Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN] **[REPORTABLE]**

Case no: A144/18

In the matter between:

SONGEZO BAM Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 20 JULY 2020

SHER, J (BOZALEK J concurring):

1. The appellant was arraigned before the regional magistrate of Vredenburg on a charge of housebreaking with intent to rob and robbery with aggravating circumstances. It was alleged that on 25 January 2016 he broke into the home of the complainant in Vredenburg and robbed him of an LG television set, a Samsung cell phone and an amount of cash. The appellant pleaded not guilty to the charge and elected not to provide any plea explanation.
2. The State tendered the evidence of the complainant and the investigating officer as well as 2 witnesses, one ‘Ballie’ and one ‘Shepherd’, who were implicated in the disposal of the television set a day or two after the alleged robbery. Both of them were accordingly warned in terms of the provisions of s 204 of the Criminal

Procedure Act[1] (the 'CPA'). Thereafter the appellant testified and called 2 witnesses to testify on his behalf. As was correctly pointed out by the magistrate their evidence was of little value.

3. The magistrate convicted the appellant as charged and imposed a sentence of 7 years imprisonment in respect of the housebreaking. He then imposed a further 15 years in respect of the robbery. In terms of the relevant provisions[2] of the Criminal Law Amendment Act (the 'CLAA')[3] this is the discretionary minimum sentence which is applicable to a first offender who is convicted of robbery with aggravating circumstances[4] unless there are substantial and compelling circumstances present,[5] and the magistrate was of the view that there were not. The basis on which the magistrate imposed a 'double' sentence was that although the appellant had been convicted of a single charge, in his view it comprised two separate offences ie housebreaking and robbery.

4. In order to ameliorate their cumulative effect the magistrate directed that the sentence which was imposed in respect of the housebreaking was to run concurrently with that which was imposed in respect of the robbery. Effectively therefore the appellant was sentenced to 15 years imprisonment. Just over a year later the appellant made application for leave to appeal against both the conviction and the sentence, which was successful.

Ad the conviction

5. As far as the conviction is concerned the complainant was a single witness in respect of the housebreaking and the robbery and the only witness who placed the appellant on the scene and identified him as one of the robbers.

6. He testified that whilst he was watching television in the lounge of his residence on the night in question 3 unknown men entered via the kitchen door, which was

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[1] Act 51 of 1977. The section provides that a person who is implicated in an offence may be called as a witness and will be indemnified from prosecution in respect thereof if the Court is satisfied that he testified honestly and truthfully.

[2] S 51(2)(a)(i) read together with Part II of Schedule 2.

[3] Act 105 of 1997 (as amended *inter alia* by the Criminal Law (Sentencing) Act 38 of 2007), which introduced so-called 'prescribed' minimum sentences (now known as 'discretionary' minimum sentences) into our law.

[4] In terms of s 1(1)(b) of the CPA aggravating circumstances are present when a firearm or 'dangerous weapon' is used in the commission of a robbery.

[5] S 51(3).

closed at the time but not locked. The first man, who had a cap on his head and a scarf around his face, pointed a firearm at him and demanded his ‘gun’ and his money, as well as his cell phone, and he duly handed it over.

7. The second man, who he identified as the appellant, told him not to make a noise, whilst the third man went to the television set and unplugged it from the wall socket.

8. When the men made their appearance the complainant’s wife ran out of the lounge. The man with the scarf ran after her, but was unable to catch her as she locked herself in her bedroom. At that juncture one of the complainant’s daughters emerged from her bedroom, and he grabbed her and took her back to the lounge where he instructed her to get the complainant to tell them where his gun was, or he would shoot her. She informed him that the complainant did not possess a firearm.

9. The complainant confirmed this and handed over his wallet to the appellant who removed the money which was in it (approximately R 1200) and threw it on the couch.

10. The appellant then took the complainant to the bathroom and told him to close himself inside, while his daughters were taken to the bedroom where his wife was and she was told to let them in.

11. After a while the house went quiet and the complainant called out to his family. They ascertained that the robbers had left, taking the television set with them. The complainant immediately reported the matter to the police.

12. A few days later the police informed him that they had recovered a television set which might belong to him. He duly went to the police station where he identified it. He was asked to return with proof of ownership and when he did so a statement was taken from him by the investigating officer. The complainant testified that as he was being escorted out of the police station the investigating officer told him to look to his right and when he did so he saw the appellant, who was handcuffed, sitting outside the detectives’ offices. He said he immediately recognized him as one of the robbers and informed the investigating officer of this.

13. It is trite that because of the fallibility of the faculties of observation and memory, evidence of identification, especially by a single witness, must be approached with caution. The Court must be satisfied not only that the witness who makes the identification is honest, but also that his identification is reliable. Whether this test is met in a particular case will depend on a number of factors. These include the duration of the incident, the opportunity which the witness had to observe the accused, the conditions of visibility and lighting, the distance between the witness and the accused, any distinguishing features or characteristics which would allow the accused to stand out and make him recognizable or identifiable, and any prior acquaintance between the witness and the accused.[6] These factors must be weighed against the totality of the evidence and the probabilities.

14. The complainant testified that the incident happened in a matter of minutes. Nonetheless, he said he had a good opportunity to observe the appellant as he had interacted with him at close range, especially when the appellant took his wallet and later when he took him to the bathroom. As far as visibility was concerned all the lights were on in the house at the time. In addition, he pointed out that the appellant was not masked as was the case with the first man and he was a large man, who was taller than his compatriots.

