IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.: CA&R 179/2024

In the matter between:-

THE STATE

and

SIYABULELA MTHIMKHULU **ACCUSED**

SPECIAL REVIEW JUDGMENT

NORMAN J:

[1] This is a special review in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977 ('the CPA'). On 26 September 2024 the Senior Magistrate sitting in East London submitted to this court, this matter on the following facts:

1.1 On the 30th of August 2024, the accused, who was legally represented pleaded guilty to housebreaking with intent to steal and theft. He was accordingly convicted on his plea. On the same day he was sentenced in terms of section 276(1)(i) of Act 51 of 1977 to a period of eighteen (18) months imprisonment.

1.2 According to the statement in terms of section 112(2) of the CPA submitted on behalf of the accused, theft was not completed. The accused was interrupted whilst trying to exit the premises though he had already removed the items from their original places. The Senior Magistrate believed that the accused should have been convicted on the charge of housebreaking with intent to steal only.

Brief background

[2] The accused was arraigned on a charge of housebreaking with intent to steal and theft, in that on or about 09 June 2024 at or near Phillip Frame road, Chiselhurst, East London, he unlawfully broke and entered the business premises at Maxton and Castle with intent to steal the goods therein and did unlawfully and intentionally steal the property of Maxton and Castle. The property allegedly stolen under the list of the recovered stolen property were items such as a microwave oven, electric kettle, keyboards, computer monitors, dell computer hard drive and a computer mouse. All those items were valued at R14 780.

[3] He pleaded guilty to the charge. The accused's legal representative handed in a statement, in terms of section 112(2) of the CPA, with specific reference to paragraph 5 thereof, it is stated:

> *"5. I plead guilty to the charges against me of housebreaking with intent to steal and theft."*

[4] In one of the paragraphs he explained how he gained entry, the items that he took and stated:

> "*. . I then took the items as mentioned in the list on charge sheet without the permission of the owner and with the intention to permanently deprive the owner of his property. <u>While trying to exit the premises</u> I met a security guard by the door who then apprehended me. The police were called and I was arrested and charged accordingly.* (my emphasis)

[5] It is apparent from the statement that he had removed the items from where they were and was in the process of trying to exit the premises. He had not exited the premises when he was apprehended by the security guard.

[6] The trial court convicted and sentenced the accused on a charge of housebreaking with intent to steal and theft. That conviction was a composite conviction. It was followed by a composite sentence of 18 months imprisonment in terms of section 276 (1) (i) of the Act.

[7] In **Bam v S [1], Sher J,** stated:

> *"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 i.e. together with the housebreaking offence. Once again, this result is congruous with the fact that one is dealing with 2 separate offences and as was stated in Zamisa 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*

[1] Bam v S (A144/18) [2020] ZAWCHC 68; [2020] 4 All SA 21 (WCC); 2020 (2) SACR 584 (WCC) (20 July 2020).

which ensues ordinarily amounts to a single conviction in respect of which there can only be a single punishment, unless one or other of 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 as to whether or not a conviction in housebreaking cases amounts to a conviction of a single offence or to more than one." (footnotes omitted)

[8] Having read the record, I am satisfied that indeed the offence of theft was not completed. If one applies the single intent test, the factory were broken into with the intention to steal which, in my view, would include an attempt to steal. Therefore, a conviction on housebreaking with intent to steal would suffice.

[9] In **S v Kharuchab**[2], at para 11, on review, the Court stated:

> *[11] In S v Radebe*[3]*, Ebrahim, J referred with approval to R v Sabuyi,*[4] *where the accused had been convicted and sentenced on the charges of housebreaking with intent to commit an offence in contravention of Ordinance 26 of 1906 and theft. The theft had taken place immediately after the breaking into the premises. In the Sabuyi case, Innes CJ stated that the test for determining whether a duplication of convictions has occurred as follows:*
>
> > *"where a man commits two acts of which each, standing alone, would be criminal, but does so with a single intent and both acts are necessary to carry out that intent, then it seems to me that he ought only to beindicted for one offence, because two acts constitute one criminal transaction."*

[10] It follows that a conviction including theft that was not completed was irregular and it ought to be reviewed and set aside. This court, exercising its powers provided for in section 304 2(c), shall accordingly alter the conviction.

[11] This takes me to the second issue of whether the sentence of eighteen (18) months imprisonment in terms of section 276(1) (i) of the Act, is proportionate to the offence committed. The personal circumstances of the accused were that he was 33 years old and married with 4 children. He is a first offender. He showed remorse and pleaded guilty. He committed the offence because he was struggling at home and the children were hungry. He was frustrated that as a father he was not able to provide for his family. He used to work at that factory as a security guard but was dismissed because he had eyesight problems. His intention was to steal food for the children and something to

---

[2] S v Kharuchab 2017(1) NR 116 (HC).
[3] S v Radebe 2006(2) SACR 604.
[4] R v Sabuyi 1905 TS 170-171, S v Cetwayo 2002 (2) SACR 319.

sell. He was aware that he will never work as a security guard again because of the conviction for this offence. His legal representative asked for a wholly suspended sentence.

[12] The State accepted that the accused had shown remorse. It also submitted that housebreaking is serious in nature. The State did not oppose the suggestion of a wholly suspended sentence.

[13] In sentencing the accused the trial court stated:

> *"Now, what is more aggravating is that you stole from your former employer. They say that you cannot bite the hand that feeds you. At some stage you were put in a position of trust by this company. They employed you, you were part of them until they released you. Now, you cannot take out your anger on them just because they had to release you and steal from them. Break in and steal valuable items from them. It is indeed not an excuse to say that you did it out of hunger. .."* (my emphasis)

[14] Throughout the reasons for sentence, the Magistrate clearly misdirected himself or herself by referring to a theft that had occurred when in fact it did not. The harshness of the sentence of direct imprisonment, in the circumstances of the case, was clearly influenced by that mistake.

[15] The fact that the goods were not taken out of the premises and removed from the factory of the complainant is something that ought to have been taken into account. The door that was used to gain entry was closed but not locked and there was no damage to it. The accused was apprehended by a security guard inside the premises and was arrested shortly thereafter. The complainant suffered no loss. The trial court gave no reasons for rejecting the submission by the defense, which was supported by the State, for a wholly suspended sentence. None of the factors mentioned herein were considered by the trial court.

[16] I accordingly find that the sentence of eighteen (18) months imprisonment for housebreaking is shockingly inappropriate in the circumstances of this case. It is not in accordance with justice and is hereby reviewed and set aside. This court believes that with all the evidence before it, it is not necessary to remit the matter to the trial court for imposition of sentence. The accused is in custody and this court does not find that direct imprisonment is appropriate but intends to replace the sentence by imposing a wholly suspended sentence which would serve as a deterrent. The effect of the sentence to be imposed will call for the immediate release of the accused.

[17] In the circumstances I make the following Order:

ORDER

1. The conviction for the offence of housebreaking with intent to steal and theft is reviewed, set aside and replaced with the following:

> **"The accused is convicted of the offence of housebreaking with intent to steal".**

2. The sentence of 18 months' imprisonment in terms of section 276 (1) (i) of Act 51 of 1977 is reviewed and set aside. The following sentence is imposed:

> **"The accused is sentenced to undergo six months' imprisonment. The sentence is wholly suspended for a period of three (3) years on condition that the accused is not convicted of housebreaking with intent to steal during the period of suspension."**

4. The sentence is antedated to 30 August 2024.

_____

T.V NORMAN

JUDGE OF THE HIGH COURT

I agree.

_____

A.S. ZONO

ACTING JUDGE OF THE HIGH COURT

18 October 2024