CASE NO.: CR 64/2012

IN THE HIGH COURT OF NAMIBIA

HELD IN WINDHOEK

In the matter between:

THE STATE

and

SAMARIA JOHN PAUL

(HIGH COURT REVIEW CASE NO.:698/2011)

(MAGISTRATE'S SERIAL NO.: 61/2010)

CORAM: **PARKER, J *et* SHIVUTE, J**

Delivered on: 2012 July 16

REVIEW JUDGMENT

SHIVUTE, J: [1] The accused was charged with the offence of housebreaking with intent to steal and theft in the district Court, Rundu and convicted as such.

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

"How did the Court satisfy itself that the accused broke itno the house? How did he gain entry?"

[3] The learned magistrate replied as follows:

"From my perspective I convicted the accused due to the fact that the accused had admitted in terms of section 115(2)(b) of Criminal Procedure Act 51 of 1977 that he broke and entered into the house of the complainant but only stole item *(face scrub)* from the list of goods that were alleged to have been stolen. The complainant testified that he left his house to go to work and later discovered that his house was broken into. Accused in his cross examination of the complainant raised the issue of the cell phone which he said was not in its packaging box as only its box was inside the house in the corner, whilst the complainant testified that he left the cell phone in its packaging box on the table together with his toiletries.

Furthermore the accused himself in his testimony admitted to have broken into and entered the complainant's house but that he only took the *face scrub*. Now looking at that evidence it is very clear that the accused did indeed break into the house as he himself never denied that the item that was found with him was among the goods that were reported as having been stolen by the accused. Therefore the circumstantial evidence together with the fact that when one invokes the doctrine of recent possession the evidence points to the accused as being the culprit.

Moreover in ***S v Mjodi 1981 (3) SA 1233 (A)*** it is stated that the legislature intended a formal admission to be proof in the sense that no further or better

proof is required. In ***S v Hendricks 1995 (2) SACR 177 (A)*** it was pointed out that the consent of the accused is a prerequisite for admissions made in terms of section 115 (2) of the Criminal Procedure Act 51 of 1977. In this particular case, before I recorded any admissions I ascertained from the accused on whether if certain allegations that he was not disputing could be recorded as formal admissions after the consequences of such admissions was explained to him. The accused consciously stated that he had no objections some of the allegations being recorded as formal admissions.

However I also see your point My Lord that the breaking element of the offence was not outlined in detail as to how it was done. May be I over emphasized or attached too much weight to the accused's own admissions and overlooked that aspect."

[4] The accused might have admitted that he broke and entered into the house but this is not sufficient to warrant a conviction for housebreaking with intent to steal. Breaking and entering are technical words. For breaking to take place there must be a removal or displacement of any obstacle which bars entry to the stracture and which forms part of the structure itself or premises. (*The State v Meyeza and Another* 1962 (3) SALR at 386)

There is no breaking if one merely walks through an open door or climbs through an open window or stretches one's arm through an open hole. Again a mere breaking without entering is not sufficient to constitute the crime. The entry is complete the moment the accused has inserted any part of his body, or any instrument he is using for that purpose, into the opening with

the intention of exercising control over some content of the building or structure.

(See Snyman, *Criminal Law* 4th edition at 543 and 544.)

[5] In this case, there is no single evidence indicating how the complainant's premises was broken into. Although the complainant was called to testify he could not tell the court how his premises was broken into, because he was told to confine himself to the items which were taken from the house. The State as well as the Court were of the opinion that the essential element of breaking was established by the accused's admission that he broke into the house.

[6] There is no evidence as to how the accused gained entry into the house and it follows that the State did not prove that the house was broken into. A theft of the goods in question, was however, proved. The result of this is that the verdict of housebreaking with intent to steal and theft has to be set aside and replaced with the verdict of guilty of theft. The sentence of N$2000.00 (two thousand) Namibia dollars fine in default of payment 8 (eight) month's imprisonment is to be altered.

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

(1) A conviction of housebreaking with intent to steal and theft is set aside and substibuted to a verdict of "guilty of theft".

(2) The sentence of N$2000.00 (two thousand) Namibia dollars fine or in default of payment 8 (eight) months' imprisonment is substituted to a fine of N$1200.00 or 6 months' imprisonment.

The sentence is backdated to the date of sentence by the court *a quo*.

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SHIVUTE, J

I agree.

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PARKER, J