15. When asked on what basis he had identified the appellant when he saw him at the police station the complainant was unable to point to any specific identifying features or characteristics, and said that he had done so on the basis of his 'general appearance'. It was pointed out to him during cross-examination that although the appellant had a number of distinctive facial marks the complainant had not made mention of any of these, either in his police statement or during his evidence in chief.

16. The greatest difficulty which I have with the complainant's identification is not that it was non-specific,[7] but that it occurred in the police station after he had been

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[6] *S v Mthetwa* 1972(3) SA 766 (A).

[7] In this regard I align myself with the remarks which were made by my brother Rogers J in *Mpilo v S* [2020] ZAWCHC 58 at para [23]: 'The appellant's counsel criticized the identificatory evidence because the witnesses had not mentioned the features of the driver's face which had caused them to identify him with the appellant. Now I know that points of this kind are often raised in criminal trials but I am not much impressed by them. It is not often that a face presents itself with one, let alone two or more, remarkable features. Nevertheless, human beings are

prompted by the police. It is noteworthy that when the investigating officer testified he sought to make out that the identification had occurred spontaneously, when in fact it had not. This raises the suspicion that it was deliberately staged. At the time when the complainant saw the accused, he was visibly in custody, and was on his own and not amongst any other persons. The possibility that these circumstances may have influenced the complainant's identification of the accused cannot be excluded.

17. In the circumstances, had the complainant's identification stood on its own it may not have been sufficient for the court to convict the appellant on it. However, as it turned out, the complainant's evidence that the appellant was one of the men who robbed him was corroborated, albeit indirectly, by the evidence of the two s 204 witnesses.

18. Both of these witnesses knew the appellant well as he was a friend of theirs, and the appellant used to buy dagga from Ballie and from the premises next door to him. The upshot of their evidence was that on or about 26 January 2016 (ie the day after the robbery had taken place) the appellant arrived at Shepherd's place. He was looking for dagga. As Shepherd didn't have any, they made their way to Ballie's house. The appellant asked Shepherd to ascertain from Ballie whether he knew of anyone who might be interested in acquiring a television set. After Ballie had established that a friend of his was and enquired how much the TV was going for, the appellant informed him that the price was R 1500.

19. Ballie then drove the appellant and Shepherd to a scrapyard in an area known as Lapland, where they retrieved a large flatscreen LG television set and loaded it onto his vehicle. They conveyed it to Ballie's house whereupon he duly paid over the R 1500, which was split between the appellant and Shepherd and two other men who had assisted them.

20. It is common cause that later that night the police arrived at Ballie's house and enquired about the TV. He took them to where it was being stored at a

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highly adept at recognizing faces and voices. A constellation of multiple minor variations in standard facial features combine to make up a facial appearance which in its own way is as unique as a fingerprint. The laborious process followed by identikit artists in teasing out from a witness the facial features of a perpetrator shows that people can readily match a face to a perpetrator without being able to verbalize a description'.

neighbour's property and explained how he had come into possession of it, and in due course the appellant was arrested and the TV was identified by the complainant.

21. The appellant's answer to this evidence was simply to deny that he had ever been present at Ballie's house with Shepherd when they offered the TV for sale, or that he had been present when it was fetched and delivered to Ballie. He also denied that he had ever received any share of the proceeds of the sale. His only explanation for why both Ballie and Shepherd would falsely incriminate him in regard to the TV was that they possibly wished to extricate themselves from being implicated in their dealings with it.

22. As was rightly pointed out by the magistrate this did not make sense, and implicating the appellant in the dealings which took place in relation to the TV in no way served to exculpate either of the witnesses. This much was evident from the fact that they were both initially arrested and later called as s 204 witnesses on the basis that they were implicated, at the very least, in receiving stolen property or dealing therewith.

23. In the circumstances the magistrate correctly rejected the appellant's contentions in this regard, and in the absence of any credible explanation as to how he came to be dealing with the TV a day after the robbery the obvious and only reasonable inference one could draw is that the appellant was one of the persons who had robbed the complainant of it, as the latter testified.

Ad the housebreaking and the sentence

(i) <u>The treatment of housebreaking charges in our law:</u>

24. In our law 'housebreaking', as such, is not a crime on its own unless it is accompanied by an intention to commit an offence.[8] This intention is commonly to steal, but it may be to commit other offences such as robbery, rape or murder. Where there is a housebreaking without such an intent then (unless damage has been inflicted during the break-in one in which case one might be dealing with the common law offence of malicious injury or damage to property, or the offender enters the property in which event they may be guilty of the statutory

[8] Hiemstra *Criminal Procedure; S v Livanje* [2019] ZASCA 126 at para [14].

offence of trespass[9] ie of being in or on the property without permission of the owner or occupier), the offence is not considered to have been completed.

25. Thus, the crime is charged as one of housebreaking with intent to commit a specific offence, or in the event that the offence is unknown to the prosecutor, the accused may be charged in such terms.[10]

26. The essential and accepted elements of the crime as it is known in our law are i) the 'breaking' of the premises -in a legal as opposed to a physical sense ie by the displacement of any obstruction to entry which forms part of the premises (such as a door or window) by opening, breaking or (re)moving it ii) entry into the premises- either completely or by means of any part of the person or via an instrument (thus the insertion of a part of the body such as a hand or even a tool which is used to effect the break-in will suffice) iii) wrongfulness ie an unlawful break-in and entry without lawful authority such as consent, an order of court or a search warrant and iv) the necessary criminal intent ie the intent to commit an offence.[11]

27. It follows axiomatically that where an offender commits a 'housebreaking' in accordance with the requisite elements and thereafter proceeds to engage in further criminal conduct which was facilitated by it, and which was the object of it, he commits a further, and separate offence.

