

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Simon Ngejama and Vetjijele Hijowo</i>	Case No.: CR 47/2022 Opuwo: OPU-CRM-1614/2020
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 26 September 2022
Neutral citation: <i>S v Ngejama</i> (CR 47/2022) [2022] NAHCNLD 96 (26 September 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. In respect of accused 1: The convictions and sentences on counts 1 and 2 are set aside.2. In respect of accused 2: The conviction and sentence on count 1 are set aside.3. In terms of s 312 of the CPA, the accused persons should be brought before the court and the magistrate is directed to enter a plea of not guilty in terms of section 113 of the CPA, and bring the matter to its natural conclusion.	
Reasons for the order:	
KESSLAU AJ (SALIONGA J concurring):	
[1] The matter comes before this court in terms of section 304(2) of the Criminal	

Procedure Act 51 of 1977 as amended, (the CPA).

[2] The accused persons appeared in the Magistrate Court in the district of Opuwo charged with the crimes of count 1: Housebreaking with the intent to steal and theft and count 2: Malicious damage to property.

[3] The accused plead guilty to the charge, were questioned in terms of Section 112(1) (b) of the CPA and subsequently accused 1 was convicted on both counts whilst accused 2 was only convicted on housebreaking with the intent to steal and theft. They were sentenced to wholly suspended sentences.

[4] The following query was directed to the magistrate to wit:

1. Accused 1 was convicted of count 1: Housebreaking with the intent to steal and theft and count 2: Malicious damage to property. Considering the 'single intent test' and/or the 'same evidence test', did this not amount to a duplication of convictions?
2. Accused 1 denied the intention to permanently deprive the owner of ownership thus denying *contrectatio*. Was the learned Magistrate satisfied that accused 1 admitted to all the elements of the offence?
3. It appears that neither Accused 1 nor accused 2 admitted that they had the intention to steal when breaking into the house.
4. Did the proceedings recorded on the 22 March 2022 not amount to an unauthorised stopping of prosecution by the prosecutor? [See *S v Wimmerth* (CR 58/2014) [2014] NAHCMD 295 (08 October 2014)].

[5] The magistrate, on the first query, conceded a duplication of convictions in that both counts were based on the same set of facts. Regarding the test to apply when considering the duplication of convictions, the following was said in *S v Makwele*¹:

'The question to be asked is whether a single intent is required in respect of both offences. On the other hand when applying the evidence test the following question is usually asked, namely: does the evidence which is necessary to establish one of the charges at the same time confirm the other offence? These test may be applied conjunctively or separately, depending on the circumstances of the particular case.'

¹ *S v Makwele* 1994 NR 53 (HC).

[6] *In casu* it was alleged that the accused broke and entered into the house of the complainant and, once inside, damaged a safe. The damage was thus caused with the intent and in the process of stealing from the complainant.² Therefor the conviction on malicious damage to property amounts to a duplication of convictions and cannot be confirmed.

[7] Turning to the second and third queries in reference to questioning in terms of section 112(1)(b) of the CPA, I find it appropriate to refer to what was held in *S v Pieters*³:

‘. . . the section must be applied with care and circumspection and on the basis that where an accused person’s responses to the questioning suggest a possible defence or leave room for a reasonable explanation other than the accused’s guilt, a plea of not guilty should be entered’.

[8] The magistrate questioned accused 1 in respect of the count of housebreaking with the intent to steal and theft as follows:

‘Q: Where you planning to return the stolen items to the lawful owner at any point in time?

A: We could have waited for the owner to find us.

Q: Where you planning on permanently depriving the lawful owner of his items as per the charred annexure?

A: no.’

Contrectatio or the taking of the property is an essential element in a charge of theft.⁴ Once it was denied by the accused, the appropriate action would have been to immediately apply section 113, enter a plea of not guilty and allow evidence to be presented. The magistrate in reply conceded as much.

[9] Instead the questioning of accused 1 proceeded as follows:

‘Q: Why did you do it?

A: I just entered the house.

Q: What made you enter the house?

A: nothing.

Q: What was your intention of breaking and entering and stealing the items as listed?

² *S v Vihajo and others* 1993 NR 233 (HC).

³ *S v Pieters* (CR 58/2013) [2013] NAHCMD 272 (04 October 2013).

⁴ *S v Valede and others* 1990 NR 81 (HC).

A: I wanted to steal the items.'

Questions to accused 2 relating to the same aspect was recorded as:

Q: Did you know that it was unlawful to break, enter the house of the complainant, steal items without permission?

A: Yes I know

Q: What was your intention?

A: I wanted to steal money and buy staff.' (sic)

The questioning went on with:

'Q: Did you plan on breaking and entering and stealing the items before executing it?

A: no.'

[10] The offense consist of two parts being (a) Housebreaking with the intent to steal and (b) theft. The intention to steal, before breaking and entering the premises, is part of the allegations made by the State and should be covered independently from the intention to permanently deprive the owner of the property.⁵ The questions to establish the intention of the accused at the time of breaking into the property did not cover this aspect in isolation, as it was preceded by a compounded question referring to multiple actions including breaking, entering and stealing. It would be better to ask in specific terms 'Why did you break and enter the property?'

[11] It is clear from the line of questioning that the magistrate had doubt on the intention of the accused at the time of breaking into the property as similar questions were repeated when unsatisfactory answers were given by the accused. Furthermore the alleged total value of stolen property was given as N\$ 11 000 and the accused were convicted on this basis however both the accused denied stealing a fire-arm with a value of N\$ 5 000 which formed part of the alleged total value. The sentence, as a result, were formulated with a higher monetary value in mind as the one admitted by the accused.

[12] Bearing in mind the fact that the second count of malicious damage to property amounted to a duplication of convictions, it serves no purpose to discuss the query regarding the unlawful stopping of prosecution at this point.

[13] When considering the above mentioned irregularities it cannot be said that the

⁵ *S v Amunyele* (CR 66/2021) [2021] NAHCMD 356 (05 August 2021).

proceedings were in accordance with justice and will be set aside.

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

1. In respect of accused 1: The convictions and sentences on counts 1 and 2 are set aside.
2. In respect of accused 2: The conviction and sentence on count 1 are set aside.
3. In terms of s 312 of the CPA, the accused persons should be brought before the court and the magistrate is directed to enter a plea of not guilty in terms of section 113 of the CPA, and bring the matter to its natural conclusion.

Judge(s) signature:	Comments:
KESSLAU AJ:	
SALIONGA J:	