CASE NO.: CR 120/07

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

MANFRED KHARUXAB **ACCUSED**

(HIGH COURT REVIEW CASE NO.: 616/2007)

CORAM: MAINGA, J *et* VAN NIEKERK, J

Delivered on: 2007/08/10

REVIEW JUDGMENT

VAN NIEKERK, J:

[1] The accused in this matter was charged with the offence of housebreaking with intent to commit a crime unknown to the State. The particulars of the offence are that the accused broke into the shop of Piet Muller at or near Leonardville in the district of Gobabis on or about 29 April 2007. The accused pleaded guilty and was questioned in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977 ("the Act"), as follows: -

"Q: Do you understand the charge against you?

A: Yes.

Q: Are you forced to plead guilty?

A: No.

Q: Did you on 29/4/07 enter the complainant's shop?

A: Yes.

Q: How did you enter?

A: I entered through the ceiling of the toilet which I cut open.

Q: Were you given permission to enter?

A: No.

Q: Why did you enter?

A: I wanted to steal.

Q: Did you manage to steal anything?

A: No.

Q: Did you realize that what you were doing was wrong and can be punished?
A: Yes.
Q: It is alleged that Mr. Piet Muller is the complainant. Do you agree or dispute?
A: I agree.

Court satisfied that accused admits to all the elements of the offence."

[2] When I received the matter on review I asked the trial magistrate whether the accused should not have been convicted of housebreaking with intent to steal and theft. The learned magistrate concedes that he should have done so. In my view the concession is correctly made.

[3] Section 262(2) of the Act provides: -

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

[4] In *S v Andrews* 1984 (3) SA 306 (E), a case which presented the same facts as the one before me, KANNEMEYER, J (with SMALBERGER, J, as he then was) in effect held that the admission by the accused during the questioning in terms of section 112(1)(b) namely, that he broke in with the intention to steal, is part of the evidential material upon which a court could rely when applying section 262(2). The *Andrews* case was followed and applied in *S v Kesolofetse and another* 2004 (2) SACR 166 (SCA), a similar case where the answers of the two accused during the

questioning showed quite clearly that they broke into the premises with the intent to steal. In that case the following was said (at p168): -

> "[6] In my view, the magistrate was therefore wrong to convict the accused in this case of the crime of housebreaking with intent to commit a crime to the prosecutor unknown, for the simple reason that the 'evidence' did not prove that offence.
>
> [7] Quite apart from this it would obviously be senseless, and in fact misleading for record purposes, to convict an accused on the basis of his or her having had the intention to commit a crime to the prosecutor unknown, where, at the end of the day, it

is known to not only the prosecutor but indeed also to the court what the intended crime was (compare *S v Wilson* 1968 (4) SA 477 (A) at 481F and the remarks in Milton *South African Criminal Law and Procedure* vol II 3rd ed at 806 - 7 and fn 146 at 807).

[8] It is obviously with this in mind, and to do away with the necessity of first amending the charge, that s 262(2) of the Criminal Procedure Act was enacted and I am in respectful agreement with the authors of Kriegler and Kruger *Hiemstra Suid-Afrikaanse Strafproses* 6th ed, where, at 666 and with reference to the provisions of s 262(2) of the Criminal Procedure Act, it is remarked:

> 'Die artikel sê ''kan die beskuldigde aan die aldus bewese misdryf skuldig bevind word'', maar dit is een van die gevalle waar *kan* gelees sal moet word as *moet*. Dit sou sinloos wees om, as 'n bepaalde opset bewys word, dit nie in die bevinding te vermeld nie.'

(See also *South African Criminal Law and Procedure* (*op cit* fn 235 at 814).)

[9] It is so that the unrepresented accused were not informed of the possibility of such a competent verdict by the magistrate (see *S v Kester* 1996 (1) SACR 461 (B) at 469h - 470c), but I am satisfied that this failure did not lead to any prejudice in this case."

[5] I respectfully agree with the approach taken in these cases. In my view there is also in this case no prejudice to the accused by convicting him for the offence which he admitted during the questioning process.

[6] The accused was sentenced to a fine of N$600 or to six months imprisonment. I shall not change the sentence.

[7] In the result I make the following order: -

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

2. The sentence is confirmed.

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VAN NIEKERK, J

I agree.

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MAINGA, J