28. Thus, where an offender unlawfully breaks and enters premises with the intention of robbing the occupants and achieves his purpose, he commits both housebreaking with intent to rob as well as the offence of robbery.

29. That in such circumstances an offender therefore commits 2 separate offences has (bar a few exceptions[12]) been consistently recognized by our Courts[13] over at least the last 60 years, since the decision in *R v O'Connell*.[14]

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[9] S 1(1) of the Trespass Act 6 of 1959.
[10] S 262 of the CPA.
[11] *S v Hlongwane* 1992 (2) SACR 484 (N) at 485A-E.
[12] One of which, regrettably, is the recent decision of this Court in *S v Davids* 2019 (1) SACR 257 (WCC), which is discussed below.
[13] *S v Mkize* 1961 (4) SA 77 (N) at 77H; *S v Buthelezi* 1961 (4) SA 376 (N); *S v Zamisa* 1990 (1) SACR 22 (N) at 23D-E; *S v Cetwayo* 2002 (2) SACR 319 (E) 321D; *S v Kulati* 2002 (2) SACR 406 (E) at 408D; *S v Maswetswa* 2014 (1) SACR 288 (GSJ) at para [3]; *Director of Public Prosecutions, Free State v Mashune* [2018] ZASCA 60 at para [10].
[14] 1960 (3) SA 272 (O).

30. However, as was pointed out in *O'Connell* [15] because it would (in most, but not all instances), amount to a so-called duplication of convictions to convict an accused of both the housebreaking and the offence it facilitated separately, as they are usually committed in the course of a single criminal enterprise or foray, they are commonly charged in a single rolled-up, composite charge.

31. The underlying rationale on which the principle against a so-called duplication of convictions is based (and which the Supreme Court of Appeal has pointed out[16] has been applied as a rule of practice in criminal proceedings in this country since at least 1887[17]) is that where an accused has committed what amounts in substance to a single criminal act it should not be 'split up and charged against him'[18] as several offences, in order to prevent a duplication of convictions, which would result in a duplication of punishments.

32. However, in its practical application the principle has not always been applied consistently and has resulted in what at times appear to be conflicting or arbitrary decisions.

33. In an effort to establish consistency the Courts adopted a number of different tests which they applied, sometimes singly and sometimes in combination, in order to determine whether the principle might be breached were an accused to be charged in a matter with more than one offence. These ranged from the so-called 'single or same intent', to the 'continuous transaction' and/or the 'same evidence' tests. Thus, in instances where the offences may have been carried out with the same/ single intent or formed part of a single continuous 'transaction' or course of conduct, or where the same evidence which was required to prove the one offence would necessarily also prove the other, charging the accused with all these offences was considered to amount to an impermissible so-called 'splitting of charges' which could potentially result in a duplication of convictions,

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[15] *Id,* at 272H-273A.
[16] In *S v BM* 2014 (2) SACR 23 (SCA) at para [3].
[17] As per *Ex parte Minister of Justice in re: R v Moseme* 1936 AD 52 at 59.
[18] Thus, the principle was previously also expressed as the principle or rule against 'splitting' of charges.

and consequently the accused would only be charged with (or convicted of) one of them.[19]

34. The same, single intent is present in housebreaking matters where an accused's intention in breaking into a property is commonly to steal or rob, and he duly sets about committing the theft or robbery after entering it. In such instances the intention present in relation to the housebreaking offence is the same as that present in the case of the offence which it facilitates, and it could also be said that the theft or robbery is part of one and the same, continuous criminal enterprise or 'transaction', as the housebreaking.

35. Ultimately however, and because of inconsistency in the application of these various tests, in 2014 the SCA held in *BM* [20] that they were nothing more than guidelines and in each matter in order to determine whether there might be an improper splitting of charges and a resultant duplication of convictions a Court is required to adopt a commonsense approach, in the light of the fundamental requirement of fairness to an accused.[21]

36. The consequences of an accused being indicted in one rolled-up ie composite charge of housebreaking with intent to commit an offence and the offence itself may in certain instances appear to be anomalous, or may at times result in what appear to be counter-intuitive or inconsistent decisions. But on analysis these can best be understood if one bears in mind the underlying purpose of the practice in relation to the charging of housebreaking offences viz the avoidance of a duplication of convictions and punishments.

37. Thus, as was pointed out in *O'Connell* [22] as it is practice in housebreaking matters for an accused to be indicted in one single, composite charge with both the housebreaking and the offence it facilitated, ordinarily one conviction will follow in respect thereof.

38. But although this is usually the case it is not necessarily always so. In certain instances, even though the accused may be charged with a single, composite

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[19] Hoexter, Cowling et al *SA Criminal Law & Procedure* Vol 3 Chp 3, C2-C3.
[20] Note 16.
[21] *Id*, para [3], followed in *S v McRae & Ano* 2014 (2) SACR 215 (SCA).
[22] Note 14 at 272H-273A.

housebreaking charge he may nonetheless properly be convicted of two offences or attempts to commit one or other of them, or he may be found guilty of competent verdicts in respect thereof, if the circumstances justify it.

