IN THE SUPREME COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

High Court Ref No : 0500599

Magistrate's Serial No : 10-2005
Case No : 5/240/2005

THE STATE

and

RANDALL SMALL

REVIEW JUDGMENT ON 20TH APRIL, 2005

FOXCROFT, J : This matter, which concerned the conviction and sentence of a 19-year old first offender, came before me on automatic review. I directed an enquiry to the magistrate, requesting reasons for his imposition of the maximum possible sentence on a 19-year old youth with no previous convictions. I have received a very full reply in regard to the sentence which the magistrate regards as an appropriate one in the circumstances.

On reconsideration of this matter, it appears to me that the facts proved do not justify a conviction of housebreaking, but do establish theft.

When questioned in terms of section 112(1)(b)of Act 51 of 1977, the accused explained that he had put his hands through an open window and taken a speaker which he could see was standing at the window. When asked whether he pushed away any *'gordyne of blinds **[sic]'*,* his answer was

> *"Daar was gordyne aan die vensters. Ek het die gordyne uit die pad uit gestoot om die speaker te vat."*

On that basis, he was convicted of housebreaking and sentenced accordingly.

In dealing with the nature and seriousness of the offence in his response to my enquiry, the magistrate cites the matter of **S v SHIBURI, 2004920SACR 314 [WLD].** A CD-player was indeed removed from the complainant's premises, as the magistrate points out, but an important difference appears at p.317 of that report, where it is said that the complainant heard his kitchen window being smashed after which he discovered that the CD-player had been removed from

in front of the smashed window. When the complainant investigated the noise of the breaking window he noticed that the kitchen window had been smashed and that a brick was lying on his microwave oven in the kitchen. The CD-player, which had been standing on the microwave oven in front of and about one or two feet from the then broken window had been removed.

I have no quarrel with what was said by the Court in that matter in relation to the increase in housebreakings and the fear of members of the public in that situation. It is indeed regrettable that things have reached such a state.

The other reported case in this regard to which the magistrate draws attention is **S v CONGOLA, 2002[2]SACR 383 [TPD].** That case concerned a 38-year old male facing 20 charges of housebreaking with intent to steal committed over a period of three years at various residential and business premises in a number of areas in the Southern Transvaal. The total value of stolen goods amounted to R153 300,00. The remarks of the trial Judge in that case must obviously be seen in the context of the crimes which had been committed, but the Court reduced an effective sentence of 84 years imprisonment to 20 years. It is, of course, so that the Court found that a sentence of four years imprisonment imposed by the magistrate in regard to each count was in order, but the matter was wholly distinguishable from the present case.

The magistrate has, of course, compared various cases of housebreaking, and not theft alone, with the present matter. In **S v HLONGWANE, 1992[2] SACR 484 [N]** MAGID, J considered the essential elements of the offence of housebreaking with intent to steal and, in particular, the element of *'breaking'* of a premises in the legal sense by the displacement of any obstruction to entry which forms part of the premises. As is pointed out in the *South African Criminal Law and Procedure*, Vol 2, 3rd Ed by JRL MILTON at 798, and in Vol 2 of the 2nd Ed by HUNT at 707,

> *"To 'break' premises means to create a way into those premises by displacing some obstruction which forms part of those premises It is a 'term of art', for 'breaking' often takes place without physical damage of any kind. Thus there is a 'breaking' if X, without causing damage, opens a closed window or door, whether or not it is locked, or pushes up or in a partially open window or (probably) door."*

In **S v HLONGWANE *[supra]*** MAGID, J went on at 486g to say :

"The allegation in extracts (1) and (2) linking the accused to the movement of the curtain is vague but I shall assume that the evidence as a whole establishes that the accused was in fact responsible for moving the curtain.

*In order to constitute a breaking the conduct complained of must have created a way into the complainant's premises 'by displacing some obstruction which forms part of those premises.' [HUNT **op.cit** at 707]. But simply to move a curtain in these circumstances does not, in my opinion, amount to the displacement of an obstruction because a curtain hung inside the burglar proofing of a modern Western house cannot possibly be regarded as an obstruction. And even if it were to be so regarded, it is certainly not part of the premises. In my view, therefore, the fact that the accused may have moved the curtain did not constitute a breaking of the premises on his part."*

In SNYMAN's work on *Criminal Law, 4th Ed at p.543* the element of breaking into a structure is considered and authorities are cited for the proposition that a *'breaking'* consists of the removal or displacement of any obstacle which bars entry to the structure and which forms part of the structure itself. One of those cases is a decision in this court in **S v LEKUTE, 1991[2]SACR 221.** In that matter the regional magistrate had doubted whether a conviction for housebreaking based on *"n blote verskuiwing van blindings voor 'n oop venster om toegang tot die huis te verkry'* was justified. VAN NIEKERK, J

with whom VAN DEVENTER, J concurred in that matter, decided that

> *"Die klem blyk dan te val op die verwydering van 'n obstruksie om toegang te verkry en nie soseer op die aard van die obstruksie nie. In die onderhawige saak kon die beskuldigde myns insiens klaarblyklik nie toegang tot die huis verkry sonder om die blindings te verskuif nie. Die blindings was dus 'n obstruksie of struikelblok wat verwyder moes word."*

The very short judgment to which I have referred suggests that the accused had removed an article from within the house after gaining access through the window. In my view the case is distinguishable from the present matter, since it is clear from the evidence in this review that the curtains did not present any obstruction, while VAN NIEKERK, J held in **S v LEKUTE** that the accused had to move the blinds in order to gain access to the house.

