

## REPUBLIC OF SOUTH AFRICA


 IN THE HIGH COURT OF SOUTH AFRICA  
 (GAUTENG DIVISION: PRETORIA)

 A 633/2014  
 21/8/2014

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

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Case no: A354/2013

District: RITAVI

High Court Ref No: 181/14

Magistrate Serial No: 3/2014

THE STATE

and

THEMBA MAROBELA

RESPONDENT

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 REVIEW
 

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KHUMALO J (N KOLLAPEN J concurring):

- [1] The 19 year old Accused was arraigned and convicted of 2 charges of housebreaking with intent to steal and theft. He pleaded guilty to both charges and after a lengthy questioning in terms of s 112 (b) of the Criminal Procedure Act 51 of 1977 (as amended) ("the Act") the court a quo returned the verdict of "guilty" as charged. Both counts were taken as one for purpose of sentence and a sentence of three (3) years direct imprisonment, twenty four (24) months of which was suspended for five (5) years was imposed.
- [2] He appeared in person without legal representation.
- [3] The particulars of the charges that were put to the Accused read as follows:

[3.1] Count 1: That upon or about 21 October 2013, at or near Sedan Village in the district of Ritavi, the Accused did unlawfully and with the intent to steal, break open and enter the house of Legget Shikwambane and did then and there wrongfully and intentionally steal the following items,... the property or in the lawful possession of Legget Shikwambane.

[3.2] Count 2: That upon or about 19 October 2013, and at or near Sedan Village in the district of Ritavi, the Accused did unlawfully and with the intent to steal, break open and enter the house of Pertunia Mhlongo did then and there wrongfully and intentionally steal the following items, to wit:-... the property or in the lawful possession of Pertunia Mhlongo.

[4] After reading the record, I was concerned if the proceedings were in accordance with the administration of justice, especially in respect of Count 2, if all the elements of the offence were admitted by the Accused.

[5] In respect of that Count, after the Accused pleaded guilty, the court proceeded to question him in terms of s 112 (1) (b) as to his Plea, the following exchange ensued:

Accused: ***Your worship I greeted without calling a person's name and there was no person responding in there and I started to touch the handle of the door in person your worship and the door got open.***

Court: *And tell me what time was it?*

Accused: 22:00

Court: *And at that time you went to Pertunia's house, why were you going to Pertunia's house?*

Accused: ***I went to Pertunia's your worship just to check as to whether she saw my sister at Mulatji or not your worship and that I had something to give her. (My emphasis)***

Court: *Okay you went to Pertunia's house and you greet and you realised nobody is responding to you then you try and open the door is that correct and you realised the door is unlocked?*

Accused: Yes your worship

Court: *Okay, so you realised the door is unlocked what in your mind why did you have the intent then to enter that homestead?*

Accused: ***I was checking Pertunia only to find that Pertunia was not there, I saw the television your worship.***

Court: *But at the time, listen to my question very carefully, the time you opened the door you realised at the time when you were opening the door that nobody was at home is that correct?*

Accused: Yes

Court: So when you open the door and you went inside you already knew that nobody was at home. What was your intention of opening the door and entering that property?

Accused: **Your worship, I got inside at the time or after I have seen the television.**

Court: How did you see the television?

Accused: **At the time I opened the door your worship it was then that I saw the television**

Court: Okay and then what went through your mind?

Accused: **What came to my mind is that I do not have a television at my place and I started to take it.**

Court: Now you entered the homestead or you opened the door, you realised there is a television you do not have a television then you decide to take the television is that what you are saying?

Accused: Yes

[6] I sent the following query to the learned magistrate; 'In view of accused's answers as to why he was at the homestead, were all the elements of the offence (that is housebreaking with intent) as per the charge sheet admitted to by the accused in his plea explanation?, and/or was the conviction in accordance with justice and the offence proven beyond reasonable doubt?'

And further enquired on sentence that:

'Since nearly all the items were returned and the Accused a youth, remorseful and related to both complainants, do the learned magistrate consider the imprisonment sentence appropriate?'