39. An example of such a matter, which at first blush appears to have resulted in a decision which is at odds with the principle against a duplication of convictions, is that in *Kulati* [23] where a full bench of the Eastern Cape High Court endorsed, on appeal to it, a double sentence which was imposed on a single, composite housebreaking charge.

40. The accused had been charged with housebreaking with intent to assault and assault with intent to commit grievous bodily harm. In respect of the housebreaking the state failed to prove its case but the magistrate properly convicted the accused of malicious damage to property, which is a competent verdict[24] on a housebreaking charge, and he also convicted the accused in respect of the assault with intent to commit grievous bodily harm which followed upon it. Thus, a conviction in respect of two offences ensued in respect of a single charge. The magistrate sentenced the accused to a fine of R1500 or 90 days imprisonment in respect of each of the offences, and ordered that these were to run concurrently with one another.

41. Although the convictions and sentences may appear to be contrary to the principles previously referred to, they are justified if one considers that on the application of any of the traditional tests or guidelines which would commonly be applied in order to determine whether there was an improper 'splitting of charges' and a duplication of convictions and punishments, the answer would be negative.

42. In this regard, the intent which was directed at damaging the property was an altogether different and separate intent from that which was directed at the assault. Equally, the evidence which was necessary to establish the former offence would not of necessity establish the latter, and the elements of the two offences were different.

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[23] *S v Kulati* 2002 (2) SACR 406 (E).
[24] In terms of s 262(1) of the CPA.

43. Thus, it could be said that the damage to the property and the assault were sufficiently distinct in intent, time and *modus* that they did not form part of a single criminal enterprise or transaction and ultimately, applying the fairness yardstick which was laid down in *BM* it was therefore not unfair to convicted the accused of 2 separate offences, even though they had been rolled up into a single charge, and it was not unfair to impose a separate punishment in respect of each of them. In sum therefore it could not be said that the accused had been punished more than once for a single criminal act.[25]

44. Similarly, and in accordance with the fact that in housebreaking cases one is usually dealing with 2 offences which are commonly charged by way of a single composite charge, if any one of the offences is not proven the charge does not necessarily fail, as a conviction may nonetheless ensue in respect of the other. Thus, if the housebreaking is not proven the accused may still be found guilty of the theft or robbery which followed it, and *vice versa*.

45. Consistent with these principles when an accused is only charged with housebreaking with intent to commit an offence but not with that offence as well, in one, rolled-up composite charge, and it subsequently transpires that in addition to the housebreaking he also committed the offence itself, he cannot be found guilty of that offence as part of the charge ie together with the housebreaking offence.[26] Once again, this result is congruous with the fact that one is dealing with 2 separate offences and as was stated in *Zamisa* [27] save in the case where a special verdict is rendered competent by statute an accused may only be convicted of an offence if he has been charged with it.

46. Thus, and by way of summary, when an accused is charged with housebreaking with intent to commit an offence and such offence, in one rolled-up composite charge, any conviction which ensues ordinarily amounts to a single conviction in respect of which there can only be a single punishment, unless one or other of

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[25] Similarly, in *R v Shelembe* 1955 (4) SA 410 (N) an offender who broke into a room and was surprised by the occupants who were sleeping at the time, and who then broke a door in order to exit the premises, was similarly held to have been properly convicted of housebreaking with intent to commit an offence unknown to the state, and malicious injury to property, although he had been charged with one, composite charge of housebreaking .
[26] *Zamisa* n 13; *S v Blaauw* 1994 (1) SACR 11 (E); *S v M* 1989 (4) SA 718 (T); *S v Jacobs* 1979 (2) SA 837 (C).
[27] *Id*, at 23F.

the 2 offences or a competent verdict in respect of one or both of them are so clearly distinct in intent, time and *modus*, and the evidence necessary to prove the one is not the same as, and does not necessarily prove, the other, and they do not form part of the same, continuous criminal transaction, in which case there will not be an improper duplication of convictions if the accused is convicted and sentenced in respect of both such offences, instead of in respect of a single offence.

47. I think it may safely be said that ordinarily, where an accused could be convicted of housebreaking with intent to commit an offence and that offence as well, and both would be committed with the same intent (eg housebreaking with intent to steal and theft or housebreaking with intent to rob and robbery), there can and should only be a single conviction on a composite, rolled-up charge, and only a single punishment would be competent.

48. One trusts that this restatement of the law will put paid to the lingering confusion and uncertainty which one still finds in judgments of the Courts and in leading textbooks [28] as to whether or not a conviction in housebreaking cases amounts to a conviction of a single offence or to more than one.

49. That confusion still abounds in respect of how to treat housebreaking cases is apparent even from the recent decision of this division in *S v Davids.*[29]

50. The accused had pleaded guilty to a single, composite charge of housebreaking with intent to rob and robbery with aggravating circumstances. But as in this matter, the magistrate sentenced the accused separately for the housebreaking, in respect of which he imposed 6 years imprisonment, and for the robbery, in respect of which he imposed an additional 15 years imprisonment, on the basis that they were two separate offences and the accused was liable to a discretionary minimum sentence in respect of the robbery, in terms of the CLAA, as a first offender.

51. On appeal the Court held that the magistrate had erred in regard to the imposition of the sentence of 15 years imprisonment on the robbery as the

[28] Vide Snyman *Criminal Law* (6th Ed) at 544.
[29] Note 12.

accused's plea did not reveal that he had admitted to having committed robbery with aggravating circumstances, but only robbery *simpliciter.*

52. In this regard, in his plea explanation the accused said that he had gained access to a building by climbing onto a balcony and opening a window. Whilst he was ransacking the premises the complainant made her appearance. The accused pushed her and fled, taking a cell phone and watch with him. It will be apparent from this explanation that it did not contain an admission that a firearm or a dangerous weapon was used in the commission of the robbery and the appeal Court was therefore correct in finding that aggravating circumstances were not present at the time. Thus, at best, the accused was guilty of robbery plain.

