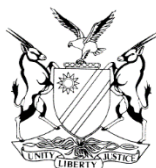


PRACTICE DIRECTIVE 61
REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: <i>The State v Tommy Joseph</i>	Case No: CR: 27/2022
High Court MD Review No: 1821/2022	Division of Court: Main Division
Heard before: Judge Liebenberg <i>et</i> Judge January	Delivered on: 11 April 2022
Neutral citation: <i>S v Joseph</i> (CR 28/2022) [2022] NAHCMD 181 (11 April 2022)	
The order: <ol style="list-style-type: none">1. The conviction is confirmed.2. The sentence is altered to read: 12 months' imprisonment, of which 2 months are suspended for a period of 5 years on condition that the accused is not convicted of housebreaking with intent to steal and theft, committed during the period of suspension.	
Reasons for order:	
Liebenberg, J (concurring January, J) [1] This review came before me in terms of section 302 (1) and section 303 of the Criminal Procedure Act 51 of 1977 (the CPA).	

[2] The accused appeared before the Magistrate's Court for the district of Keetmanshoop where he faced a charge of housebreaking with intent to steal and theft. He pleaded guilty and the court invoked s 112(1)(b) of the CPA. He was subsequently convicted and sentenced to a term of imprisonment coupled with a suspended sentence, which reads as follows:

'12 months' imprisonment without the option of a fine of which a period of 2 months is suspended for a period of 5 years on condition accused [is] not convicted of housebreaking and theft related offences during period of suspension.'

[3] The accused was correctly convicted. The anomaly lies with the sentence imposed, more particularly the suspended condition, which reads that the accused is not convicted of *housebreaking and theft related offences during* the period of suspension. As a result a query was directed to the magistrate in the following terms:

'The condition of suspension pertaining to the prohibited offence reads "Housebreaking". Is "housebreaking" an offence?'

[4] The magistrate explained that the condition refers to housebreaking and theft related offences. She partly conceded that housebreaking does not constitute an offence on its own, and indicated that, should this court find that the wording is improper, the correct wording should be 'Housebreaking with intent to steal and theft.'

[5] It is trite that an essential requirement of a suspensive condition is that it must be formulated in such a way that it does not cause future unfairness or injustice; neither must it be too wide or vague. The reason for the required unequivocal formulation of a suspensive condition is because the non-compliance with a condition of a suspended sentence has grave consequences for an accused. The primary object is, after all, that the accused must understand what he or she has to do or avoid in order to ensure that the sentence is not put into operation. If the condition of suspension is too wide, it is bound to lead to uncertainty and misinterpretation.¹

[6] Furthermore, it is settled law that housebreaking as such is not a crime unless accompanied by the intention to commit some other crime. In *S v Shuuvani*² this court

¹ *S v Simon* 1991 NR 104 (HC); *Hiemstra's Criminal Procedure*, Issue 2 at 28-79 to 28-80.

² *S v Shuuvani* (CR 10/2014) [2014] NAHCNLD 21(20 March 2014).

endorsed the sentiments outlined in *S v Maseko and Another*³ where it was held that:

‘There exists no offence, either at common law or in statute which consists of mere “housebreaking” without some concomitant intent.’

[7] In applying the above mentioned principles to the present matter, it is evident that the conditions of the suspended offence is not only vague, but relates to a non-existent offence (housebreaking). Therefore, the sentence as it reads cannot be allowed to stand.

[8] In the result the following order is made:

1. The conviction is confirmed.

2. The sentence is altered to read:

12 months’ imprisonment, of which 2 months are suspended for a period of 5 years on condition that the accused is not convicted of housebreaking with intent to steal and theft, committed during the period of suspension.

J C LIEBENBERG JUDGE	H JANUARY JUDGE

³ *S v Maseko and Another* 2004 (1) SACR 22 (TPD) at 22h-l.