

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Benson Muyongo</i>	Case No.: 272023 <b>Ondangwa:</b> OND-CRM-1633/2023
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Lady Justice Salionga J <i>et</i> Honourable Mr Justice Kessler J	<b>Delivered on:</b> 25 July 2023
<b>Neutral citation:</b> <i>S v Muyongo</i> (CR 27/2023) [2023] NAHCNLD 69 (25 July 2023)	
<b>It is hereby ordered that:</b>  <ol style="list-style-type: none"><li>1. The conviction is set aside and substituted with that of housebreaking with intent to steal.</li><li>2. The sentence is confirmed.</li></ol>	
<b>Reasons for the order:</b>	
KESSLAU J (SALIONGA J concurring)	
<p>[1] The matter came before this court on review in terms of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA). The accused was charged in the Magistrates Court of Ondangwa on a charge of housebreaking with the intent to commit a crime unknown to the State. He plead guilty and during questioning in terms of</p>	

Section 112(1)(b) of the CPA admitted that he broke into the property with the intention to steal. He however did not steal anything. The magistrate then convicted him of the charge of housebreaking with the intent to steal and theft. The accused was thereafter sentenced to 28 months imprisonment of which half was suspended on the usual condition.

[2] The magistrate was queried as follows:

'On what basis did the learned Magistrate convict on the offense of 'housebreaking with intent to steal and theft' instead of 'housebreaking with intent to steal' considering that nothing was stolen?' (Emphasis added)

[3] The magistrate, in reply, conceded that the elements for a conviction on theft was not present.

[4] Section 262(2) of the CPA stipulates that:

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

[5] It is well-established in our law that s 262 (2) of the CPA provides for a competent verdict that may be imposed on a charge of housebreaking with intent to commit a crime unknown to the State however 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.<sup>1</sup> *In casu* he was not charged with theft and the conviction thereof cannot stand.

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

1. The conviction is set aside and substituted with that of housebreaking with intent to steal.

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<sup>1</sup> *Bocky v The State* (CA 27/2010) [2013] NAHCNLD 40 (08 July 2013); *S v Eichab* (CR 76/2021) [2021] NAHCMD 410 (13 September 2021); *S v Dixon* 1995 NR 115 (HC) at 117.

2. The sentence is confirmed.	
<b>Judge(s) signature</b>	<b>Comments:</b>
KESSLAU J:	None
SALIONGA J:	None