



CASE NO.: CR 50/2012

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

In the matter between:

THE STATE

and

HAMUTENYA GABRIEL

(HIGH COURT REVIEW CASE NO.: 954/2012)

(MAGISTRATE'S SERIAL NO.: 51/2012)

CORAM: PARKER, J et SHIVUTE, J

Delivered on: 2012 June 21

REVIEW JUDGMENT

SHIVUTE, J: [1] This matter has been submitted for automatic review in terms of section 302 of the Criminal Procedure Act, (Act 51 of 1977).

[2] The accused appeared in the Magistrates Court Ondangwa charged with the offence of Housebreaking with intent to steal and theft. He pleaded guilty and he was dealt with in terms of section 112 (1) (b) of the Criminal Procedure Act.

[3] The accused was asked to explain to the court what he did wrong that made him to say that he was guilty. The accused stated that he broke into the complainant's room and stole the goods as indicated in the annexure.

He was asked why he did it and he replied that he was passing by the complainant's room and saw that she was not there and decided to go in the room to steal because, he wanted to sell the property and use the money for himself. The accused had admitted the allegations and other elements of the offence as contained in the charge sheet except the fact that it has never been established how the accused gained entry into the room.

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

'How did the accused gain entry?'

[5] The magistrate responded in the following terms:

"I concede that I overlooked to properly canvass the essential element of breaking into the property. As a result, the means used to gain entry is not addressed and thus the conviction is improper."

[6] A breaking is an essential element of the crime of housebreaking with intent to steal and for there to be a breaking there must be a displacement of part of the premises in question. There is nothing on record indicating how the accused entered the complainant's room. Although the accused stated that he broke into the complainant's room, this is not sufficient to prove a breaking. The magistrate ought to have established from the accused how he gained entry. Since the essential element of the offence of housebreaking with intent to steal is not established, the conviction of housebreaking with intent to steal and theft cannot be allowed to stand. It

follows that the sentence of 15 (fifteen) months imprisonment of which 5 (five) months are suspended for 3 (three) years on condition that the accused is not convicted of housebreaking with intent to steal and theft committed within the period of suspension imposed on the accused cannot be allowed to stand.

[7] Accordingly, the conviction and sentence are set aside and the case is remitted to the magistrate with a direction that he records a plea of not guilty as required by section 113 of the Act and proceeds with the trial. In sentencing the accused the magistrate must consider the term of imprisonment served by the accused.

SHIVUTE, J

I agree.

PARKER, J