

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: The State v Berent Engelbrecht	Case No: High Court Ref. No.:1162/2023 CR 101/2023
	Division of Court: High Court Main Division
Heard before: Honourable Justice Liebenberg <i>et</i> Honourable Lady Shivute	Delivered on: 12 October 2023
Neutral citation: <i>S v Engelbrecht</i> (CR 101/2023) [2023] NAHCMD 643 (12 October 2023)	
Order: (a) The conviction of housebreaking with intent to commit a crime unknown to the state is set aside and substituted by the conviction of housebreaking with intent to steal. (b) The sentence is confirmed.	
Reasons for order:	
Shivute J (Concurring Liebenberg J)	

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

[2] The accused was charged with housebreaking with intent to commit a crime unknown to the State and convicted as charged after the court invoked the provisions of section 112 (1)(b) of the CPA. He was sentenced to two years direct imprisonment.

[3] I directed a query to the court a quo why it convicted the accused of housebreaking with intent to commit a crime unknown to the state, in circumstances where the accused was asked as to what he intended to do when he entered the premises and he stated that he wanted to take food?

[4] The magistrate responded as follows:

‘I humbly make reference to page five (5) of the typed record of proceedings when the court questioned the accused in terms of the Criminal Procedure Act.

2. Do you stand justified that when you were inside the house and what you intend doing inside the house you wanted to go take food?

A. It is not correct I am wrong for what I did, I was not supposed to go into the house.

Q. Did you take the food when you were inside the house?

A. No

Q. Why not?

A. I was stopped by the lady inside the house, she said do not do anything. The accused indicated he did not take the food as he was stopped by a lady. In my view whether the lady exists or not, whether the lady is real or exaggerated no evidence was led as to the lady's name and the lady was not called to corroborate or dispute accused's version. In the case of *Woodrow* 1992 (2) SACR 109 (C) 112-113 the court was acutely aware of this illogical aspect of the "crime of housebreaking with intent to commit a crime unknown to the prosecutor." X broke into a house with the apparent intent merely to speak to his ex-girlfriend. The court set aside the conviction of housebreaking with intent to commit a crime unknown to the prosecutor. Cf, however *Slabb* 2007 (1) SACR 77 (C) 81, where the court held that one should adopt a common-sense approach and that there is a need for a known crime as housebreaking with intent to commit a crime unknown to the prosecutor. However, in the current case accused did not steal anything. Perhaps accused could have been charged or convicted of trespass if it is difficult to determine accused's real intention or intention to

trespass.'

[5] The accused was questioned by the learned magistrate at page five of the proceedings and I quote verbatim:

'Q' Before you entered the house what did you intend doing?

A. I entered to go take food.

Q. Do you stand justified that you entered to go take food in the house?

A. It was break. I went into the person's house I was not given permission to go in.

Q. When you were inside the house what did you intend doing inside the house?

A. I wanted to go take food.

Q. Do you stand justified that when you were inside the house and what you intend doing inside the house you wanted to go take food?

A. It is not correct. I am wrong for what I did, I was not supposed to go into the house.

Q. Did you take the food when you were inside the house?

A. No.

Q. Why not?

A. I was stopped by the lady who was inside the house.'

[6] From the record of the proceedings, its evident that the accused's intention to go inside the house was to steal food. Therefore, it is illogical to convict the accused with the crime of housebreaking to commit a crime unknown to the state. The accused had revealed the unknown crime to be theft. He did not steal the food because he was stopped by a lady who was inside the house.

[7] Since the accused's intention to enter the premises was to steal food, the conviction of housebreaking with intent to commit a crime unknown to the state cannot be allowed to stand. It is therefore, substituted with the conviction of housebreaking with intent to steal.

[8] The accused was sentenced to two years' imprisonment. I do not wish to change the sentence as the accused is not going to be prejudiced if the sentence is applied to the substituted conviction.

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

(a) The conviction of housebreaking with intent to commit a crime unknown to the state is

set aside and substituted by the conviction of housebreaking with intent to steal.

(b) The sentence is confirmed.

N N SHIVUTE
JUDGE

J C LIEBENBERG
JUDGE