IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A 775/16

Date: 7/11/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

3/11/2016 .....
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THE STATE V VUSI HLOPHE

HIGH COURT REF. NO.	**:239/2016**
MAGISTRATE'S SERIAL NO.	**:H31/16**
MAGISTRATE'S CASE NO.	**:A678/2015**

REVIEW JUDGMENT

PRETORIUS J,

(1) This matter is an automatic review which came before me in terms of section 303 of the **Criminal Procedure Act**[1]. The accused was arraigned in the Cullinan District Court on a charge of attempted

[1] Act 51 of 1977

housebreaking with intent to steal and theft read with the provisions of section 262(1) of the **Criminal Procedure Act**[2].

(2) It was alleged that on 28 June 2015 the accused did unlawfully and intentionally, acting with common purpose, and with intent to steal attempt to break open the corrugated iron roof and to enter the shop of Mr Mabongwane and unlawfully and intentionally attempted to steal items valued at approximately R5 000, the property of Mr Mabongwane. The accused was unrepresented at trial.

(3) He pleaded guilty and was convicted on 15 July 2016 and sentenced to *"2 years imprisonment half suspended for 5 years on condition that the accused is not convicted of housebreaking with intent to commit an offence committed during suspended period"*.

(4) Rautenbach AJ, who originally dealt with this matter, enquired from the learned Magistrate and made the following remarks:

> *"No record of actual conviction or consideration of sentence. Why was accused convicted of attempted housebreaking?"*

(5) The learned Magistrate replied, *inter alia*,

> *"On reading the plea of the accused I noticed that the accused*

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[2] *Supra*

pleaded to housebreaking with intent to steal and therefore, it cannot be attempt as the act and intention of breaking in has been completed. *The accused should have been charged with intent to steal and attempted theft.* ***Thus Court take full responsibility for having failed to notice or realize the discrepancy before taking and admitting the plea.***" (Court emphasis)

Thereafter Mngqibisa-Thusi J referred the matter to the Director of Public Prosecutions (DPP) for comment and recommendations. The DPP replied and this court has to deal with the matter.

(6) When questioned in terms of section 112(1)(b) of the **Criminal Procedure Act**[3] as to how the accused had committed the offence, the following was recorded:

"ACCUSED: I broke the corrugated iron roof of the shop of the complainant. I entered the shop. Whilst inside it seems there was some boys around who saw me. They called the owner and he came and found me inside. He then called the police and was arrested. I had not yet stolen.

COURT: Do you admit that by breaking the corrugated iron you were committing housebreaking?

ACCUSED: I admit.

COURT: Do you admit that your intention was to enter and

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[3] *Supra*

steal?

ACCUSED: I admit.

COURT: Did you know that housebreaking with intent to steal and attempted theft is an offence and if convicted you may be punished?

ACCUSED: I knew.

COURT: Do you admit that the property you broke into belongs to P M Mabogwane?

ACCUSED: I admit."

(7) The State accepted the accused's plea. On the J15 the Magistrate recorded next to date of plea, *"guilty"* and next to judgment he entered, *"guilty"*. It appears there is a discrepancy between the offence with which the accused had been charged, namely attempted housebreaking and the questioning by the Magistrate where the accused pleaded to housebreaking with intent to steal and attempted theft, completely different offences. Due to the fact that the Magistrate did not record what the accused was actually convicted of, it further complicates the matter.

(8) It is trite that when an accused pleads guilty the court is obliged to ask questions to ascertain whether the accused, in this instance an unrepresented accused, admitted all the essential elements of the

offence. In **S v Williams**[4] the court held:

> *"It is well settled that s 112(1)(b) was designed by the legislature to protect an accused from the consequences of an unjustified plea of guilty.* ***Accordingly the section has to be applied with care and circumspection, bearing in mind the principles above****. Where an accused's responses to questioning suggest a possible defence, or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter should be clarified by evidence."* (Court emphasis)

(9) In **S v Mebe**[5] the court held:

> *"It is apparent that the lacuna in the charge escaped the attention of the magistrate. His questioning of the accused confirms that he was unaware that the charge, as framed, was defective since he did not address this issue at all. In any event, I cannot see how any replies from the accused could have remedied this defect, since the suspicion that the door was stolen should have been formed in the mind of some other person and not the accused.* ***The magistrate's failure to identify that the charge was defective has resulted in a miscarriage of justice. Since there was an absence of evidence to cure this defect in the charge, the magistrate***

[4] 2008(1) SACR 65 (C) at paragraph 6
[5] 2004(2) SACR 537 (CK) at paragraph 13

erred in convicting the appellant and his co-accused of having contravened s 36 of Act 62 of 1955." (Court emphasis)

The decision confirmed the decision in **Mkhize v The State and Another; Nene and Others v The State and Another**[6] where Broome J held:

"In my view accused persons in proceedings such as this should be invited to explain what happened. An accused should be encouraged to tell his story. Where possible questions from the Bench should be as few as possible, and 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, of course, (c) to confine the accused to the relevant detail.... The magistrate's ***task is not only to ascertain from the accused whether he admits the allegations in the charge but, and this cannot be over emphasized, to satisfy himself that the accused is guilty of the offence.***" (Court emphasis)

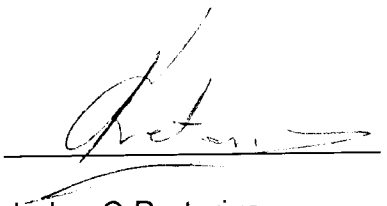
(10) In the present instance the Magistrate himself concedes that he had not convicted the accused according to the plea relating to the charge against him. The Magistrate's failure to identify that the charge was not correct resulted in a miscarriage of justice and

[6] 1981(3) SA 585 (N) at 586H – 587J

there was no evidence led to cure this failure by the Magistrate. This fact is conceded by the DPP, who recommended that the conviction and sentence should be set aside as the questioning conducted by the magistrate does not conform to the offence with which the accused is charged. There can be no doubt that the magistrate's actions resulted in a miscarriage of justice.

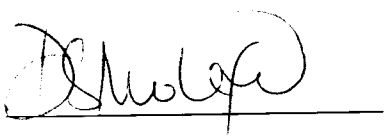
(11) In these circumstances the conviction cannot stand.

1. The conviction of the accused is set aside;
2. The sentence of the accused is set aside.



Judge C Pretorius

I agree.



Judge D S Molefe