A446/2008 /ES

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 9/6/2008

REPORTABLE / OF INTEREST TO OTHER JUDGES

Magistrate
PRETORIA

Case No: 14/02162/2007
Supreme court ref no: 2007

THE STATE v MALUTA MAVUNGU

REVIEW JUDGMENT

PRINSLOO, J

[1] The accused was convicted in the Pretoria regional court of "housebreaking with the intent to commit an offence and trespassing".

[2] The accused was sentenced to three years imprisonment wholly suspended for five years on condition that the accused is not convicted, during the period of suspension, of housebreaking with intent to commit an offence.

[3] For illustrative purposes, it is convenient to quote the charge-sheet:

"Housebreaking with the intent to commit a crime unknown to the prosecutor

That the accused is guilty of the offence of housebreaking with the intent to commit a crime unknown to the state (read with the provisions of section 262(1) and section 264 of the Criminal Procedure Act 51 of 1997).

In that on or about 21/7/07 and at or near Centurion 0utdoor & Caravan, Kloofsig in the regional division of Gauteng the accused did unlawfully and with the intent to commit a crime unknown to the state, break open and enter the caravan of Mr Camfer and/or the owners of Centurion 0utdoor & Caravan."

[4] The accused was legally represented in the court below.

[5] At the commencement of the trial the accused pleaded not guilty. According to the record, his plea-explanation, advanced on his behalf by his attorney, was the following:

"0n the night in question, your worship is my instruction that the accused was from a party, he was off-loaded at Tembisa, your worship, he is a resident of Centurion. 0n his way towards where he is residing, he was chased your worship, by three men.

> Then, while he was running away, your worship, it is my instruction that he was of the view that they want to rob him, your worship. He entered particular premises, your worship, screaming. Then as nobody could come to his assistance, he saw a caravan, your worship, and went to it and entered it through a door. It is my instruction and he slept inside that caravan.
>
> He was woken up in the morning, your worship, whilst still sleeping in that caravan. That is all your worship."

[6] It is common cause that the caravan was the property of Centurion 0utdoor and Caravan, a business in the Pretoria district which, *inter alia*, exhibits caravans on its premises for purposes of selling them to the public. The caravan entered by the accused was such a caravan. It was new, fitted, *inter alia*, with a bed, a kitchen and cutlery. There was also a fridge. It was obviously fit to be used as a caravan, in the normal sense of the word.

[7] The first state witness was Mr Freedom Maihela Mohlele, who worked at the outdoor business as a security guard. He was patrolling the premises on that particular evening when he heard a noise emanating from the caravan. He called his supervisor, Mr Roelf Kamfer. When the latter arrived, the two of them, at about 22:00 or 23:00, approached the caravan. Mr Kamfer lit inside with the

torch. The door was locked. The accused was found seated on the bed inside. He was asked to get out but refused. The witness and Kamfer then pulled him out through the window and had him arrested.

[8] The witness testified that the window through which the accused was extracted, had been broken. The glass was broken. The witness regularly checked the caravans and when he checked earlier that evening that particular window was closed and unbroken.

[9] Nothing was removed from the caravan. The shoes of the accused were found in the caravan. According to the witness a small piece of the glass was broken to permit entry by the accused who could insert his hand through the opening caused by the breakage, to open the window.

[10] The witness, in cross-examination, denied that the door was open and that the accused was removed from the caravan through the door.

[11] The second and last state witness was Mr Roeloff Petrus Kamfer. He is the owner of the security firm guarding the outdoor premises of the caravan owner.

[12] He confirmed that the previous witness called him to the scene that particular evening. He confirmed that the door was locked but that the hatch of the window

had been opened. A piece of the broken perspex glass was found on the ground outside the window.

[13] The witness looked through the window and saw the accused lying on the bed. The other windows of the caravan were still locked. The accused was then pulled to the outside through the window. The police were called and the accused was arrested. His running shoes were found in front of the bed where he had been sleeping. The witness could not smell alcohol on the breath of the accused and he did not regard him as being inebriated. Under cross-examination the witness insisted that the door was locked. The next day employees of the owner unlocked the caravan for this witness for inspection purposes. Nothing had been stolen. In cross-examination the witness insisted that the door had been locked. He described how the window had been forcibly broken to allow entry. This witness described the caravan as a second hand one and not a new one. Nothing turns on this.

