

CASE NO.: CR 111/07

SUMMARY

THE STATE

versus

ABSALOM HENGUA

VAN NIEKERK, J et HEATHCOTE, A J

18 JULY 2007

CRIMINAL LAW

THEFT

Where someone takes the property of another for purposes of keeping it as security for payment, this does not constitute the crime of theft.

CASE NO.: CR 111 /07

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

ABSALOM HENGUA

(HIGH COURT REVIEW CASE NO.: 774/07)

CORAM: VAN NIEKERK, J et HEATHCOTE, AJ

Delivered on: 2007-07-18

REVIEW

JUDGMENT:

VAN NIEKERK, J et HEATHCOTE, AJ: [1] The accused in this matter stood trial in the magistrate's court, Okakarara, on a charge of housebreaking with intent to steal and theft of a generator. He pleaded guilty and was questioned by the court in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977, as follows:

2

"Q: Did you on the 19 November 2006 at or near Okatupapa village in the district of Okakarara enter the house of complainant Filimon Tjikoromunyo?

Ans: Yes.

Q: How did you enter the house?

Ans: I pushed the door and the door opened and I went inside and took the machine inside.

Q: When you enter the house what was your intention?

Ans: My intention was to go in and take the machine.

Q: Whose machine was it?

Ans: Machine for Filimon the complainant.

Q: Was the door closed before that?

Ans: Door was closed but not locked.

Q: Why did you take the machine?

Ans: The complainant had my money which he did not want to pay so I decided to take the machine to keep it until he paid.

Q: Did you have any right to enter the house of the complainant and take the machine?

Ans: No.

Q: Why did you take the machine?

Ans: I took the machine for the complainant had my money.

Q: When you entered the house of the complainant who was in that house?

Ans: No one.

Q: What time was it when you entered the house?

3

Ans: It was night time.

Q: Why are you pleading guilty?

Ans: Because I entered the house without permission.

Q: What did you do in that house?

Ans: I took the machine without permission.

Q: If the value of the machine is N\$899.95 will you dispute?

Ans: I will not dispute for I did not know the value.

Q: Did you know you were doing wrong when you entered the house of the complainant and took the machine?

Ans: I knew that it was wrong.

Q: Why did you do it?

Ans: It's because of my money it was paining me.

Q: How much did complainant owe you?

Ans: N\$600.00

Q: When did he pay you?

Ans: After the machine was recovered and returned back to him.

Q: Did you tell complainant that if you do not pay my money I am going to

take your machine?

Ans: No.

Q: What you did was wrong, unlawful and punishable in law.

Ans: Yes

Crt is satisfied that you are guilty of the charge of housebreaking with intent to steal and theft and you are now convicted."

4

[2] The accused was sentenced to a fine of N\$2000 or two years imprisonment of which half was suspended on certain conditions.

[3] When the matter was submitted on review, the Reviewing Judge addressed the following query to the trial magistrate:

"Did the accused make any admissions which could satisfy the learned magistrate that he intended stealing the generator or that he committed theft? In the light thereof that the accused in effect stated that he broke in and entered the premises with intent to take the generator, and did indeed take the generator, as security for a debt, should the learned magistrate not have entered a plea of not guilty?"

[4] In her reply the learned magistrate concedes that a plea of not guilty should have been entered. We agree. In *S v Van Coller* 1970 (1) SA 417 AD (incidentally a matter which commenced in the Windhoek magistrate's court), the appellant's conviction of theft was set aside. The appellant, a medical doctor, removed medical equipment from Botswana to South-West Africa, in order to exert pressure on an official of the Botswana Government to withdraw criminal charges against him -

something which was undertaken by the official, but which was not done as undertaken. The Appellate Division, Jansen JA writing the judgment,

5

held, after a thorough consideration of relevant cases, that, where someone takes the property of another, for purposes of keeping it as security for payment, this does not constitute the crime of theft as the "accused" continues to acknowledge the ownership of the person from whom the article was removed. Jansen JA concluded at 426D:

"If the taking of another's property with the intent to hold it as security, i.e. enforce a debt, does not amount to taking with intent "to deprive the owner of the whole benefit of his ownership", there appears to be no reason in principle why the position should not be the same, where the owner is held to ransom for purposes other than enforcing a debt."

[5] We accordingly make the following order:

1. The conviction and sentence are set aside.
2. The case is remitted to the magistrate's court, Okakarara, in terms of section 312(1) of the Criminal Procedure Act, 51 of 1977, with the direction to act in terms of section 113 of the said Act.

6

VAN NIEKERK, J

HEATHCOTE, A J

