

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGEMENT

Case Title: The State v Thomas Gabiseb	Case no: CR 55/2022 Case No.: TSU-CRM-3295/2020
Heard before: Honourable Mr. Justice Munsu, AJ <i>et</i> Honourable Mr. Justice Kessler AJ	Division of Court: Northern Local Division Delivered on: 06 October 2022
Neutral citation: <i>S v Gabiseb</i> (CR 55/2022) [2022] NAHCNLD 105 (06 October 2022)	
The order: <ol style="list-style-type: none">1. The conviction is set aside and substituted with a conviction of housebreaking with intent to steal.2. The sentence is confirmed.	
Reasons for the order:	
MUNSU, AJ (KESSLAU, AJ concurring): [1] This is a review matter in terms of section 302 of the Criminal Procedure Act 51 of 1977	

(the Act). The accused was charged with one count consisting of the main charge of housebreaking with intent to commit a crime unknown to the State and an alternative charge of malicious damage to property. The issue for consideration relates only to the main charge for which the accused was convicted and sentenced to fifteen (15) months imprisonment.

[2] The allegations are that on 26 November 2020 and at or near Extension 4 in the district of Tsumeb the accused did unlawfully and intentionally break and enter the house of Dreyer Charlene with intent to commit a crime unknown to the State. The accused pleaded guilty to the charge and the court questioned him in terms of section 112 (1) (b) of the Act. I am satisfied with the rest of the questioning that was done; however, the learned magistrate did not properly deal with the element of intention on the part of the accused at the time of breaking. He questioned the accused as follows:

'Q: After you broke the door what happened?

A: I went in. when I entered the owner of the house returned home. She found me inside the house. She noticed the police officers. Police officers arrived and they hand cuff me, beat me up and look me away. (sic).

Q: What did you want to do inside the house? (My underlining).

A: I had an intention of stealing when I went inside. (My underlining).

Q: What did you do when you were inside the house?

A: I was looking around unfortunately the owner came back so I didn't get the chance to steal anything.' (My underlining).

[3] It is evident from the questioning that the accused's intention at the time of breaking was to steal. In *S v Tjavara*¹ January J had the following to say:

'[5] Housebreaking with intent to steal is a competent verdict for housebreaking with intent to commit a crime unknown to the state in terms of s 262(2) of Act 51 of 1977. It made no sense to convict an accused of an offence to the prosecutor unknown when he has admitted the commission of an actual offence.²

[4] In the result I make the following order:

¹ *S v Tjavara* (CR 04/2020) [2020] NAHCNLD 08 (17 January 2020).

² See: *S v Kharuxab* 2008 (1) NR 345 (HC)

1. The conviction is set aside and substituted with a conviction of housebreaking with intent to steal.
2. The sentence is confirmed.

Judge(s) signature	Comments:
MUNSU, AJ.	NONE
KESSLAU, AJ.	NONE