IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: A165/~~2011~~ 2012

IN THE MATTER BETWEEN:

LYNUS MOAHLODI APPELLANT

AND

THE STATE RESPONDENT

31/8/2012

JUDGMENT

TEFFO, J

[1] The appellant was charged in the district court held at Klerksdorp with the following counts, housebreaking with intent to commit an offence unknown to the prosecutor (count I) and contravention of the provisions of section 67(1)(a) of Act 68 of 1995 in that he obstructed a police official in the performance of his duties (count II).

[2] He pleaded not guilty to both counts but was convicted on 4 July 2003 of housebreaking with intent to steal and acquitted on the charge of contravention of section 67(1)(a) of Act 68 of 1995.

[3] The matter was then referred to the Regional Court on 3 October 2003 for sentence. On 29 June 2007 the appellant was sentenced to seven (7) years imprisonment.

[4] Leave to appeal was granted by the court *a quo* on 22 June 2011 in respect of the conviction.

[5] The grounds upon which this appeal is based are that the court *a quo* had misdirected itself in finding that the appellant did commit the offence as set out in count 1.

[6] The facts of this matter were briefly as follows: On 22 May 2003 at about ± 22:00 three police officers were patrolling in town, At the corner of Flecker Street and another street just as they were to turn to Orkney liquor store they saw the appellant and another person at Orkney liquor store. The appellant had a stone in his hand and was busy breaking the window of the liquor store. This other person with whom the appellant was, was also kicking the other window of the liquor store. The two were arrested and before they were taken to the police station this other person with whom the appellant was, managed to run away. The owner of the liquor store was summoned to the scene and according to him even though there was an opening at the broken window of about 70 cm nothing was missing in the store. It did not seem as if the appellant and the person with whom he was, were able to gain entry into the store, and neither did they attempt to do so.

[7] The issue for determination is whether the learned magistrate in the court *a quo* had misdirected himself in finding the appellant guilty of house breaking with intent to steal.

[8] The evidence of the two police officers corroborated each other in all material respects. Their evidence was clear that they saw appellant hitting the window with a stone. The appellant's version was that he had just been released on bail. He was on his way home after meeting a friend at another drinking spree where they had been drinking liquor. Further that he was never at Orkney liquor restaurant and he did not break the window. If one takes the evidence in totality I find that the court *a quo* correctly rejected the appellant's version in that it was improbable and could not be reasonably possibly true.

[9] It is common cause that the window of the liquor restaurant belonging to Mr Patrick Lash was broken. It is also common cause that after the breaking of the window the appellant and his friend never gained entry into the liquor restaurant and nothing was stolen.

[10] Housebreaking with intent to commit a crime consists in unlawfully and intentionally breaking into and entering a structure or building, with the intention of committing some crime in it. (*S v Badenhorst* 1960 (3) SA 563 (A)(566B).

[11] Housebreaking per se is not a crime although the act of housebreaking as such may, depending upon the circumstances, amount to the crime of malicious damage to property. The crime of housebreaking must be accompanied by the intention of committing some other crime. A mere breaking without entering is not sufficient to constitute the crime although it may amount to an attempt to commit the crime. (*Maruma* 1955 (3) SA 561 (O), *Ncanca* 1954 (4) SA 272 E. *Ndlovu* 1963 (1) SA 926 (T).

[12] Counsel for the state concedes that the evidence led at the court *a quo* did not prove the crime of house breaking with intent to steal. I agree with both counsels that the evidence led did not prove the crime of housebreaking with intent to steal and that the court *a quo* could at most have convicted the appellant of malicious damage to property.

[13] I therefore find that indeed the court *a quo* had misdirected itself by finding the appellant guilty of housebreaking with intent to steal.

[14] On that basis it is my view that this court has to interfere with regard to the sentence of seven (7) years imprisonment that was imposed.

[15] I make the following order:

15.1 The appeal against the conviction of the appellant is upheld.

15.2 The conviction of the appellant on a charge of housebreaking with intention to steal is therefore set aside and replaced with a conviction of malicious damage to property.

15.3 The sentence imposed against the appellant of seven years imprisonment is also set aside and replaced with a sentence of one year imprisonment which is backdated to 29 June 2007.

TEFFO J
JUDGE OF THE HIGH COURT

I agree

PRELLER J
JUDGE OF THE HIGH COURT