53. The Court held[30] that the magistrate had committed a serious misdirection when he stated, during sentencing proceedings, that the appellant had been found guilty and had been convicted of 2 distinct offences, a misdirection which was perpetuated when the magistrate imposed a double sentence, as a single charge of housebreaking with intent to rob and robbery with aggravating circumstances had been put to the accused and he had been convicted of a *'single offence'*.[31]

54. As will be apparent from what is set out above, although the housebreaking charge which featured in *Davids* consisted of 2 separate offences, only a single conviction could ensue in respect thereof, because it was formulated in a single rolled-up *charge*, and not because it constituted a single *offence*. A conviction can only occur in respect of a charge on which an accused is indicted, or a competent verdict in respect thereof. Thus, it appears that both the magistrate and with respect, this Court, erred in their findings.

(ii) <u>The treatment of the housebreaking charge in this matter</u>:

55. In the matter before us, the magistrate similarly correctly pointed out that housebreaking with intent to rob and robbery are two separate offences which, for 'practical' reasons are usually combined. But, as in the case of his predecessor in *Davids* he erred when he went on to say that as they were

[30] Per Wille J, Slingers AJ concurring.
[31] *Id*, at para [11].

separate offences they should be punished separately, because the accused was only convicted on a single, composite *charge*.

56. By doing so the magistrate improperly 'split' the charge in two, which effectively resulted in a duplication of convictions and punishments, for what essentially amounted to a single criminal 'transaction' or course of conduct. His error in this regard is evident from his statement, during sentencing proceedings, that he was imposing 7 years imprisonment in respect of the 'charge' ('*aanklag*') of housebreaking and the discretionary minimum of 15 years imprisonment on the 'charge' ('aanklag') of robbery with aggravating circumstances. There was only one charge in respect of which only a single conviction could ensue and in respect of which only a single sentence could be imposed.

57. As a result, the double sentence which the magistrate imposed constituted a material misdirection, and we are thus not only at large to reconsider the issue of sentence afresh, but are in fact obliged to do so.[32]

58. But in order to do so, the further question which arises for determination is how we are to deal with any so-called prescribed or, as it is now known, discretionary minimum sentence which may be applicable in terms of the CLAA.

(iii) <u>Discretionary minimum sentences and housebreaking charges</u>:

59. If one applies the principles set out above ie that an offender who has been convicted of a single, rolled-up housebreaking charge for what essentially amounts to a single criminal act (albeit that it may actually consist of two separate offences committed with the same intent) should only be punished once for it, then logic and fairness dictate that only one sentence can and should be imposed.

60. But what sentence does the Court impose when, had the offences been charged separately the accused would possibly have faced a prescribed ie discretionary minimum sentence in respect of one or either, or possibly both of these offences? Which of these punishments, if any, must be imposed, or are both applicable by virtue of the CLAA?

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[32] Per Mocumie JA in *Mathekga & Ano v S* [2020] ZASCA 77 at para [19], referring to *S v Phillips* 2017 (1) SACR 373 (SCA) at para [5].

61. When faced with these questions in *S v Maswetswa* [33] Wepener J expressed the view that a single, rolled-up charge of housebreaking (ie a charge of housebreaking with intent to commit an offence and that offence), would be 'technically ineffective' in circumstances where the CLAA and the sentences prescribed therein were applicable.[34]

62. In this regard he pointed out that in terms of the CLAA an offender who is convicted of housebreaking would be liable to a sentence of 5 years imprisonment in the case of a first offence, 7 years in respect of a second, and 10 years for any subsequent offence, whereas offences which frequently accompanied or followed upon housebreakings such as robbery could, depending on the circumstances, attract differing sentences, in excess of that.

63. Consequently, he was of the view that a single, composite housebreaking charge was no longer appropriate and there was good reason to formulate its constituent offences as separate charges.[35]

64. He held that it was therefore desirable that housebreaking charges should be framed in such a manner as to separate the allegations of housebreaking with intent to commit an offence, from that offence[36] (which he described as the 'substantive' charge), and that it would be wrong to combine offences for which different minimum sentences were prescribed in terms of the CLAA, into one charge.[37] In his view the better practice would be to charge offenders separately for the offence of housebreaking with intent to commit a crime and the crime itself.[38] I respectfully disagree with these sentiments.[39]

65. In determining what minimum sentence permutations may be applicable to housebreaking matters in terms of the CLAA, one must firstly have regard for the competent verdicts which are provided for in the CPA, in respect of a

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[33] 2014 (1) SACR 288 (GSJ). I note that in its original format the judgment is cited and reported on SAFLII as *S v Maswetsa* [2013] ZAGPJHC 385, not *S v Maswetswa*.
[34] *Id*, at para [7].
[35] Para [4].
[36] Para [8].
[37] Para [19].
[38] Para [18].
[39] The judgment in *Maswetswa* has also been subjected to trenchant academic criticism *vide* Watney 'Unnecessary Confusion in respect of Housebreaking' *TSAR* 2014 Vol 3 606-615.

