

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA  
WINDHOEK  
REVIEW JUDGMENT



MAIN DIVISION,

<b>Case Title:</b>		<b>Court Ref Number:84/2022</b>
<i>The State</i>		<b>Cr 39/2022</b>
<i>v</i>		
<i>Desmond Haseb</i>	<i>First Accused</i>	<b>Division of Court:</b> Main Division
<i>Vincent Muranda</i>	<i>Third Accused</i>	
<b>Heard before:</b>		<b>Delivered on:</b>
Hon. Judge Shivute <i>et</i>		20 May 2022
Hon. Judge January		
(HIGH COURT MAIN DIVISION REVIEW REF NO. (84/2022))		
<b>Neutral citation:</b> <i>S v Haseb and 1 Other</i> (CR 39/2022) [2022] NAHCM 254 ( 20 May 2022)		
<b>The order:</b>		
<p>a. Count 1, in respect of accused 1: The conviction and sentence are set aside.</p> <p>b. In respect of count 1, the matter is remitted to the trial court in terms of s 312 of the Criminal Procedure Act 51 of 1977 and the Magistrate is directed to question the accused in terms of s 112 (1)(b) of the Act in order to determine accused 1's intention at the time of breaking and entering the house.</p> <p>c. When sentencing the accused, the court should take into consideration the portion of the sentence the accused had already served.</p> <p>d. Count 2, in respect of accused 1: The conviction and sentence are set aside and substituted with the following: The accused is found guilty of the offence of theft and sentenced to 1 (one) year imprisonment.</p> <p>e. The sentence on count 2 is antedated to 4 January 2022.</p> <p>f. Count 3, in respect of accused 3: The conviction and sentence are confirmed.</p>		

**Reasons for order:**

SHIVUTE J, ( JANUARY J concurring):

[1] This is a review in terms of s 302 (1) of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The two accused persons appeared before the Magistrate's Court for the district of Grootfontein. Accused 1 was charged with two counts of housebreaking with intent to steal and theft, whereas accused 3 was charged with receiving stolen property, in contravention of s 7 (1) of the General Law Amendment Ordinance 12 of 1956.

[3] The accused pleaded guilty and the court proceeded to question the accused in terms of s 112 (1)(b) of the Act. Subsequently, accused 1 was found guilty on both counts of housebreaking with intent to steal and theft and sentenced to 3 (three) years imprisonment on count 1 and 2 (two) years imprisonment on count 2. Accused 3 was found guilty of receiving stolen property and sentenced to a fine of N\$ 5000.00 or 2 (two) years imprisonment.

[4] The reviewing court directed two queries to the Magistrate. Firstly, as to how he satisfied himself on the first count that when accused 1 broke and entered the premises his intention was to steal, if no question was asked pertaining to his intention at the time he was entering. Secondly, as to how he satisfied himself on the second count that the first accused broke into the house on 6 December 2021, if the house was already broken into on 5 December 2021 and the fact that Accused 1 said that when he took the mattress on 6 December 2021 he did not remove any obstruction.

[5] The Magistrate conceded that he did in fact err during the s 112(1)(b) questioning as he omitted to enquire from accused 1 as to his intention when breaking and entering the house of the complainant on 5 December 2021.

[6] The Magistrate further responded that at the time of questioning accused 1 on his actions relating to count 2, he incorrectly imputed the first act of breaking and entering from count 1 onto count 2, with the misguided conclusion in mind that the accused broke

into the same place with the same intent. He further explained that at the time, he was of the view that the accused could not escape the element of “breaking and entering” as the accused broke and entered the same premises the previous day just to return to and enter the same premises the next day to steal again.

[7] In *S v Combo*,<sup>1</sup> it was held that when the court questions the accused in terms of s 112(1)(b) of the Act, it must ensure that he admits all the elements of the offence in such a way that it enables the court to conclude for itself whether the accused is guilty of the offence charged. The accused’s answers must establish an unequivocal plea of guilty. If there is any doubt, a plea of not guilty should be entered.

[8] The magistrate could therefore, not have been satisfied in the present case that accused 1 admitted all the elements of the offence in count 1 as the element of intention was never established.

[9] The element of “breaking” consists of the removal or displacement of any obstacle that bars entry to the structure and which forms part of the structure.<sup>2</sup>

[10] During the s 112 (1)(b) questioning, the accused stated that, the gate was already open when they reached the premises on 6 December 2021. He further stated that, they entered through the window which was left open from the previous day and they just jumped inside the house. The door to the room was also already open so they just entered. Therefore, in terms of count 2, the element of “breaking” was not met as there was no removal or displacement of an obstruction on 6 December 2021. Thus the conviction of count 2 cannot be allowed to stand as accused 1 should have been convicted on the competent verdict of theft.

[11] With regard to count 3, in respect of accused 3, this court has no qualm with it as accused 3 was properly convicted and sentenced.

[12] In the result, it is ordered that :

- a. Count 1, in respect of accused 1: The conviction and sentence are set aside.

<sup>1</sup> *S v Combo and Another* 2007 (2) NR 619 (HC).

<sup>2</sup> C R Snyman *Criminal Law* 2 ed p 527.

- b. In respect of count 1, the matter is remitted to the trial court in terms of s 312 of the Criminal Procedure Act 51 of 1977 and the Magistrate is directed to question the accused in terms of s 112 (1) (b) of the Act in order to determine accused 1's intention at the time of breaking and entering the house.
- c. When sentencing the accused, the court should take into consideration the portion of the sentence the accused had already served.
- d. Count 2, in respect of accused 1: The conviction and sentence are set aside and substituted with the following:

The accused is found guilty of the offence of theft and sentenced to 1 (one) year imprisonment.

- e. The sentence on count 2 is antedated to 4 January 2022.
- f. Count 3, in respect of accused 3: The conviction and sentence are confirmed.

<b>NN SHIVUTE</b>	<b>HC JANUARY</b>
<b>JUDGE</b>	<b>JUDGE</b>