

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION WINDHOEK

REVIEW JUDGMENT

Case no: CR 22/2018

In the matter between

THE STATE

v

**ANDREW HENRY
DYLAN MCKAY
BRENDON PIENAAR**

**FIRST ACCUSED
SECOND ACCUSED
THIRD ACCUSED**

(HIGH COURT MD REVIEW CASE NO: 1834/2017)

Neutral Citation: *S v Henry* (CR 22/2018) [2018] NAHCMD 65 (20 March 2018)

Coram: SIBOLEKA, J et SALIONGA, AJ

Delivered: 20 March 2018

Flynote: Criminal Procedure- Wrong charge reflected on review sheet-Corrected to show the offence accused is charged with—Prejudice-Conviction and sentence in order

REVIEW JUDGMENT

SALIONGA, AJ (SIBOLEKA, J concurring)

[1] The three (3) accused were charged with housebreaking with intent to steal and theft, with the alternative count of theft and accused 1 & 3 were convicted upon their own pleas of guilty on theft and housebreaking with intent to steal and theft. Accused three's plea explanation of his guilty on Housebreaking was erroneously replaced with theft. The court invoked section 113 of Act 51 of 1977, entered a plea of not guilty in respect of accused 2 (two). A separation of trial was ordered in respect of accused 2. Accused 1 was sentenced to 24 (twenty four) months direct imprisonment and accused 3 was sentenced to 12 (twelve) months imprisonment, a situation which attracts interference from this court.

[2] When the matter came on review I directed the following queries to the Magistrate that:

- '(a) Record must be properly bounded before submitted on review as documents were mixed up.
- (b) Review sheet must be corrected to indicate the offences with which the accused persons were convicted of.
- (c) Accused persons were charged with house breaking with intent to steal and theft and alternative charge of theft and cannot be found guilty as charged
- (d) Accused persons indicated to have taken the goods but does not know why they had taken the goods and accused 3 admitted to have broken into the house but was nevertheless found guilty of theft.'

[3] The learned Magistrate in his reply conceded as follows:

- '(a) The record has now been properly bound and filed for submission.
- (b) Review sheet has been corrected to indicate the offences the accused persons are convicted of, (It has always reflected housebreaking with intent to steal and theft and that remains the case).
- (c) Accused were never charged with possession of property suspected to have been stolen only housebreaking with intent to steal and theft and alternative count of theft. Accused had foreseen that taking the owner's properties without his consent is stealing from him that resulted in a conviction of theft.
- (d) That accused 3 admitted to have broken into the house and was found guilty of theft to which he pleaded guilty to. The accused pleaded not guilty to housebreaking with intent to steal and theft. The state accepted his guilty plea to theft.'

[4] All three accused pleaded not guilty to the first count of Housebreaking with intent to steal and theft, they however pleaded guilty to the alternative count of theft. Questioning in terms of Section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 was conducted on each accused, in relation to the alternative count of theft.

Accused one: here is how the Magistrate questioned the accused on the offence of theft itself:

'Court: "Can you tell the Court what happened there that led to your arrest"?

Accused one: "The day of the offence occurred, my co-accused's came and took me, and that is when we went to that house and we took the TV's and the DVD. That is how we came that I have been arrested".

Court: Why did you take the items?

Accused one: "I don't know why I took the items".

Court: "Did you have the intention to take such property"?

Accused One: "No"

Court: "Accused person the Court is satisfied that you admit all the elements of the offence and you are found guilty as charged".'

[5] The problem I find with the above questioning is that it is not complete. The trial Magistrate is not allowed by law to record a vague or an incomplete answer furnished

by an undefendent accused without ventilating it more to get some substance sense from what he is talking. Accused one said they found the alleged stolen property at the house, but the trial court did not bother to find out where exactly.

[6] As it stands it is unclear whether the TV and DVD were just found gathered by an unknown person and left outside the house, nothing is clear from the court's questioning, yet at the end of accused one's questioning the trial court said it was satisfied and found him guilty as charged.

[7] Accused one was eventually convicted on theft, and since this offence involves the taking of another person's property without consent, coupled with the time factor in this matter from the date of sentence. I will allow the conviction on theft.

[8] During the same court proceedings accused three's questioning on the actual offence of theft reveals the following:

'Court: "Can you tell the Court what happened there that led to your arrest"?

Accused three: "I broke into the house with accused 2, we took laptops and then we went home and we went to take accused 1, and then we went to collect the TV's that's all".'

[9] The crime of Housebreaking with intent to steal and theft has been unequivocally admitted, but the trial Court nonetheless stated the following:

'Court: "The Court is satisfied that you admit all the elements of the offence and you are found guilty as charged, for theft".'

It is my considered view that the conviction of accused three on theft, when he unreservedly said he 'broke' into the house and took the property reflected on the charge should not be allowed to stand.

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

- (a) The conviction and sentence of accused 1 (one) on theft is confirmed.

- (b) The conviction and sentence of accused 3 (three) on theft is set aside and replaced with the following:

Convicted on: Housebreaking with intent to steal and theft.

Sentence: Three (3) years imprisonment.

The sentence is antedated: 19 October 2016.

J.T. SALIONGA
ACTING JUDGE

A.M. SIBOLEKA
JUDGE