housebreaking charge.[40] In this regard if the evidence does not prove that the housebreaking was effected with the intent to commit the offence as charged, but another offence, or the offence of malicious injury to property, the accused may be convicted accordingly.[41]

66. In the second place one must also consider the competent verdicts which are provided for in the CPA in respect of the 'substantive' offences which are commonly combined with housebreaking and which are usually facilitated by it,[42] such as robbery and theft.[43]

67. In this regard an accused facing a charge of robbery may be convicted of assault with intent to commit grievous bodily harm or assault common, or theft, or the statutory offence of receiving stolen property, if the evidence allows for this and is insufficient to prove the robbery.[44] Similarly, on a charge of theft the accused may be convicted of the statutory offences pertaining to the receipt of stolen property. None of these competent verdicts on charges of robbery or theft, bar that of theft, and then only theft in excess of a prescribed amount or theft committed in a group context, or theft of ferrous or non-ferrous metal (most commonly copper) which forms part of essential infrastructure (such as overhead cables for the supply of electricity), are subject to the minimum sentences which are set out in Schedule 2 of the CLAA. So too, no minimum sentence is prescribed for malicious injury to property.

68. As far as the CLAA itself is concerned, broadly speaking it provides for an increasing severity of punishment in regard to the discretionary minimum

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[40] These are set out in ss 262(1)-(3) of the CPA.
[41] S 262(1).
[42] I have left out of account other crimes of violence which often follow upon or accompany housebreakings, such as murder and rape, as these are inevitably charged as separate offences, for it is very rare (although not totally unheard of) for housebreakings to be carried out with the aim of committing these offences. Usually the commission of these crimes is incidental to the housebreaking, which is most often directed at stealing what is inside the property which is broken into. Thus, offenders who kill or rape subsequent to a housebreaking are usually charged with these crimes as separate offences, in addition to housebreaking with intent to commit robbery or theft.
[43] S 260 sets out the competent verdicts in respect of a robbery charge and s 264 deals with those applicable in respect of theft.
[44] S 260.

sentences which are applicable, depending on the seriousness of the offences and whether an offender is a first, second, or subsequent offender.

69. In its original iteration the CLAA[45] did not provide for a prescribed, or discretionary, minimum sentence for housebreaking. This was only introduced in 2007 [46] when it was specified ('breaking or entering any premises with intent to commit an offence') as one of the offences listed in Part IV of Schedule 2.

70. But housebreaking only qualifies for a minimum sentence if the accused had a firearm with him which was intended for use 'as such', at the time of its commission, in which case if the accused is a first offender he will be liable to a sentence of 5 years imprisonment, 7 years if he is a second offender and 10 years if he is a third or subsequent offender.[47] Thus, ordinary housebreaking *per se* does not qualify for a minimum sentence, contrary to what was said in *Maswetswa.* [48]

71. As far as the most common offences which are facilitated by housebreakings are concerned ie robbery and theft, both of these are liable to attract a minimum sentence, in certain circumstances.

72. Thus, robbery with aggravating circumstances[49] ie robbery which is committed by means of a firearm or dangerous weapon, and robbery which involves the taking of a motor vehicle, are listed in Part II of Schedule 2 of the CLAA, and are liable to a sentence of 15, 20 or 25 years imprisonment, in the case of first, second and subsequent offenders.[50]

73. In the case of other robberies (ie those where aggravating circumstances are not present or where property other than a motor vehicle is stolen), first second and subsequent offenders are only liable to minimum sentences of 5,7 or 10 years [51] *provided the accused had a firearm with him which was intended for use*, at the time of the commission of the offence.

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[45] As at promulgation in 1997.
[46] By way of the Criminal Law (Sentencing Act) 38 of 2007, which came into effect on 31 December 2007.
[47] S 51(2)(c) rtw Part IV of Schedule 2.
[48] At para [6].
[49] As defined in terms of s 1(1)(b) of the CPA.
[50] S 51(2)(a)(i)-(iii) rtw Part II of Schedule 2.
[51] S 51(2)(c)(i)-(iii) rtw Part IV of Schedule 2.

74. The way I understand the relevant provisions of the Act read together with the relevant Parts of Schedule 2 thereof, which provide for the respective minimum sentences which I have referred to, it will therefore only be in a situation where an offender had with him a firearm which was *intended* for use in the commission of a housebreaking with intent to commit robbery and the robbery which it facilitated (but which was *not* in fact used in the commission thereof- for in such instance he will be guilty of robbery with aggravating circumstances), that there will be a possibility of a discretionary minimum sentence being applicable in respect of both such offences, even though they are charged as one, by way of a single, rolled-up charge.

75. And in keeping with the rationale and principles set out above in regard to the charging and punishment of housebreaking offences where the intent in relation to the housebreaking is the same as that in relation to the offence which it facilitates and the offences are part of one criminal foray, there can only be one sentence imposed, and in my view the determinative offence ie the one which should determine the minimum sentence which may be applicable, is that which the housebreaking facilitated, which is the principal offence at which the housebreaking was directed.