[14] In his own evidence the accused more or less stuck to the version presented on his behalf for purposes of the plea explanation. He insisted that he entered the caravan through the door and that he had been chased by some possible assailants.

[15] In his judgment, the learned magistrate, correctly in my view, rejected the version of the accused as not being reasonably possibly true. Had there been screaming

for help and chasing of the accused by possible assailants, the first witness would have noticed the commotion. Moreover, the evidence is overwhelming that the accused broke into the window and gained entry in that way rather than through the locked door.

[16] I find no material misdirection on the part of the learned magistrate as far as his findings on the facts are concerned. The wholly suspended sentence, although perhaps harsh, was not part of the section 304(4) referral, *infra*, of the magistrate. According to the record, the magistrate initially contemplated something more lenient, "totdat die beskuldigde so volgehou het met sy leuens". I see no basis for interfering.

[17] According to the record, the learned magistrate formulated the conviction as follows: "Housebreaking with an intent to commit an offence and trespassing."

[18] The learned magistrate then referred the case to this court of review in terms of section 304(4) of Act 51 of 1977. In this referral, the learned magistrate says the following:

> "0n page 20 of the judgment, I specified the offence of which the accused was convicted. i.e. housebreaking with intent to commit an offence and trespassing. In view of the charge against the accused, he should only have been convicted of housebreaking with intent to commit trespassing,

which I should have done in the first place.

I respectfully request that, if the Honourable Judge of Review is otherwise satisfied, that he will set aside my description of the offence convicted of for housebreaking with intent to commit trespassing."

[19] I referred the matter to the Director of Public Prosecutions for assistance. I questioned whether the proposed new formulation of the conviction would be competent and also whether a caravan can be the subject of a conviction of the Trespass Act 6 of 1959, given the fact that, in terms of that Act, the offence is committed by the unlawful entry of a building, or part of a building or land. My query was whether a "building" can also be a caravan.

[20] Senior officials of the Director of Public Prosecutions responded with their usual competence and diligence. I add that, for the reasons mentioned, they were not asked to comment on the sentence. I shall deal with the two topics in the same order as listed.

Is the new proposed formulation of the conviction in order?

[21] It is convenient to quote the provisions of section 262(2) of Act 51 of 1977:

"(2) If the evidence on a charge of house-breaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought

> under a statute or the common law, does not prove the offence of house-breaking with intent to commit an offence to the prosecutor unknown, but the offence of house-breaking with intent to commit a specific offence, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved."

[22] In the new service issue (April 2008) of Hiemstra's *Criminal Procedure* it is stated that subsection (2) creates, as a possible verdict, also "housebreaking with intent to contravene section 1(1) of the Trespass Act 6 of 1959 by, after the break-in, remaining in the premises (or building) without consent."

[23] I find myself in respectful agreement with these remarks.

[24] The difficulty with the formulation presented by the learned magistrate can be gleaned from a reading of *R v Badenhorst* 1960 3 SA 563 (A). In broad terms, it was held in that judgment that the mere entry ("konstruktiewe intrede") rather than the act of spending time inside the building, will not lead to a conviction involving both housebreaking and trespassing. See the judgment at 567F-H. The following is also said at 568A:

> "Uit voorgaande sal blyk dat 'n klagskrif wat die misdaad beskryf as huisbraak met opset om artikel 1(1) van Wet 6 van 1959 te oortree, gebrekkig is. Die opset kan nie betrekking hê op albei misdrywe in die

> artikel genoem nie. 0ok wat die onregmatige binne-wees betref, is dit wenslik om in die klagskrif die aard daarvan nader te omskryf, sodat sal blyk dat dit nie 'n aanswesigheid is wat met die intrede by inbraak saamval nie."