[7] The learned magistrate's reply was that:

*Accused was found guilty after a lengthy questioning in terms of s 212 (1) (b) of the Act and I felt justified to come to this conclusion and was satisfied beyond reasonable doubt that he was guilty.*

*'I was quite concerned about the issue of intent as one can see from my line of questioning the Accused. However when one has to look at the circumstances holistically, one cannot ignore that this was the same modus operandi of the accused in the first count. Also it is unclear if he found that nobody was at home and use this opportunity to break in and steal. I further found his reason of being at the complainant's house at the time of the night suspicious in its own right looking at the time and reason for proceeding to that homestead. On this aspect the court found him untruthful and unwilling to take the Court into his complete confidence.'*

[8] It is important not to lose sight that this was questioning in terms of s 212 (1) (b). The query and the magistrate's response were sent to the National

Director of Public Prosecutions for his comment and the Registrar received his comments stating that:

*The fact that intention was formed not long before the deed does not alter the fact that the Accused formed the necessary intention to steal the property mentioned in Count 2.*

*Upon questioning by the magistrate in terms of s 212 (1) (b) the Accused answered as follows:*

- (a) *"He said when he opened the door at the complainant's house, it came to my mind that I did not have a television at my place and I started taking it"*
- (b) ***"This intention of stealing only came to my mind at the time I opened the door and the door got open, I saw the items, it was then that the intent developed."***
- © *"I knew at the time I took the items of the complainants, that was to deprive them permanently of their ownership."*
- (d) he understood that at the time at which he entered the premises and he knew that nobody was at home and if he took the television without permission of the owner that it was an offence which was punishable by law and that it was unlawful, he answered to the affirmative."

In the premise, the conviction on Count 2 was in accordance with justice as the **Accused admitted to all the elements of theft.** (my emphasis).

- [9] Considering that the offence the accused was charged with was **housebreaking with intent to steal** which constitutes of the following elements that need to be proven before a conviction can be returned:

- [9.1] breaking – the Accused must have broken into the building
- [9.2] entering – physical presence inside the structure
- [9.2] a barrier, building or structure– that is used for human cohabitation or a human dwelling
- [9.4] unlawfully and intentionally – with the intention to steal

the question remained if all the elements of the offence had been admitted by the Accused, sufficiently, for the learned magistrate to find that the offence has been proven beyond reasonable doubt and return a guilty verdict thereon?

[10] A careful scrutiny of the Accused's answers as highlighted prove that Accused entered into the premises to go and check upon and enquire after his sister from the complainant. After greeting and not receiving a response he touched the door and realised that the door was open. He said he entered to see if complainant was there, that is when he saw the Television and decided to steal it.

[11] The magistrate and the prosecution's responses do not address the Accused's intention to steal that he must have had when allegedly breaking into the complainant's house and the act of breaking itself, since the charge clearly stated that "he did unlawfully and with the intent to steal, break open and enter the house of Pertunia Mhlongoana.

[12] It is very well that "breaking" is one of the elements of the crime and defined as constituting the removal or displacement of any obstacle that bars entry to the structure and forms part of the structure itself, including pushing a closed or partially open door or window but excluding walking through an open door; see *Mososa* 1931 CPD 348 351-352; *Moroe* 1981 4 SA 897 (O) 899. However, housebreaking per se does not constitute this crime. As illustrated by the example in *Mososa* and *Moroe*.

[13] For housebreaking with intent to constitute a crime the breaking must be accompanied by the intention of committing some other crime. In practice that is usually committed with the intent to steal. The intention must have been formed before or ideally when breaking in; see Snyman's *Criminal Law* 4<sup>th</sup> ed. If then the intention is formed after entry the crime of housebreaking with intent is not committed. see *Steyn* 1946 OPD 426 at 429; *Andries* 1958 2 SA 669 (E). The evidence herein indicates that it was only after the Accused had entered the house and saw the television that he decided to steal it.

[14] The intention of the Accused when he entered the homestead of the complainant was to check on his sister as he said, he greeted there was no answer and when he tried the door it was opened. He further, with the intention of seeing whether the complainant was there entered, he realised then that complainant was not there and saw the television, that is when he decided to go in and take it. In his own words he said, as repeated by the prosecution in their reply, **"Your worship at the time I went there I did not intent stealing. This intention of stealing only came to my mind at the time I opened the door and the door got open, I saw the items, it was then that the intent developed."**

[15] The answers of the Accused therefore did not establish all the elements of housebreaking with intent but established, as correctly pointed by the director of public prosecution, that of theft, a competent verdict on a charge of housebreaking and theft. See *S v Small* 2005 (2) SACR 300 (C) 303h.