76. I prefer this terminology to that which was used in *Cetwayo* and *Kulati,*[52] where the Court referred to it as the 'actual' offence, or that which was used in *Maswetswa*[53] where it was referred to as the 'substantive' offence. In my view both housebreaking and the offence which it facilitates are substantive, actual offences. The danger in using such terminology is that it harks back to an earlier time when, in accordance with Roman-Dutch law, housebreaking was considered not to be an offence in its own right, but simply a matter of aggravation of the offence which it facilitated. Thus, in the case of a housebreaking which was committed with intent to steal and a subsequent theft, it was considered that the 'real' offence which was committed was the theft.[54]

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[52] *Cetwayo* n 13 at 321D; *Kulati* n 23 at 408D.
[53] Note 33 at para [8].
[54] *R v Impey & Ano* 1960 (4) SA 556 (E) at 566G referring to *R v Vail* 19 EDC 273; *R v Sabuyi* 1905 TS 170; *R v Gentleman* 1919 CPD 245. See also *S v Maunye & Ors* 2002 (1) SACR 266 (T) at 277F-287F.

77. In the circumstances, where a housebreaker has with him a firearm which he actually uses in a robbery which is facilitated by the housebreaking there will not be a minimum sentence applicable in respect of the housebreaking, only one in respect of the robbery. So, in such cases there will be no question of a minimum sentence being applicable in respect of both offences.

78. As far as theft is concerned, on my reading of Schedule 2 it only attracts minimum sentences of 15, 20 or 25 years imprisonment for first, second or subsequent offenders where it involves an '*amount*' of more than R 500 000 (and not goods?) if committed by a single person on their own (or more than R 10 000 if the person is a law enforcement officer) or more than R 100 000 if committed in a group context in execution of a common purpose.[55] I think it is fair to say that most thefts committed subsequent to housebreakings in this country, would probably not be struck by these provisions.

79. Theft is also subject to minimum sentences where it involves ferrous or non-ferrous metal which forms part of essential infrastructure.[56] As most instances of such theft are committed in the open (usually involving overhead or underground cables), it will not usually be facilitated by a housebreaking, and there will therefore in such cases most often also not be a question of a minimum sentence being applicable for housebreaking, and at best only one in respect of the theft.

80. The bottom line therefore is that if one sets about hypothesizing the various permutations which may occur, where a housebreaking facilitates an offence which may attract a minimum sentence in terms of the CLAA and Schedule 2 thereto, there will in most instances not be a clash or a dilemma as to which minimum sentence may be applicable. And in my view, where there is the possibility of a conflict the minimum sentence which should apply is that which is

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[55] Part II of Schedule 2.

[56] Where it results in damage to essential infrastructure or to a basic service, or was perpetrated by a law enforcement officer, it is liable in terms of Part II of Schedule 2 to sentences of 15, 20 or 25 years imprisonment. Where it is committed in other circumstances it may attract lesser sentences of 5, 7 or 10 years (in terms of Part IV provided that at the time the accused had a firearm in his possession which was intended for use in the commission of the offence), or alternatively where none of these considerations are present to 5, 7 or 10 years (in terms of Part V).

determined by the offence which the housebreaking facilitates, as it is the principal offence at which the housebreaking is directed.

81. In this regard it is noteworthy that, save in the case of a third or subsequent housebreaking offender who has on each occasion when he offended had a firearm with him which he intended to use but did not and who was only convicted of housebreaking (ie breaking and entering) and not another offence which it facilitated (a highly unlikely scenario)- in which event a sentence of 10 years imprisonment may be applicable[57]- where housebreakings are accompanied by serious crimes of violence the sentences which may be imposed in respect of such offences are ordinarily in excess of the prescribed sentence which may be applicable in respect of such housebreakings.

82. Thus, by way of example, in instances where a housebreaking is accompanied by and facilitates a murder, which is planned or premeditated, or multiple rapes (ie where the victim is raped more than once or by more than one offender) or the rape involves a child younger than 16 years of age, the minimum sentence applicable to the determinative, principal offence is imprisonment for life.[58] Other forms of rape which do not fall within one of these categories are punishable[59] by sentences which start at 10 years in the case of a first offender, and which progress in multiples of 5 years to a sentence of 20 years in the case of a third or subsequent offender. Similarly, as previously pointed out, in the case of robbery with aggravating circumstances the 'starting' minimum sentence applicable ie that applicable in the case of a first offender, is 15 years.

83. In my view, applying the approach which I have adopted would thus be in keeping with the legislative scheme in terms of which this graded scale of minimum 'tariffs' for certain offences, based on their severity, is set out in Schedule 2 of the CLAA read together with s 51 thereof, and would give effect to the objectives which the legislature seeks to achieve thereby, and would not do an injustice to the victims of housebreaking offences. In addition, it would be consonant with the principles of avoiding a duplication of convictions and

[57] In terms of s 51(2)c) rtw Part IV of Schedule 2.
[58] In terms of s 51(2)(a) rtw Part I of Schedule 2.
[59] In terms of s 51(2)(b) rtw Part III of Schedule 2.

punishments which is given effect to in the long-standing practice of charging offenders by way of a single, rolled-up composite charge of housebreaking and the offence it facilitates.

84. In *Maswetswa* the accused was convicted of attempted murder (for which he was sentenced to 8 years imprisonment), murder (for which he was sentenced to life imprisonment) and housebreaking with intent to rob and robbery.

85. Notwithstanding the views which he expressed Wepener J held that although the accused had effectively been found guilty of 2 offences in respect of the third (housebreaking) charge, because of the longstanding practice of combining the offences in the form of a single, composite charge, the appropriate sentence to impose was a single sentence of 15 years, which was the sentence applicable to a first offender for robbery with aggravating circumstances, as the robbery was the 'actual' offence for which the punishment was prescribed.[60] Thus, ultimately the result in *Maswetswa* lends support to the approach which I have proposed, notwithstanding the views expressed therein.

