

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

<b>Case Title:</b> The State v Shetunjenga Ngalukwe	<b>Case No:</b> CR 40/2024
<b>High Court NLD Review No.:</b> 630/2024	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Salionga J et Kessler J	<b>Delivered on:</b> 1 October 2024
<b>Neutral citation:</b> <i>S v Ngalukwe</i> (CR 40/2024) [2024] NAHCNLD 105 (1 October 2024)	
<b>It is hereby ordered that:</b>  <ol style="list-style-type: none"><li>1. The conviction and sentence are set aside.</li><li>2. In terms of s 312 of the Criminal Procedure Act 51 of 1977, as amended, the accused person should be brought before the court and the magistrate is directed to question the accused according to the guidelines in this judgment and to bring the matter to its natural conclusion.</li><li>3. In the event of a conviction, the magistrate is to consider the period of imprisonment that the accused has already served.</li></ol>	
<b>Reasons for the order:</b>	
KESSLAU J (SALIONGA J concurring)	
[1] The matter, from the Magistrate's court of Opuwo, was submitted for review in	

terms of ss 302-304 of the Criminal Procedure Act 51 of 1977 (the CPA), as amended.

[2] The accused pleaded guilty to a charge of housebreaking with the intent to steal and theft. After questioning by the magistrate in terms of s 112 (1)(b) of the CPA, the accused was convicted and sentenced.

[3] During the magistrate's questioning, the accused indicated that he entered through an open window. Furthermore, from the record it was not clear which question dealt with the accused's intention to commit the housebreaking. A query was forwarded to the magistrate on these aspects.

[4] The magistrate on the first point conceded that she failed to establish how the accused gained access to the property. CR Snyman explains the 'breaking in' part of the crime as follows:

'The act can be subdivided into two separate components, namely (a) breaking into the structure and (b) entering it. The first component will be considered first. For breaking to take place no actual damage to the structure need be inflicted, although it usually is in practice. The "breaking" consists of the removal or displacement of any obstacle which bars entry to the structure and which forms part of the structure itself. Thus, to push open a closed (though not locked) door or window or even to push open a partially closed door or window will amount to breaking, but there is no breaking if one merely walks through an open door, climbs through an open window or stretches one's arm or an instrument through an open hole.'<sup>1</sup>

[5] On the second point, the magistrate replied that she did question the accused regarding his intention and that my query in this regard suggests 'a new method of questioning' which she will comply with in future. From the record, I assume the question that the magistrate is referring to was: 'What was your intention of stealing in the first place?' The accused replied that he needed money. The questions regarding intention should be asked separately. Firstly, what was your intention of breaking into the house and, secondly, a question on the intention of the accused regarding the theft.

[6] The offense consists of two parts being (a) housebreaking with the intent to steal and (b) theft. The intention to steal when breaking and entering the premises, is part of the allegations made by the State and should be covered independently from the

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<sup>1</sup> CR Snyman, Snyman's Criminal Law, 7<sup>th</sup> ed, 2020 p 482.

intention to steal.<sup>2</sup>

[7] Additionally, the magistrate asked the accused ‘Where you having intention to permanently deprive the lawful owner of her items?’ (sic) This is a leading question that should be avoided and, furthermore, it is loaded with legal terms that the accused might not understand.

[8] Considering the above, the magistrate could not have been satisfied that the accused admitted to all of the elements of the offense. In the result, the following orders are made:

1. The conviction and sentence are set aside.
2. In terms of s 312 of the CPA, the accused person should be brought before the court and the magistrate is directed to question the accused according to the guidelines in this judgment and to bring the matter to its natural conclusion.
3. In the event of a conviction, the magistrate is to consider the period of imprisonment that the accused has already served.

Judge(s) signature	Comments:
KESSLAU J:	None
SALIONGA J:	None

<sup>2</sup> *S v Amunyela* (CR 66/2021) [2021] NAHCMD 356 (05 August 2021).