

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

CR NO: 11/2017

In the matter between:

THE STATE

and

ERASTUS NUUYOMA

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: **232/2017**

Neutral citation: *S v Nuuyoma* (CR 11/2017) [2017] NAHCNLD 77 (9 August 2017)

Coram: TOMMASI J and JANUARY J

Delivered: 9 August 2017

Flynote: Review — Sentence — Housebreaking with intent to steal and theft — Conviction not in accordance with justice — No 'breaking' proved — Convicted for theft — Sentence inappropriate — A sentence of 6 (six) months imprisonment imposed.

Summary: The accused was convicted of Housebreaking with intent to steal and theft after his plea of guilty. During questioning it emerged that he did not remove any obstacle forming part of the structure that he allegedly broke into. He just climbed through an open window. The conviction and sentence are set aside and substituted with a conviction of theft. The accused is sentenced to 6 months imprisonment. The court orders that the accused must be immediately released.

ORDER

1. The conviction for housebreaking with intent to steal and theft is set aside; and substituted with a conviction of theft;
2. The sentence of 1 (one) year imprisonment is set aside;
3. The sentence is substituted with a sentence of 6 (six) months imprisonment; and
4. The sentence is ante-dated to 19 January 2017;
5. The accused must immediately be released.

JUDGMENT

JANUARY J (TOMMASI J concurring)

[1] This case is before me on automatic review.

[2] The accused was convicted for housebreaking with intent to steal and theft. The accused pleaded guilty and was questioned pursuant to the provisions of section 112(1) (b) of the Criminal Procedure Act, Act 51 of 1977. The magistrate recorded after

questioning that she was satisfied that the accused is guilty. The accused was sentenced to 1 (one) year imprisonment.

[3] The proceedings are not in accordance with justice. The magistrate could not have been satisfied that the accused is guilty of housebreaking with intent to steal and theft. The record of proceeding reflects *inter alia* as follows;

'Q: Are you forced to plead guilty to the charge?

A: No.

Q: Why are you pleading guilty to the charge?

A: Because I did it.

Q: Did you enter the house of the complainant on 11/04/2016 at Iiyale village in the district of Oshakati?

A: Yes.

Q: How did you get entry into the said house?

A: I did not find the house locked.

Q: Where did you pass when you enter the house?

A: I passed through the window.

Q: How did you find the window?

A: I found it open.

Q: How open?

A: It was just open.

Q: What did you do when you found it open?

A: I then pass through it and I went in and I took what was read today.

Q: What did you intent to do inside the house?

A: I went in to take what I took out ...'

[4] The act of breaking is subdivided into separate components namely (a) breaking into the structure and (b) entering it.¹ It is trite that for the act of breaking, no actual damage need to be inflicted. The offender at least needs to remove or displace an obstacle which bars entry to the structure and which forms part of the structure itself. It therefore suffices if a partially open but not locked door or window is pushed further open. There is however no breaking if one merely walks through an open door or climbs through an open window or pushes one's arm through an open hole.²

(5) The conviction stands to be set aside. I am satisfied that the accused is guilty of theft. Considering the low value of the property stolen, the sentence in my view, is also harsh and inappropriate. The accused is a first offender at the age of 32 years of age. He is not married but has 6 children of which the youngest is 2 months old. The property was recovered.

(6) In the result:

1. The conviction for housebreaking with intent to steal and theft is set aside; and substituted with a conviction of theft;
2. The sentence of 1 (one) year imprisonment is set aside;
3. The sentence is substituted with a sentence of 6 (six) months imprisonment; and
4. The sentence is ante-dated to 19 January 2017;
5. The accused must immediately be released.

H C JANUARY
JUDGE

I agree,

¹ C R Snyman, *Criminal Law*, Fifth Edition p 552 paragraph 6, 2008.

² See: C R Snyman, *Criminal Law* p 552 (*supra*)

**M A TOMMASI
JUDGE**