[16] The court a quo also seemed to have lost sight of the fact that it was busy with an enquiry to determine if the Accused was in actual fact pleading guilty to the charge or if there was a likelihood of a defence then convert the plea to one of "not guilty". The magistrate was supposed to be careful in weighing the responses as the

Accused was unrepresented, he could not have been aware of what the implications of his answers were. Therefore whether the court did or did not believe the Accused it did not matter, its duty was to ascertain if the Accused had a possible defence. The ambit of the questions put to the Accused by the court guided by the Constitutional rights of the Accused to a fair trial as determined by s 35 of the Constitution of 1996.

[17] The learned magistrate's response that it was unclear to him whether the intent was formulated after discovering that the complainant was not at home was answered by the Accused in a straight forward reply but displaced by the continued questioning. All the same, the mere fact that the magistrate was uncertain, he was obliged to enter a plea of "not guilty" to the charge of housebreaking with intent to steal. Instead the learned magistrate proceeded to pose leading questions, a step discouraged by the courts; see *S v Mkhize* 1981 (3) SA 585 (N) at 586H and *S v Balatseng* 2005 (2) SACR 28 (B) at [17]. The court seemed desperate to find "intent" for housebreaking, as established from the length of the questioning and type of questions posed; signified by the following exchange:

Court: *Okay, so you realised the door is unlocked what in your mind why did you have the intent then to enter that homestead?*

Accused: *I was checking Petunia only to find that Petunia was not there, I saw the television your worship.*

Court: *But at the time, listen to my question very carefully, the time when you opened the door you realised at the time when you were opening the door that nobody was at home is that correct?*

Accused: *Yes,*

Court: *so when you open the door and went inside you already knew that nobody was at home. What was your intention of opening the door and entering that property?*

Accused: *Your worship, I got inside at the time or after I have seen the television.*

Court: *How did you see the television?*

Accused: *At the time I opened the door your worship it was then that I saw the television*

Court: *Okay and then what went through your mind?*

Accused: *What came to my mind is that I do not have a television at my place and I started to take it.*

[18] The Accused's intent when entering the homestead was also very clear from the first answer, but the court relentlessly proceeded to pose further questions obviously nudging the Accused towards the answer sought by the magistrate, as in *Balatseng supra*, to admit intent before entering.

[19] In *Mkhize supra*, the court concluded that, 'the questions of the court should be as few as possible, preferably only those necessary (a) to elucidate what the accused has volunteered and (b) to canvass any allegations in the charge not mentioned by the accused and,...(c) to confine the accused to the relevant details.'

Otherwise the object of s 112 (1) (b) is defeated. In *S v Witbooi* 1978 (3) SA 590 (T) 595B-C, the court found that the object of s 112 (b) (1) is defeated if admissions of 'unlawfulness' and 'intent' are obtained in the absence of facts which support a finding of unlawfulness and intent.

[18] The Accused at the time of trial was 21 years old and struggled to complete Grade 8 the previous year, unsophisticated and the process must have been beyond his comprehension. s 112 (1) (b) was designed to protect litigants who are like the Accused with limited education and unrepresented, from the adverse consequences of an ill- considered plea of guilty.

[19] The learned magistrate's attitude towards the responses and the lengthy questioning during the exchange carry an enormous weight as to whether or not the Accused overall had a fair trial. In respect of Count 2, besides the fact that not all the elements of housebreaking with intent to steal were proven in that count, but theft, Accused also did not have a fair trial. However there is sufficient evidence to convict the accused for theft.

[20] The court is as a result entitled to interfere with the sentence since the Accused is convicted of a lesser crime on count 2. The court further took into consideration that most of the goods were discovered.


[20] Under the circumstances, I would make the following order:

[20.1] Conviction on Count 2 for housebreaking and theft as set out in the charge sheet is set aside and conviction for theft substituted therefor.

[20.2] The sentence imposed by the magistrate in the court a quo is set aside and the following sentence imposed

'two (2) years imprisonment, eighteen (18) months of which is suspended for three (3) years on condition that Accused is not found guilty of housebreaking under any common law or statutory provision, robbery or theft that is committed during the period of suspension.

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**N V KHUMALO**  
**JUDGE OF THE HIGH COURT**

**I agree and it is so ordered**

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**N KOLLAPEN**  
**JUDGE OF THE HIGH COURT**