[25] From this authority I come to the conclusion that the "to be altered" wording of the conviction as proposed by the learned magistrate, namely, "housebreaking with intent to commit trespassing" would fly in die face of what the learned chief justice, in *Badenhorst,* held would constitute a defective charge-sheet.

[26] Support for this approach is also found in the formulation advanced by *Hiemstra, supra* and also in more recent cases such as *S v Konyana en 'n Ander* 1992(1) SACR 461 (O) and *S v Jasat* 1997(1) SACR 489 (A).

[27] The question of the charge-sheet being defective does not arise here since the charge was housebreaking with intent to commit an unknown offence. This situation is the inevitable result where competent verdicts arise. The accused was also legally represented so that the question of surprise and prejudice does not arise. It also appears that the provisions of sections 262 and 264 of the Criminal Procedure Act 51 of 1977 were recorded at the outset.

[28] It follows, that in the event of it being concluded that a conviction under the

Trespass Act is in order, the wording proposed by the learned magistrate will have to be extended to specify that the trespassing was committed by being in or remaining in the caravan.

Can the entry of a caravan form the basis of a contravention of the Trespass Act 6 of 1959?

[29] Section 1(1) of Act 6 of 1959 reads as follows:

> "(1) Any person who without the permission-
>
> (a) of the lawful occupier of any land or any building or part of a building; or
>
> (b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,
>
> enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building."

[30] It may be useful to start the enquiry by examining comparable authorities dealing with housebreaking as opposed to trespassing.

[31] In *S v Jecha and 0thers* 1984 1 SA 215 (ZHC) the accused were charged with the

offence of housebreaking with intent to steal and theft. They had broken into a caravan parked in a garden, uninhabited at the time, but containing camping gear. There was no further evidence before the court about the normal and present use of the vehicle. The magistrate had convicted the accused of theft as he had entertained some doubt whether the caravan constituted "premises" for the purpose of the definition of the offence of housebreaking. The following is said by SQUIRES, J at 218B-E:

> "Had there been any evidence that the caravan was used periodically as a house even for holiday camping purposes or ordinarily used to keep the camping gear in it, that would have been enough, it seems, to establish it as a structure which, if broken into, would be regarded as a premises for purposes of our law of housebreaking. …
>
> In the result, therefore, while the meaning and ambit of 'premises' in the offence of housebreaking with intent to commit some offence is wide enough to cover a caravan that is lived in permanently and even one that is lived in from time to time if living in it is the ordinary purpose to which it is put, I think on the facts of this case – and I stress that limited area of application – the magistrate was right in holding that housebreaking was not established."

[32] In *R v Lawrence* 1954 2 SA 408 (C) a conviction of housebreaking into a ship's

cabin on the basis that it was ordinarily used for human habitation was upheld. 0n the facts of that case the cabin was being used by a ship's officer by whom it was ordinarily occupied. The ocean-going ship was moored in Table Bay docks at the time.

[33] In *S v Madyo* 1990(1) SACR 292 (E) the accused was charged with the crime of housebreaking with intent to commit theft and theft, the allegation being that he broke into a store-room and into a caravan belonging to one Brandt and that, having done so, he stole articles of considerable value from inside the caravan. I find it convenient to quote a somewhat lengthy passage from the judgment of KANNEMEYER, JP at 294d-i:

> "In that case (this was a reference to the case of *Jecha, supra*) the Court came to the conclusion that the State had failed to prove that a caravan parked in a garden but uninhabited at the time constituted premises for the purposes of this offence.
>
> Now the test that I have mentioned requires that there should be some degree of permanence about the purpose for which the premises are used and not, as I understand the authorities, that there should be some degree of permanence in the user thereof for that purpose. A seaside cottage is intended for human habitation. The fact that it is seldom occupied and then only for short periods and at irregular intervals does not alter the

permanence of the purpose for which it is used or designed.

I respectfully agree that where something such as a house is designed for human habitation the test is met and that the very nature of the premises can be decisive, but in my view a caravan falls into this category. In the *Shorter 0xford Dictionary* a caravan is defined as a house on wheels while in *HAT* it is defined as a 'woonwa'.