At 544 of *Criminal Law, 4th Ed,* SNYMAN cites **S v HLONGWANE *[supra]*** for the proposition that

> *"Neither will the mere moving of a curtain amount to 'entering', since a curtain cannot be regarded as an 'obstruction'."*

What the writer is obviously suggesting is that housebreaking is concerned with breaking and entering. If breaking has not occurred because no obstruction has been removed, then there is no entry associated with that breaking. The entry would, of course, amount to trespass if done without permission.

The question of an accused moving a curtain covering a window and gaining access came up again for consideration before the Full Court of the Northern Cape Division in **S v MADINI, 2000[4]All SA 20.** There too the accused had said that he had simply pushed the curtain away *('Ek het dit net weegeskuif')*. The matter had been referred to the Full Bench for a consideration of **S v HLONGWANE and S v LEKUTE** to which I have referred, as also **S v RUDMAN, 1989[3]SA 368[ECD].**

In the **RUDMAN** case, the accused had entered a flat through an open window and which was *'big enough for a grown-up to go through'.* The conviction of housebreaking and theft was altered to one of theft in that matter.

Reverting to **S v MADINI,** the Full Court referred to the same passage that I

have referred to in **S v HLONGWANE** and also referred to passages in **S v LEKUTE** relating to the

> *"verwydering of verplasing van enige struikelblok wat in die weg van 'n binnetreder tot die struktuur staan en wat deel vorm van die struktuur".*

BASSON, J took the same view as MAGID, J in **HLONGWANE's** case, making the further observation that curtains differ from blinds and can hardly be regarded as constituting an obstruction, particularly if they are so thin and transparent as not to cover the entire window, as seems to be the case in the matter before me, since the accused said he could see the speaker from the outside of the house. BASSON, J also held that curtains can certainly not be regarded as part of the construction of the building. Furthermore, curtains are normally inside a structure, so that a person entering a room through a window is partially inside and has therefore already entered before the curtains are *'broken'* or not. The Court also referred to the old type of blinds (Venetian blinds) fixed top and bottom which could perhaps be treated as an obstruction, and held that it was not convinced that the decision in **S v LEKUTE** was correct, saying that

"die hele aangeleentheid sal heroorweeg moet word as die besondere feite soos in daardie saak hulle weer sou voordoen."

As I have already indicated, I consider the decision in **S v LEKUTE** to be distinguishable. In any event, I prefer the approach of **S v HLONGWANE** and I do not consider that housebreaking occurred on the facts of the case before me. There can however be no doubt that on the accused's admissions under questioning, theft was committed and a verdict of guilty of theft is substituted for that of housebreaking with intent to steal and theft.

As far as sentence is concerned, I shall not dwell on the magistrate's comments in relation to housebreaking since they are no longer appropriate. One relevant consideration is, of course, deterrence, and the magistrate said that

"IN CASU :

Mnr Small is 'n vonnis opgelê om ander af te skrik. Verder is daar elke dag vyf of meer huisbraak sake op die hofrol. Van die inbrake vind plaas in die nag terwyl die huisbewoners slaap. Die inbrekers skep 'n wesentlike lewensgevaarlike situasie vir die bewoners en insluitende die inbrekers. Onskuldige huisbewoners

se eiendom en hulle lewens is in gevaar."

I have already held that this was not housebreaking, and the conduct of the accused in this matter did not present any danger to anybody in the house. For punishment to have a proper deterrent effect, appropriate cases must be chosen. It is not appropriate, in my view, to say that

"Ten spyte van die afwesigheid van enige beserings aan die bewoners van die huis, is daar 'n wesentlike lewensrisiko vir enige bewoners by die inbraak van huise. Kinders en volwassene ***(sic)*** *is al dood gemaak tydens inbrake."*

I consider that the magistrate misdirected himself in finding that on the facts of this case the Court would fail in its constitutional duty to the community if it did not remove the accused from the community. *'Direkte gevangenisstraf'* was certainly not the only appropriate sentence. Neither is reference to sentences in Gauteng in respect of theft of motor vehicles of any comparable value in the present situation.

The accused has already spent nearly two months in prison, and I made an order for his immediate release after seeing the magistrate's reasons and reconsidering this matter. In my view, an appropriate sentence in this matter should have been the sentence which follows and which is substituted for the sentence which the magistrate imposed.

In the result, it is ordered as follows :

1. The conviction is set aside and a conviction of theft is substituted therefor.

2. The accused is sentenced to imprisonment for six months, suspended for three years on condition that he is not convicted, during the period of such suspension, of the offence of theft or attempted theft.

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J G FOXCROFT

VAN REENEN, J : I agree.

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