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

Date 24/05/2016
Case No: A325/2016
Case No: B 74/2013

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(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

In the matter between:

The State

and

Tshepiso Samuel Lebeko

REVIEW JUDGMENT

Maumela J.

1. This matter came before court as a special review in terms of section 304 (4) of the Criminal Procedure Act 1977¹: "Criminal Procedure Act". Before the magistrate for the district of Potchefstroom, held at Fochville, the court *a quo*,

¹ Act No 51 of 1977.

"the accused", Tshepiso Samuel Lebeko, appeared together with two co-accused persons.

2. They were charged as follows:
Accused number 1 was charged with the following two offences:
 - 1.1. House breaking with intent to steal and Theft and
 - 1.2. Attempted House breaking with intent to steal and Theft.Accused number 2 and 3 were each charged with Attempted House breaking with intent to steal and Theft.
3. The allegations on count one were that upon or about 15 February 2013, and at or near [...], in the district of Fochville, the accused did unlawfully and intentionally and with the intent to steal, break open and enter the house of Ntefeleng Jacobeth Janjie and did wrongfully and intentionally steal the following items; to wit R 200-00 in cash, 1x camera, 3x cell phones and clothing, the property or in the lawful possession of Ntefeleng Jacobeth Janjie.
4. On count 2 allegations were that upon or about 19th of February 2013, and at or near [...], in the district of Fochville, the accused did unlawfully and intentionally and with the intent to steal, attempt to break open and enter the house of Thabiso Obed Monnagadise, and did there and there wrongfully and intentionally attempt to steal house items; the property or in the lawful possession of Thabiso Obed Monnagadise.
5. Relevant to this case, before the court a *quo*, accused number 1, pleaded guilty to both charges. On both counts the court proceeded in terms of section 112 (1) (b) of the Criminal Procedure Act. The court concluded that that accused number 1 admits all the elements in the charges against him. It convicted him as charged in both counts.

6. Accused number 2 and 3 were only charged with count 2; (Attempted House breaking with intent to steal and Theft). They both pleaded guilty to count 2. The court proceeded against them further in terms of section 112 (1) (b) of the Criminal Procedure Act. The court *a quo* then convicted both of them, (accused 2 and 3), of Attempted Theft.

THE EVIDENCE.

7. Responding to questions put to him in terms of section 112 (1) (b), accused number one told court concerning count 2 that he and his two co-accused were prowling the streets on the day of the incident. As they passed near the house of the complainant in count two; they noticed that the windows were not properly secured.
8. Relevant to the case **now** before court, concerning count 2, the court *a quo* proceeded in terms of section 112 (1) (b) against accused number 1. Accused number 1 admitted that he, together with his two accomplices entered the premises of the complainant in count 2, (Thabiso Obed Monnagadise). He told court that the three of them noticed that a window of a room at the complainant's place was not safely secured.
9. He stated that while he and his colleagues were still making efforts to open the window, the noise they made drew the attention of the complainant. The complainant discovered the threesome's felonious intent and gave chase. He apprehended accused number 2 while accused number 1 and 3 escaped. Accused number 1 stated that it is then that he immediately left for home.
10. On the basis of the answers accused number 1 gave in response to questions by the court *a quo* in terms of section 112 (1) (b) of the Criminal Procedure Act, the court *a quo* convicted accused number two of Attempted House Breaking with Intent to Steal and Theft.

accused number 1 can be correctly convicted of attempted house breaking with intent to steal and attempted.

Based on the above, the conviction of accused number 1 on count 2 which is a conviction on Attempted House Breaking with Intent to Steal and Theft stands to be set aside, and substituted by one of Attempted House Breaking with Intent to Steal and Attempted Theft. The case has to be remitted back to the court *a quo* so that an appropriate sentence can be imposed upon accused number one for purposes of count 2. The following order is made:

ORDER.

1. The conviction of accused number one by the court *a quo* on a charge of Attempted House Breaking with Intent to Steal and Theft, is set aside, and it is substituted by a conviction of accused number 1 on Attempted House Breaking with Intent to Steal and Attempted Theft.
2. The case is remitted back to the magistrate for the district of Potchefstroom, held at Fochville, for an appropriate sentence to be imposed upon accused number 2 for purposes of the conviction on count 2.



