



CASE NO.: CR 53/2012

**IN THE HIGH COURT OF NAMIBIA
HELD IN WINDHOEK**

In the matter between:

THE STATE

and

GERHARD AFRIKANER

MARIUS BEUKES

(HIGH COURT REVIEW CASE NO.: 254/2010)

(MAGISTRATE'S SERIAL NO.: 191/2009)

CORAM: PARKER, J *et* SHIVUTE, J

Delivered on: 2012 June 21

REVIEW JUDGMENT

SHIVUTE, J: [1] The two accused persons are convicted on their own plea of guilty of housebreaking with intent to steal and theft in the Magistrate's Court Gobabis. Each accused person was sentenced to N\$2500.00 (two thousand five hundred Namibia dollars) fine or 12 (twelve) months' imprisonment.

[2] I directed a query to the magistrate in the following terms:

“How did the court satisfy itself that the accused persons had an intention to steal when they entered the house, if they were not asked questions pertaining to their intention to enter the house?”

[3] The magistrate replied as follows:

“The accused persons might not have been asked a question pertaining to the intention of having entered the house, but they answered that they took items which do not belong to them out of the house. Both accused persons admitted having broken into the house and took items without any claim of right. I ask that the proceedings be quashed if the omission to question them of their intention of entering the house is so serious to the extent that it leads the proceedings defective. This record does not give out of good reflection its state is unexplainable. It appears that after the magistrate made correction in pencil the record was just forwarded to the High Court without being typed over.”

[4] When the learned magistrate questioned the accused persons she never established the intention of the accused persons at the time they entered the house. Section 112 (1) (b) of Act 51 of 1977 questioning has a twofold purpose namely: to establish the factual basis of the plea of guilty and to establish the legal basis for such plea. From the admissions the court establish whether the legal requirement for the commission of the offence have been met. These include questions of unlawfulness, *actus reus* and *mens rea*. The court can only satisfy itself if all the elements of the offence are adequately covered through the admissions.

[5] In this case the court never asked the two accused persons pertaining to their intention at the time they entered the premises. Since the State has alleged that the accused persons' intention to enter the house was to steal,

this is an essential element and it was not covered by the learned magistrate.

[6] In view of the above reasoning I am not satisfied that he accused admitted all the elements of the offence. Therefore, the conviction and the sentence cannot be allowed to stand. As the accused persons have already served their sentences I found it not necessary to remit the matter to the learned magistrate to question the accused persons afresh.

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

The conviction and sentence are set aside.

SHIVUTE, J

I agree.

PARKER, J