



CASE NO.: CR

59/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

IMMANUEL HAMUKOTO

[HIGH COURT REVIEW CASE NO.: 1183/2011]

CORAM: SWANEPOEL, J et SIBOLEKA, J

Delivered on: 2011 JULY 15

REVIEW JUDGMENT

SIBOLEKA, J.:

[1] The accused appeared before the Magistrate's Court at Mariental on a charge of Housebreaking with intent to Steal and Theft.

[2] During questioning in terms of section 112(1)(b) of Act 51/77 the

following came to surface:

“Court: From where did you enter the building.

Acc: I went through the window.

Court: Was the window open.

Acc: Yes.”

[3] Despite the above the learned Magistrate returned the following verdict:

“Court: Accused, Court is satisfied that you admit allegations in charge and finds accused guilty as charged.”

[4] I directed the following query to the learned Magistrate:

“The Honourable Reviewing Judge remarks as follows:

Does getting into another person’s house through an already open window constitute “Housebreaking with intent to steal and theft”.

In this matter the record in part states that:

“Court: From where did you enter the building.

Acc: I went through the window.

Court: Was the window open.

Acc: Yes.”

Please explain. Your early reply will be appreciated.”

[5] The Magistrate’s reply has been received and reads:

“Housebreaking with intent to steal and theft is a common law crime. Elements to secure a conviction are different factors to be taken as a whole. In the matter for review, court questions the accused in order to establish element of breaking in. There are numerous authors that discuss criminal specific offences. I followed the approach of Milton¹ in particular the element of breaking in. It is argued that in order for

breaking element to be satisfied, there needs to be a displacement of some sort.

However, this court is likely to agree that it may seem odd to call someone a housebreaker when he pushes a partially open door, but not when he simply walks through an open door. But the only alternative (unless one requires a physical breaking) is to adapt the former English rule and say that there can never be a breaking when an unfastened partially open window or door is pushed further open. Neither Gardiner JP nor other South African courts and Namibian courts² have been prepared to do. ³(My emphasis).

In essence this court would agree with Judge Beadle in *R v Faison*⁸⁸ that, “the gravamen of the housebreaking is not so much the breaking as the unlawful entry, it is perhaps surprising that we do not go further, and treat it as housebreaking if X enters through an opening without displacement.

For this reason I convicted accused with the offence as charged. I stand to be corrected by the Honourable Reviewing Judge.”

[6] It is my considered view that for a conduct to constitute ‘a breaking in’ there has to be a removal of an obstruction during the process of entering the premises.

[7] In *S v Rudman* 1989(3) SA 368 at 369G the Court stated:

“... That an unlawful entry into premises through an open window did not constitute a breaking in and that Rudman’s conviction of housebreaking with intent to steal and theft (he had entered the premises through an open window which was big enough for a grown-up to go through,) had to be altered to a conviction of theft only.”

[8] The sentence is in order and will not be tampered with. However, the conviction cannot be allowed to stand.

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

The conviction of Housebreaking with intent to Steal and Theft is set aside and substituted with that of 'Theft'.

SIBOLEKA, J

I agree.

SWANEPOEL, J