

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA  
DIVISION, OSHAKATI



NORTHERN LOCAL

REVIEW JUDGMENT

Case no: CR 58/2022

In the matter between:

THE STATE

v

NGESHEYA TAUNO NAPADJE

ACCUSED

(HIGH COURT NORTHERN LOCAL DIVISION REVIEW REF NO: 246/2022)

**Neutral citation:** *S v Napadje* (CR 58/2022) [2022] NAHCNLD 112 (14 October 2022)

**Coram:** SALIONGA J *et* KESSLAU AJ

**Delivered on:** 14 October 2022

**Flynote:** Criminal procedure- Automatic review- Guilty plea- Housebreaking with intent to steal proven and conviction on housebreaking with intent to commit a crime unknown to the State substituted- Section 262 (2) of the Criminal Procedure Act 51 of 1977 found application- Sentence confirmed.

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ORDER

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1. The conviction of housebreaking with intent to commit a crime unknown to the State

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

2. The sentence is confirmed.

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## JUDGMENT

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SALIONGA J (KESSALAU AJ concurring):

[1] The accused was charged with the crime of Housebreaking with the intent to commit a crime unknown to the State.

[2] The charge sheet alleges that on 18 November 2021 and at Engela village in the district of Eenhana the accused did unlawfully and intentionally break and enter the room of Hendrina Shivuila with the intent to commit a crime unknown to the State.

[3] Accused pleaded guilty and was convicted of Housebreaking with intent to commit a crime unknown to the State pursuant to questioning in terms of section 112 (1) (b) of the Criminal Procedure Act, Act 51 of 1977.

[4] When the matter came before me on automatic review, I directed a query to the learned Magistrate why was accused convicted of housebreaking with intent to commit a crime unknown to the State if during questioning he indicated or admitted that without succeeding he wanted to get a TV from the room he had broken into.

[5] On 13 September 2022, the divisional magistrate for Oshakati division returned the record with a covering letter in which he stated that magistrate K Shaatuna has resigned in August 2022. In his covering letter he indicated that he had read through the record of proceedings and questioning in terms of section 112 (1) (b) of the Act. He further indicated that despite the magistrate having regurgitated the allegations on the charge annexure in relation to the offence of Housebreaking with intent to commit a crime unknown to the state, accused was asked whether he admits or denies same to which the he replied that he admits because he wanted to get the TV.

[6] The Divisional magistrate went further to state that the above responses brings to the fore that his intention when he broke into the house was to steal. Therefore it is indeed wrong for the magistrate to have convicted the accused of an

offence of housebreaking with intent to commit a crime unknown to the State whereas his intention was made known to the court. He requested the court to apply the procedure adopted in *S v Kharuxab*<sup>1</sup> for a conviction to be substituted with that of housebreaking with intent to steal. I fully agree with the Divisional Magistrate's comments and observations and his nobility, efforts and prompt reply to queries directed to magistrates who are no longer in the service is highly commendable and encouraged.

[7] Section 262 (2) of Act 51 of 1977 provides as follows:

'If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown but the offence of housebreaking with intent to commit a specific offence the accused may be found guilty of the offence so proved.' See also ***S v Dixon*** 1995 NR 115.

[8] It is clear, that when the accused broke into the room, his intention was to steal a TV but was interrupted by the owner of the premises and the admissions made did not establish that any theft had taken place after the break in. I find that the concession was properly made.

[9] It follows that the conviction of housebreaking with intent to commit an offence to the prosecutor unknown cannot be allowed to stand. It has to be substituted with the conviction of Housebreaking with intent to steal as no prejudiced will be suffered.

[10] In the result I made the following order;

1. The conviction of housebreaking with intent to commit a crime unknown to the State is set aside and is substituted with the conviction of housebreaking with intent to steal.
2. The sentence is confirmed.

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<sup>1</sup> *S v Kharuxab* (CR 120/2007) [2007] NAHC 63 (10 August 2007)

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J. T. SALIONGA  
Judge

I agree,

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E. E. KESSLAU  
Acting Judge