86. In my view, it would therefore not be appropriate to seek to circumvent long-established practice in regard to the way housebreaking charges are formulated by separating them into 2 separate charges simply in order to allow for different discretionary minimum sentences to be imposed in terms of the CLAA, and in most instances doing so would effectively result in a duplication of convictions and punishments, which would be liable to being set aside on appeal.

87. Where the circumstances are such that the available evidence indicates that the accused had differing intentions in relation to the housebreaking and any subsequent offence(s) which he committed after perpetrating it; and the evidence which could be tendered in respect of each of such offences, were they to be tried separately, would not be the same, and would not be inextricably woven up or bound together and would clearly pertain to different elements, nothing would stop the state from charging the accused with separate offences in such circumstances.

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[60] *Id,* at para [8].

88. As I previously pointed out, this frequently happens in cases where housebreaking with intent to rob or steal is accompanied by, or results not only in, robbery or theft, but in murder. In such circumstances the accused is commonly charged with housebreaking with intent to rob and robbery in one rolled-up charge, as well as with murder as a further, separate charge. The same would be applicable where, although the aim of the housebreaking is to steal or rob, the perpetrators not only achieve their purpose but also rape someone who they find in the premises they break into.

89. When an accused is a repeat housebreaker, that can be taken into account as an aggravating factor when considering what sentence should be imposed in respect of the principal offence ie the offence which the housebreaking facilitated, [61] even though it may be subjected to a minimum sentence in terms of the CLAA. In this regard for example in *Mashune* [62] the SCA held that the fact that an accused had a number of previous convictions for housebreaking was an aggravating factor which was to be taken into account in considering what sentence to impose in respect of the (principal) offences, which consisted of 2 instances of rape, which had been committed in the course of 2 housebreakings. Because of the previous convictions the SCA[63] consequently increased the discretionary minimum sentence of 10 years which had been imposed *a quo* on each of 2 composite charges of housebreaking with intent to rape and rape,[64] to 15 years on each count.[65]

Conclusion

90. I now turn to consider what sentence should be imposed on the appellant. He was party to the commission of two serious offences: a housebreaking whereby the sanctity and privacy of the complainant's home was invaded at night whilst he and his family were watching television, and a robbery which was effected by

[61] This is not a reversion to the earlier treatment of housebreaking in our law whereby it was not considered to be a substantive offence in its own right- see the discussion at para [76] above.
[62] Note 13.
[63] Per Rogers AJA.
[64] As per s 51(2)(b) of the CLAA rtw Part III of Schedule 2.
[65] In order to ameliorate the cumulative effect thereof it directed that 8 years in respect of the sentence which was imposed on the second count was to run concurrently with the sentence which was imposed in respect of the first.

means of the use of a firearm, during which time the complainant's daughter was threatened that she would be shot and the complainant and his family were traumatized, and a number of valuable items were taken from them, only one of which was recovered.

91. As previously indicated, there is no minimum sentence applicable in respect of the housebreaking-in this regard there would only have been one in the event that the appellant had a firearm with him at the time which he intended using, but did not, and no robbery had been committed, and this was not the case. There is however a minimum sentence of 15 years imprisonment applicable in respect of the principal offence to which the appellant was an accomplice (ie the robbery with aggravating circumstances, which was facilitated by the housebreaking).

92. It is trite and well-established that in introducing the so-called prescribed or discretionary minimum sentences the legislature intended to provide for a severe, standardized and consistent sentencing regime that would ordinarily be enforced unless substantial and compelling circumstances are present, and it has thus repeatedly been said by the highest Courts that such sentences should not be departed from lightly, or for flimsy reasons.

93. It is further trite that whether such circumstances exist is a matter which must be determined by each Court, on a case-by-case evaluation of the facts and circumstances before it. All the factors which a Court would traditionally have taken into account before the introduction of such sentences, must be considered. If, after due and careful consideration thereof the Court comes to the conclusion that the imposition of the 'prescribed' sentence would be unjust, in that it would be disproportionate, having regard to the nature of the offence(s) concerned, the interests of society and the accused's personal circumstances, it is justified in deviating therefrom.[66]

94. At the time when he committed these offences the appellant was a relatively youthful first offender of the age of 25, and was supporting 2 young children (one of whom tragically passed away while the case was pending). By the time he was sentenced on 21 June 2017, he had been in custody awaiting trial for 16 months.

[66] *S v Malgas* 2001 (1) SACR 469 (SCA).

In my view, having due regard for the nature and seriousness of the offences which he committed (in respect of which he was an accomplice and played a non-violent role) and the interests of society in seeing offenders who commit such crimes serve appropriately stiff terms of imprisonment, as well as the appellant's personal circumstances, there are substantial and compelling circumstances present which would make the imposition of a sentence of 15 years imprisonment, disproportionate. In my view, the appropriate sentence to impose is one of 12 years imprisonment.

95. I would accordingly make the following Order:

93.1 The appeal against conviction is dismissed.

93.2 The appeal against sentence is upheld, and the sentence of 7 years imprisonment which was imposed in respect of the housebreaking and the sentence of 15 years imprisonment which was imposed in respect of the robbery with aggravating circumstances are set aside, and replaced with a sentence of 12 years imprisonment, which is antedated to 21 June 2017.

M SHER

Judge of the High Court

I agree, and it is so ordered.

L BOZALEK

Judge of the High Court

Appearances:

For appellant: Ms A De Jongh

Legal Aid, Cape Town
For respondent: Adv E Cecil
Director of Public Prosecutions, Cape Town