) (b) of the Act.
3. In the event of a conviction, the court, in sentencing, must have regard to the sentence already served by the accused.

<b>J C LIEBENBERG</b> <b>JUDGE</b>	<b>K MILLER</b> <b>ACTING JUDGE</b>

<sup>2</sup> *S v Maseko and Another* 2004 (1) SACR 22 (TPD) at 22h-l, *State v Gideon Shuuvani* (CR 10/2014). [2014] NAHCNLD 21 (20 March 2014).