

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT
PRACTICE DIRECTION 61

Case Title: The State v Johannes Gaingob	Case No: CR 25/2024
High Court MD Review No: 166/2024	Division of Court: High Court, Main Division
Coram: Christiaan J <i>et</i> Shivute J	Delivered: 28 March 2024
Neutral citation: <i>S v Gaingob</i> (CR 25/2024) [2024] NAHCMD 141 (28 March 2024)	
ORDER: <ol style="list-style-type: none">1. The conviction on a charge of housebreaking with intent to steal and theft is altered to a conviction of theft.2. The sentence is set aside and substituted with a fine of N\$2000 or 6 (six) months' imprisonment.3. The sentence is antedated to 30 January 2024.	
REASONS:	

CHRISTIAAN J (SHIVUTE J concurring):

[1] Serving before court for determination is a review judgment transmitted from the Omaruru Magistrate's Court where the accused stood charged with a count of housebreaking with intent to steal and theft. The accused was convicted on his guilty plea and sentenced to 12 (twelve) months' imprisonment.

[2] When the matter came on review, a query was addressed to the trial court to wit, 'can the learned magistrate explain on what basis the accused was convicted of the offence of housebreaking with the intent to steal and theft, if the magistrate did not ask questions to determine whether the tent is considered to be a building/premises/structure used for habitation or storage? It is further not clear from the learned magistrate's questioning what premises was broken into, as the words, tent, house and/or rest camp was used interchangeably during questioning.'

[3] The following was the response of the trial court:

I. The presiding officer in taking the plea inquire about the specifications of place at which the alleged crime was committed and the response was that a tent of a tourist that was overnighing at Brandberg rest camp was broken into and mentioned items allegedly stolen, to which the accused pleaded guilty in admitting that he cut open the tent to gain entrance and stole the items.

II. The word tent and/or rest camp was used interchangeably by the presiding officer, which is lack of oversight from the presiding magistrate.

III. A question concerning a window is also just lapse of concentration in typing as such question was never put to the accused and should not have been in the record.

IV. Magistrate is convinced that accused admit on cutting open a tent at a rest camp in which a tourist was overnighing and stole the items mentioned in charge sheet.

V. The honourable magistrate apologise for lack of oversight on his part as well as the unnecessary mistakes that will be avoided in future.'

[4] The offence of housebreaking with intent to commit a crime consists in unlawfully

and intentionally breaking into and entering a building or structure, with the intention of committing some crime in it.¹ (Underlined for emphasis)

[5] It is apparent from the record, as well as the response from the magistrate, that there are inconsistencies therein, particularly with the interchangeable use of the words tent, house and/or rest camp and also the reference to the breaking of a window. Although the concession is made that these were a mere oversight on account of a lapse in concentration, they mar the record and it can hardly be said that the proceedings were in accordance with justice.

[6] It was stated in *S v Ashipala*² that premises or the concept of 'house' has taken on many forms in our law with the general principle being that the premises referred to must ordinarily be used for human habitation or for the storage or housing of property of some kind. It thus follows therefore, that the failure on the part of the magistrate to question the accused on the essential element of the offence regarding whether the tent is considered to be a building, premises or structure used for habitation or storage should not have resulted in a conviction on the preferred charge for the reason that a crucial element of the offence was not proven. The conviction on the offence of housebreaking is tainted with irregularity and cannot stand.

[7] As previously stated, the accused was convicted on his plea of guilty after admitting to having committed the offence of housebreaking with intent to steal and theft. As a competent verdict to that of the more serious offence of housebreaking with intent to steal and theft, the conviction will be altered to a conviction of theft. On account of having altered the conviction to that of a lesser offence, it follows that the sentence must be interfered with. The accused is a first offender who pleaded guilty on his first appearance and the stolen goods were recovered. Although the crime of theft is a serious offence, the sentence imposed in the court a quo is harsh and must be substituted.

[8] In the result, it is ordered that:

1. The conviction on a charge of housebreaking with intent to steal and theft is altered to a conviction of theft.

¹ CR Snyman *Criminal Law* 6 ed at 543.

² *S v Ashipala* (CR 14/2022) [2022] NAHCNLD 38 (8 April 2022) at 6.

2. The sentence is set aside and replaced with a fine of N\$2000 or 6 (six) months' imprisonment.
3. The sentence is antedated to 30 January 2024.

**P CHRISTIAAN
JUDGE**

**N N SHIVUTE
JUDGE**