

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION  
JOHANNESBURG

CASE NO: 137/2013

(1)	REPORTABLE: <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: <u>NO</u>
(3)	REVISED: _____
<u>4/10/13</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between:

THE STATE

Versus

MASINGA, TOKELO

ACCUSED

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J U D G M E N T

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MUDAU, AJ:

[1] This matter comes before me on special review pursuant to the provisions of section 304A of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The accused whose age is reflected on the J18 as a male aged 20 appeared before the additional Magistrate (AK Khan) on a charge of housebreaking with intent to commit a crime unknown to the State. The accused who at the time enjoyed legal representation pleaded guilty to the charge.

[3] In amplification of his plea, a statement into section 112 (2) was handed in and received as Exhibit "A" reads as follows:

*"I the undersigned Tokello Masinga, do hereby plead guilty to the charge of housebreaking with intent to commit a crime unknown to the state as follows:-*

*1.*

*I admit that I understand the charge against me and that I instructed my legal representative to draft this statement on my behalf.*

*2.*

*I admit that on the 10 day of March 2013 I was at Krugersdorp in the district of Krugersdorp.*

*3.*

*I did unlawfully and intentionally break open and enter a house of Marthians Johannes Vos with the intent to commit a crime unknown to the State.*

4.

*On the day in question I did consume alcohol containing drinks hour I was able to operate my wrongful acts.*

5.

*I went into the complainant's yard, I then opened the garage door without the owner's permission, I intended to sleep, I cannot recall if the door was locked, pulled the door up and I entered into the said garage.*

7.

*By the time I so acted knew that my actions were unlawful and therefor punishable by law.*

8.

*I make this statement freely and voluntary without any undue influence thereto.*

*Dated and signed at Krugersdorp on this 25 day of April 2013."*

[4] The learned Magistrate was satisfied that the accused is guilty of the offence of housebreaking with the intent to trespass and trespassing in apparent reference to section 1 of the Trespass Act no 6 of 1959. The Magistrate was correct in his finding as Section 262(2) provides that:

*"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, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved".*

[5] Subsequent to the conviction and during the pre-sentence, it transpired that the accused was 16 of age and a child as defined in terms of the Child Justice Act (refer to in section 1)<sup>1</sup> as at the time of his conviction.

[6] Section 16 (2) of the Child Justice Act provides as follows:-

*"If a presiding officer is of the opinion that an error regarding age may have caused any prejudice to a person during the proceedings in question, the presiding officer must transmit the record of the proceedings to the registrar of the High Court having jurisdiction, in the same manner as provided for in section 303 of the Criminal Procedure Act, in which event the proceedings must be dealt with in terms of the procedure on review as provided for in section 304 of the Criminal Procedure Act".*

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<sup>1</sup> 'Child' means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).

[7] Eksteen J dealt with a similar matter in *S v Mentoer* 2013 JOL 29973 (ECG) where he stated at Para 5 as follows:-

*"In terms of the CJA children charged of criminal offences are afforded a wide range of protections, dependent upon the seriousness of the offences of which they are charged. In the present case the offence of which the accused is listed in Schedule 1 to the CJA and accordingly falls into the least serious category of offences affording the widest range of protections. Where a child has been deprived of these benefits I think that the prejudice is manifest".*

I align myself with the findings by my learned brother Eksteen J.

[8] The DPP whose opinion I sought upon receipt of the papers had recommended that the conviction be set aside and the matter should be referred back to the Magistrate's Court to start *de novo*.

[9] Under the circumstances the conviction falls to be set aside and the matter must be referred back to the Magistrate's Court, Krugersdorp.

[10] In the result it is ordered that:-

1. The conviction is set aside;

2. Should the Prosecution Authority decide to pursue criminal prosecution of the accused the matter is to commence *de novo* before a different Magistrate in accordance with the Child Justice Act.



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**T P MUDAU**

**ACTING JUDGE OF THE SOUTH GAUTENG  
HIGH COURT, JOHANNESBURG**

I agree



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**G J STRYDOM**

**ACTING JUDGE OF THE SOUTH GAUTENG  
HIGH COURT, JOHANNESBURG**

**DATE OF REVIEW: 3<sup>rd</sup> October 2013**

**DATE OF JUDGMENT: 03<sup>rd</sup> October 2013**