T. A. Maumela.

Judge of the High Court of South Africa.

I agree.

A. H. Petersen
Acting Judge of the High Court of South Africa.

11. Subsequent to sentencing the matter came before the High Court on review in terms of section 304 of the Criminal Procedure Act. The honourable reviewing judge sent a query to the magistrate, questioning the conviction of accused number 1 on count 2. In response the magistrate conceded that on count 2, accused number 1 should have been convicted of Attempted House Breaking with Intent to Steal and Attempted Theft; instead of House Breaking with Intent to Steal and Theft.
12. Comments of the Director of Public Prosecutions were solicited and the latter responded to the effect that accused number 1 should indeed have been convicted of Attempted House Breaking with Intent to Steal and Attempted Theft, instead of House Breaking with Intent to Steal and Theft.
13. The court is to consider whether or not to set aside the conviction of accused number 1 on count 2 by the court a *quo* which had convicted him of House Breaking with Intent to Steal and Theft. Evidence proved that accused number 1, together with his accomplices only went as far as attempting to open a window at complainant's house. Their noise drew the attention of the complainant who took immediate measures to counter the intruders. He apprehended accused number 2 while accused number 1 and 3 escaped, whereupon accused number 1 ran home.
14. The available evidence only proved an attempt on the part of accused number one and his accomplices to break open, and to enter the house of the complainant in count two. The further shows that when the complainant in count two discovered what was about to happen he chased after the would-be criminals, apprehending accused number 2.
15. In the case of *R v Schoombie*², the court stated that there are two types of attempt to commit an offence. The two

² 1945 A.O. 541, at page 545 – 6.

types of attempt are:

- (a). Those in which the wrongdoer, intending to commit a crime, has done everything which he set out to do but has failed in his purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise, and
- (b). Those in which the wrongdoer has not completed all that he set up to do, because the completion of his unlawful act has been prevented by the intervention of some outside agency. To the latter may be added the case where the completion by the wrongdoer of his unlawful acts has been prevented by his changing his mind and the desisting from the actual commission of the crime.

16. In this case accused number one and his accomplices noticed that a window at the complainant's house was not safely secured. They entered the premises and started efforts to open the window. They attempted to open the window. The reason behind the opening of the window was so as to bail items from within the house. They could not succeed in committing the crime intended because the complainant in count 2 interrupted them, and chased them off, eventually apprehending accused number 2.

17. In *S v Du Plessis*³ Corbett JA stated: *"The decision any particular case as to whether or not, at the moment of interruption or prevention (of the accused's unlawful acts), the conduct of the accused had progressed beyond the stage of preparation and constituted a commencement of the consummation must in the last resort become effectual enquiry relating to the particular circumstances of the case in which the following factors, among others, would play a part: whether the state the accused had made up his mind the crime, the degree of proximity or remoteness with that arrested conduct bore to what would have been the final act required for the commission of the crime and, generally,*

³ 1981 (3) SA 382 (A).

considerations of practical common sense. It is doubtful whether any greater precision than this can be achieved.

To constitute an attempt (a) there must have been at the time of interruption an intention to commit the contemplated crime, and (b) it must appear that the party concerned had embarked upon a series of acts, which had beyond the preparation stage, and which, if not interrupted, would have led to the commission of the crime."

18. When the complainant in count two interrupted accused number one and his accomplices they had conceived the intention to break into complainant's premises and to steal property from there within. They jumped over the fence. They approached a window and shifted it, so as to open it. While doing so they made noise enough to draw the attention of the complainant. They had already embarked upon efforts to open a window so as to gain entry and to steal property as intended.
19. Accused number 1 and his accomplices were interrupted. They had clearly formulated the intention to steal. They embarked upon the series of acts outlined above.
20. It is clear that accused number 1 and his accomplices did not have a change of heart about their intended crime. They were rather interrupted by the complainant. Had the complainant not been home, accused number 1 in his accomplices would have proceeded to break into complainant's premises and they would have stolen property there in. In this regard the attempt on the part of accused number one was completed.
21. From the answers accused number 1 provided when the court *a quo* questioned him in terms of section 112 (1) (b) of the Criminal Procedure Act the intention behind breaking in was to steal property there in. It is for that reason that