

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

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| Case Title: <i>The State v Riaan Gamob</i> | Case No: CR 3/2023 |
| High Court MD Review No: 2083/2022 | Division of Court: High Court, Main Division |
| Coram: Liebenberg J <i>et</i> Claasen J | Delivered on: 6 February 2023 |
| Neutral citation: <i>S v Gamob</i> (CR 3/2023) [2023] NAHCMD 31(6 February 2023) | |
| ORDER: 1. The conviction is set aside and substituted with the following: Guilty of housebreaking with intent to rape. 2. The sentence is confirmed. | |
| REASONS FOR ORDERS: | |
| LIEBENBERG J (CLAASEN J concurring): | |

[1] The unrepresented accused appeared in the magistrate's court for the district of Gobabis on one count of housebreaking with intent to commit a crime unknown to the state. When the charge was read to the accused person after he tendered a guilty plea, he was questioned by the District Court magistrate in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA). Not satisfied that the accused admitted to the allegations set out in the charge, the court entered a plea of not guilty. After hearing evidence the accused was convicted of housebreaking with intent to rape and attempted rape. The matter was then transferred to the Regional Court in terms of s 116(1) of the CPA for sentencing. Upon perusing the record of the District Court, the Regional Court magistrate was of the view that the proceedings of the District Court was not in accordance with justice and referred the matter to the High Court for review in terms of s 116 (3)(a) of the CPA.

[2] The District Court in its judgment failed to furnish adequate reasons for the conviction of housebreaking with intent to rape and attempted rape. It would appear that the District Court magistrate acted in terms of s 262(2) of the CPA which reads:

'If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown but the offence of housebreaking with intent to commit a specific offence, the accused may be found guilty of the offence so proved.' Emphasis provided

[3] In the matter of *Bocky v The State*¹ the court stated the following:

'The magistrate misdirected himself by convicting the accused of both offences ie housebreaking with intent and rape, as s 262 (2) only provides for a conviction of housebreaking with intent to commit the offence proved (in this instance to rape) and not the commission of the

¹ *Bocky v The State* (CA 27/2010) [2013] NAHCNLD 40 (08 July 2013).

offence itself ie rape. Section 262 (2) provides for a competent verdict that may be imposed on a charge of housebreaking with intent unknown to the State but where the accused's intent, when entering becomes known during the trial or is admitted by the accused, he or she may only be convicted of housebreaking with the intent proved/admitted and not the offence committed once inside. The section does not provide that the accused may be convicted of two offences ie housebreaking with intent to rape and rape.' Emphasis provided

[4] During the court's questioning the accused indicated that when he broke and entered into the house, his intention was to rape the complainant. It is thus evident that the unknown offence for which the accused was initially charged, became known to the state. What the accused went on to further do in the house constituted an independent crime and could no longer, as a matter of law, be considered as a competent verdict provided for in s 262 (2) of the CPA.

[5] I am satisfied that the accused will not be prejudiced if the conviction is substituted with the correct offence. Despite the fact that the accused was partly convicted of the wrong offence, this does not affect the sentence imposed.

[6] For the forgoing reasons the conviction is not in accordance with justice and falls to be set aside and substituted with a conviction of the offence of guilty of housebreaking with intent to rape.

[7] In the result it is ordered:

1. The conviction is set aside and substituted with the following: Guilty of housebreaking with intent to rape.
2. The sentence is confirmed.

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| J C LIEBENBERG JUDGE | C CLAASEN JUDGE |