



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 36/2013

In the matter between:

THE STATE

and

FILLIP MANGATE

Neutral citation: *The State v Mangate* (CR 36/2012) [2013] NAHCMD 154 (7 June 2013)

Coram: NDAUENDAPO, J and UNENGU, AJ

Delivered on: 7 June 2013

Flynote: Criminal law – Housebreaking with intent to steal and theft – Proof of Accused selling and found in possession of goods removed from the house of complainant – Failure of accused to explain possession of such goods – Conviction of theft substituted with one of guilty of housebreaking with intent to steal and theft on review.

Summary: The accused charged with housebreaking with intent to steal and theft but convicted of theft – on review the conviction of theft has been substituted with a conviction of housebreaking with intent to steal and theft due to failure of the accused to explain possession of goods removed from the house of complainant during the housebreaking.

ORDER

In the result, I make the following order:

- (i) The conviction of theft is set aside and substituted with a conviction of guilty of housebreaking with intent to steal and theft.

- (ii) The sentence is confirmed.

REVIEW JUDGMENT

UNENGU, AJ (NDAUENDAPO, J concurring):

[1] The accused was charged with housebreaking with intent steal and theft, but, after a trial, he was convicted of theft and sentenced to pay a fine of N\$2000.00 with an alternative imprisonment period of 12 months of which N\$1000.00 or 6 months thereof suspended for 3 years on the usual condition. Thereafter the matter was submitted for automatic review.

[2] On review, I queried the learned magistrate why he convicted the accused of theft and not of housebreaking with intent to steal and theft – the crime he was charged with.

[3] Answering to the query the learned magistrate gave a brief assessment of evidence placed before him by the State and concluded that in his opinion, the evidence was entirely circumstantial which supported the crime of theft – even though the State hoped to secure a conviction of housebreaking with intent to steal and theft based on the doctrine of recent possession.

[4] To support the conviction of theft, the magistrate referred to *S v Kapolo*¹, a judgment by Strydom, JP (as he then was) with Frank, J concurring. In the *Kapolo* matter, the accused was also charged with housebreaking with intent to steal and theft. No direct evidence was led by the State to link the accused to the housebreaking of the project building. However, based on the doctrine of recent possession, the magistrate found the accused guilty of housebreaking with intent to steal and theft. On review, the conviction of guilty of housebreaking with intent to steal and theft, was substituted with a verdict of guilty of theft of the sewing machine, found in accused's possession when he was arrested. Strydom, JP stated that 'it is correct that where a person is found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, a court is entitled to infer that such person had stolen the article or that he is guilty of some other offences'.

[5] The facts in the present matter are almost identical to the facts in the *Kapolo* matter.

[6] In this matter the house of the complainant was broken into around 2 September 2010 when she was on holiday in Windhoek. Several items, amongst others, a stove (hot plate) and a pot were removed from the house. On 4 September 2010, 2 days after the burglary, the accused sold the stolen pot to a certain Paulus Tjivera for N\$25.00 – the accused telling Mr Tjivera that the pot was his property which he brought with from the farm. This pot was identified by complainant as hers which was removed from the house during the housebreaking. Similarly, a stove, also one of the stolen items from the house of complainant was found wrapped up in the trouser of the accused by a witness, on 4 September 2010, the same day the

¹1995 NR 129 (HC)

accused sold the pot to Tjivera. The stove was also identified by the complainant as hers. After the state's case was closed the accused elected to, also close his case without him or any other person testifying on his behalf.

[7] As previously indicated, the facts of this matter and those in the *Kapolo* matter are almost identical. There is, however, a difference between the two matters. This is that the accused in the present matter failed to explain his possession of the stolen stove (hot plate) and the pot which items, according to the evidence, the stove was found wrapped in his trousers and the pot was sold for N\$25.00 to one of the witnesses. Whereas in the *Kapolo* matter, accused, although not testifying himself, called witnesses who told the court that another person gave the sewing machine to him to sell – confirming his plea explanation.

[8] In view of the failure of the accused to give an explanation of his possession of the pot and stove (hot plate) which could be accepted by the court as reasonably true, I am of the view that the only inference which can be drawn from the facts of the matter, is that none other than the accused has broken into the house of the complainant and removed the stove (hot plate) and the pot with a combined value of N\$300.00 and should be so convicted.

[9] This matter was submitted for automatic review more than a year after the sentence was passed. It is therefore possible that the accused had either paid the fine or a part fine thereof while in custody or had served the six (6) months, the alternative sentence. That being so, it will not serve any purpose to substitute the sentence imposed by the magistrate.

[10] In the result, I make the following order:

- (i) The conviction of theft is set aside and substituted with a conviction of guilty of housebreaking with intent to steal and theft.

- (ii) The sentence is confirmed.

EP Unengu
Acting Judge

N Ndauendapo
Judge