Now this brings me to the chief ground upon which Ms Meyer urges us to hold that a caravan normally speaking is not a house for the purposes of housebreaking. She bases this argument on the fact that it is a vehicle. She submits that a caravan requires to be licensed, that to transfer a caravan from one person to another requires that it passes roadworthy tests and that injury caused by the driver or towing of a caravan falls to be dealt with under the appropriate motor vehicle assurance legislation. Ergo, her argument continues, this cannot be a house under normal circumstances, it is a vehicle.

In my view the mere fact that a caravan is a house on wheels or a 'woonwa' does not in any way prevent it from being a house for purposes of housebreaking.

In Hunt *South African Criminal Law and Procedure* volume 2 ('common law crimes') 2nd edition (by Milton) at 712 one finds this remark dealing with this question:

> '… basically the Court's approach, if unscientific, is one of common sense. The general principle on which the Courts have worked is that the premises must be "such as are or might ordinarily be used for human habitation or for the storage or housing of property of some kind".
>
> The suggestion that the Courts have adopted a commonsense approach is in my view justified if one refers to the decisions. When circumstances required it, a tent has been held to be a house, whereas a royal box in the show grounds when circumstances showed otherwise, was held not to be a house. If one adopts a common sense approach it is, in my view, artificial to require evidence as to user to be produced <u>where the premises in question consist of what normally is used, when it is used, as a human habitation, whether it be a house fixed to a foundation or a house on wheels</u>.' " (Emphasis added.)

[34] In *S v Temmers* 1994(1) SACR 357 (C), the accused was convicted in a magistrate's court of housebreaking with intent to steal and theft. It appeared that

the accused had broken into a caravan with intent to steal goods inside and did in fact steal cigarettes, chocolates and groceries. The questioning of the accused in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 revealed that the caravan was used as a mobile shop. 0n review, the court queried whether the mobile shop qualified as a structure for the purposes of the crime of housebreaking. It was held that to decide whether a structure qualified for the purposes of housebreaking, the real distinction was between on the one hand a structure or *quasi*-structure in which goods were kept or stored to safeguard them from the elements or misappropriation or placed for functional reasons and on the other hand structures or *quasi*-structures in which goods were placed for ease of storage or conveyance. Thus to break with the intention of stealing into a modern steel container lying on the wharf-side prior to being loaded into a vessel for conveyance would not fall within the ambit of the crime. But, if the self-same container was converted into a habitation, breaking into it with intent to steal fell within the ambit of the crime. Similarly if that container was used as a storeroom, or as an office, or as a shop, it acquired a character which made it appropriate to regard a breaking and entry into it as conduct properly falling within the particular mischief which the common-law crime of housebreaking with the intent to commit an offence was there to prevent. It was quite unacceptable, so the court held, to arbitrarily insist that where a structure was not used for human habitation it had to be an immovable in a technical sense of the common law before any breaking and entry into it to commit an offence could fall within the ambit of the

crime of breaking with intent to commit an offence. In this case the matter was referred back to the magistrate for him to question the accused afresh in order to ascertain the nature of the mobile shop.

[35] The learned author, Snyman *Criminal Law*, 4th edition at 539 and further offers a very useful discussion on the subject. He defines housebreaking as "housebreaking with intent to commit a crime consists in unlawfully and intentionally breaking into and entering a building or structure, with the intention of committing some crime in it".

[36] When it comes to the "building or structure", he says the following at 541:

> "Generally, the house, structure or premises in respect of which the crime is committed can be any structure which is or might ordinarily be used for human habitation or for the storage or housing of property. It is most often a house (irrespective of whether it has one or many rooms), store-room, business premises, an outbuilding or a factory. It has been held that the crime can also be committed in respect of a tent wagon used as a residence (the case of *M'Tech* 1912 TPD 1132) and a cabin on a ship …"

[37] The learned author also says on 541:

> "It is difficult to deduce from the cases a general principle that can be applied in order to decide whether a particular premises or structure

> qualifies as one in respect of which the crime can be committed. *De Wet and Swanepoel* concluded that if the structure is used for human habitation it does not matter whether the structure is movable or immovable, but if it is used for the storage of goods, it must be immovable."

