

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Lisias Johannes Ashipala</i>	<b>Case no:</b> CR 14/2022 Oshakati 25/2022
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	<b>Delivered on:</b> 8 April 2022
<b>Neutral citation:</b> <i>S v Ashipala</i> (CR 14/2022) [2022] NAHCNLD 38 (8 April 2022)	
<b>It is hereby ordered that:</b> <ol style="list-style-type: none"><li>1. The conviction on a charge of housebreaking with the intent to steal and theft is altered to a conviction of theft;</li><li>2. The sentence is set aside and replaced with a fine of N\$ 2 000 or 8 (eight) months imprisonment;</li><li>3. The sentence is antedated to 4 March 2022.</li></ol>	
<b>Reasons for the order:</b>	
KESSLAU AJ ( concurring SALIONGA J ):	
[1] The matter comes before this court in terms of section 304(2) of the Criminal	

Procedure Act 51 of 1977 as amended, (hereinafter referred to as the CPA).

[2] The accused appeared in the Magistrate Court in the district of Oshakati charged with the offense of housebreaking with the intent to steal and theft. The allegation *inter alia* was that he broke and entered the house of the complainant.

[3] The accused plead guilty and was questioned in terms of Section 112(1) (b) of Act 51 of 1977<sup>1</sup> during which he admitted that he opened the gate to the garden of the complainant and stole the said property from the garden. He was however convicted on the charge of housebreaking and sentenced to fifteen months imprisonment.

[4] I directed the following query to the magistrate: 'The accused admitted walking into a garden and taking the property without entering any building/premises/structure used for habitation or storage. On what basis was he convicted of Housebreaking with the intent to steal and theft?'

[5] The magistrate graciously conceded that she wrongly convicted the accused on a charge of Housebreaking and requests the court to substitute same with a charge of theft and to confirm the sentence imposed.

[6] The definition of the offense by Burchell and Milton is: 'Housebreaking with the intent to commit a crime consists in unlawfully breaking and entering premises with intent to commit that crime<sup>2</sup>.' Premises or the concept of 'house' has taken on many forms in our law with the general principle being that the premises referred to must ordinarily be used for human habitation or for the storage or housing of property of some kind<sup>3</sup>. It does not include a garden.

[7] The accused admitted to the offence and as competent verdict the conviction will be altered to a conviction of theft.

[8] The Magistrate submitted that the same sentence should apply. The sentence

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<sup>1</sup> The Criminal Procedure Act

<sup>2</sup> J. Burchell and J. Milton, *Principles of Criminal Law*, ed (1994) at 542.

<sup>3</sup> J. Burchell and J. Milton (*supra*), at 545.

imposed in the court *a quo* was for the compounded offense of housebreaking with the intent to steal and theft which generally carries a more severe punishment than the single offense of theft. Bearing in mind that the accused stands convicted of a lesser offense it follows that this court should interfere with the sentence.

[9] The accused plead guilty on his first appearance in court and was a first offender. Normally the option of a fine is included in these circumstances to enable the accused to avoid imprisonment. Direct imprisonment should be reserved for instances when it is important to remove the offender from society for the public's protection or if, due to the seriousness of the offense, it is required<sup>4</sup>. There is no reason why the option of a fine cannot be included in the sentence even more so considering the value of the items and the fact that it was recovered shortly after the offense was committed.

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

1. The conviction on a charge of housebreaking with the intent to steal and theft is altered to a conviction of theft;
2. The sentence is set aside and replaced with a fine of N\$ 2 000 or 8 (eight) months imprisonment;
3. The sentence is antedated to 4 March 2022.

Judge(s) signature	Comments:
KESSLAU AJ:	
SALIONGA J:	

<sup>4</sup> *Shetu v The State* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 34 (1 April 2021).