
**CASE NO.: CR 05/2012**

**IN THE HIGH COURT OF NAMIBIA**
**HELD AT OSHAKATI**

In the matter between:

**THE STATE**

**and**

**NDJOMBO MBENGE KAMANGOTI**

*(HIGH COURT REVIEW CASE NO.: 314/2011)*

***CORAM:*** LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 02 March 2012

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**REVIEW JUDGMENT**

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**LIEBENBERG, J.:** [1] The accused appeared in the Magistrate's Court, Outapi on a charge of housebreaking with intent to steal and theft and after evidence was heard he was convicted as charged and sentenced to seven months' imprisonment.

[2] When the matter came on review a query was directed to the trial magistrate enquiring whether the mere moving of a curtain hanging in front of the entrance of the room, would constitute an act of "breaking", an element of the offence of housebreaking with intent to steal and theft. The learned magistrate in his reply was of the view that the moving of a curtain in front of a doorway (or window) would indeed constitute a "breaking" and relied on the authoritative work of the author C R Snyman: *Criminal Law*[1] where the following is said at p 552 para 6:

> "The "breaking" consists of the removal or displacement of any obstacle that bars entry to the structure and which forms part of the structure itself. … The obstacle which is removed in order to break in need not be a permanent attachment to the building. However, it must form part of the structure. Therefore, the mere shifting of blinds in front of an open window in order to gain access to the house will qualify as a "breaking in", but not the mere shifting of a pot plant on a window-sill." (emphasis provided)

Had the learned magistrate gone further and included the next sentence in the passage quoted, he would have had a different proposition, for it reads:

> "Neither will the mere moving of a curtain amount to 'entering', since a curtain cannot be regarded as an 'obstruction'."

[3] In this case the accused gained entry into the complainant's room by pushing aside a curtain hanging in front of the doorway. It is clear that the

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curtain does not form part of the structure (the room) and by pushing it to one side upon entry, cannot be construed as a "breaking in", as there was no removal or displacement of an "obstruction". In *S v Hlongwane*[2] the Court decided the question as to what constitutes "housebreaking", in circumstances similar to the present case, where the accused had moved the curtain hanging in front of an open window, and at 486g-i it is stated:

> "In order to constitute a breaking the conduct complained of must have created a way into the complainant's premises 'by displacing some obstruction which forms part of those premises' (Hunt (op cit at 707)). But simply to move a curtain in these circumstances does not, in my opinion, amount to the displacement of an obstruction because a curtain hung inside the burglar-proofing of a modern Western house cannot possibly be regarded as an obstruction. And, even if it were to be so regarded, it is certainly not part of the premises.
>
> In my view, therefore, the fact that the accused may have moved the curtain did not constitute a breaking of the premises on his part."

Also see: *S v Small*[3] at 302-303; *S v Markus and Others.*[4]

[4] It seems to me well-settled that where an accused as in this case merely pushes a curtain aside, this does not constitute a "breaking in" in terms of the offence of housebreaking with intent to commit an offence; hence, the accused's conviction in the present case cannot be permitted to stand. The accused ought to have been convicted on the competent verdict of theft.

[2] 1992 (2) SACR 484 (N)
[3] 2005 (2) SACR 300
[4] 1992 NR 230 (HC)

[5] Whereas the accused is now convicted of theft, generally considered for purposes of sentence, to be less serious than the offence of housebreaking with intent to commit a crime, the question arises whether or not the sentence of seven months imprisonment imposed, is appropriate. I think it is and there is no need to interfere with sentence. In any event, the accused by now would have served his sentence and the outcome of these proceedings is purely academic.

[6] In the result, the Court makes the following order:

1. The conviction is set aside and substituted with a conviction of theft.
2. The sentence is confirmed.

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**LIEBENBERG, J**

I concur.

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**TOMMASI, J**