And,

> "0n the other hand, it would seem that, according to the criterion in *Temmers*, the crime can be committed in respect of virtually any structure used for human habitation, no matter how flimsy it is constructed."

[38] 0f course, all these authorities deal with housebreaking and not with trespassing as intended by the Trespass Act 6 of 1959. As quoted above, the Trespass Act requires the transgressor to enter or be in "any building or part of a building".

[39] In their very useful contribution, Advocates Wait (Deputy Director of Public Prosecutions) and Pienaar (Senior State Advocate) visited some dictionaries for assistance.

The *Shorter 0xford Dictionary* refers to a building as a "permanent fixed thing built for occupation (house, school, factory, stable, etc)".

The *Verklarende Handwoordeboek van die Afrikaanse Taal* 5th edition p262

describes a "gebou" as "konstruksie wat 'n dak en mure het, gewoonlik van permanente aard, soos 'n huis, 'n winkel, 'n bergplek, 'n onderdak vir diere, en dies meer …"

The *Little 0xford Dictionary* defines "build" as "construct by putting parts or material together, develop or establish" and the *Shorter 0xford English Dictionary* on historical principles defines "build" as "to construct for a dwelling. Hence to erect, construct, whence, to construct by fitting together of separate parts."

Kritzinger Schoonees, Cronje, Eksteen *Groot Woordeboek* defines a "gebou" as "building, structure, fabric, premises, edifice, construction, building".

[40] The two learned counsel submit that whilst a caravan is a "house" for housebreaking, it is also a "building" as intended by the Trespass Act. I find myself in respectful agreement with these submissions. In my view, the reminder in *Madyo, supra*, that a caravan is a "house on wheels" and a "woonwa" is good authority for the proposition that a caravan should be regarded as a "building" for purposes of interpreting the Trespass Act. Such an approach would seem to be in harmony with the general tenor of the judgments dealing with which structures lend themselves to competent convictions for housebreaking. Further support for this approach is, in my view, to be found in the attitude of *De Wet and Swanepoel* (at 351) to the effect that if the structure is used for human habitation it does not

matter whether the structure is movable or immovable (see the quote by *Snyman, supra*). This approach seems to be extended even to structures not used for human habitation where the learned judges say the following in *Temmers* at 361f:

> "What we find quite unacceptable, is the arbitrary insistence that where a structure is not used for human habitation, it has to be an immovable in the technical sense of the common law before any breaking and entry into it to commit an offence can fall within the ambit of the crime of housebreaking with intent to commit an offence."

[41] 0n a more generous and practical interpretation, some of the dictionary meanings, *supra*, for "to build" and "building" can, in my view, also accommodate a caravan.

[42] For all these reasons, I am of the view that it would be appropriate to extend the approach of our courts, *supra*, when it comes to what structures (at least habitational ones) lend themselves to convictions for housebreaking, also to the interpretation of the Trespass Act when it comes to "any building or part of a building".

[43] To hold otherwise could lead to the absurd result that one can break into a caravan (as long as nothing is damaged or stolen) and sleep there with impunity because it does not amount to trespassing, and housebreaking, in itself, is not a crime – see

Snyman op cit at 540 and authorities there quoted.

[44] Such a conclusion would fly in the face of the common sense approach described by KANNEMEYER, JP *supra*.

[45] In the circumstances I would make the following order:

1. The conviction is set aside and replaced with the following:

   "The accused is convicted of housebreaking with intent to contravene section 1(1)(b) of the Trespass Act, Act 6 of 1959, by being in (or remaining in) the caravan, broken into, without permission.

2. The sentence is confirmed.

W R C PRINSLOO
JUDGE OF THE HIGH COURT

I agree

F J JOOSTE
ACTING JUDGE OF THE HIGH COURT

14-021

IN THE ORDINARY COURSE OF EVENTS