

A935/14

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT)**

HIGH COURT REFERENCE NO: 414/14

MAGISTRATE'S SERIAL NO: 3/14


MAGISTRATE'S CASE NO: D32/12

8/1/2015

JUDGE'S CHAMBERS  
NORTH GAUTENG HIGH COURT  
PRIVATE BAG 442

PRETORIA

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DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: <del>YES</del> / NO.
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO.
(3)	REVISED.
10/12/2014	
DATE	SIGNATURE

THE MAGISTRATE'S OFFICE BELFAST

PRIVATE BAG X 601

BELFAST

1100

12 December 2014

In the matter between:

**THE STATE**

and

**SOLLY DIBAKWANE**

*CORAM: HUGHES J et*

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**SPECIAL REVIEW JUDGEMENT**

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HUGHES J

1. This is a special review in terms of Section 304(4) of the Criminal Procedure Act 51 of 1977 (the Act).
2. Solly Dibakwane, the accused, was nineteen years of age when he was alleged to have committed the offences charged with.
3. The accused was charged with two counts of housebreaking with the intent to steal and theft. In respect of count 1 the state alleged that on 21 or 22 July 2012 and in Sakhelwa which is within the district of Belfast the accused unlawfully and intentionally broke into and entered the home of Lucky Madonsela with the intent to steal. He

entered and stole the item as set out under count 1 on the charge sheet.

4. In the case of count 2, the accused allegedly broke into and entered the house of Phillip Mbeyane. He stole the items listed under count 2 on the charge sheet. The second count also occurred on 21 July 2012 in Sakhelwe, in the district of Belfast.
5. At the commencement of the trial the accused pleaded guilty to both counts. The court questioned the accused to verify his guilty plea. With regards to count 1, when asked by the court how he had gained entry into Lucky Madonsela's premises? The accused response was that he had found the door of the premises open so he just entered.
6. When questioned on count 2, he explained that he had gained entry into Phillip Mbeyane home by putting his hand through a hole that was in the window and in doing so he was able to open the window from the outside of the premises.
7. The court, rightfully I might add, entered a plea of not guilty in respect of count 1 and a plea of guilty in respect of count 2.
8. The complainant in count 1, Lucky Madonsela, was called to give evidence. The accused conducted his own defence. The accused submitted to the complainant that when he had arrived at his home

the door was open and had already been broken. Lucky Madonsela replied that when he returned he found the broken door and spade. See below the record of the accused's submission and the complainants answer thereto:

*"V: Toe ek by die huis kom kry ek dis oop, dit was klaar oopgebreek, maar daar het niemand ingegaan nie?"*

*A: Ek het die gebreekte deur gekry en die graaf."*

9. From the above it is evident that the state did not prove that the accused broke into Lucky's premise. In addition no evidence was adduced to dispute the explanation preferred by the accused as to render it being unfounded and untrue. The unlawful, intentional breaking into the premises of the complainant in count 1 was regrettably not proven by the state beyond a reasonable doubt.
10. The accused only admitted entering the premises and removing the goods as set out under count 1 of the charge sheet. In the circumstances, the removal of the complainant's property resulted in the crime of theft (the unlawful intentional appropriation of certain property) being established instead. This is further confirmed by the accused's explanation.
11. The magistrate who presided over this case is now deceased. He pronounced the accused guilty as charged of count 1. The additional

magistrate, Mr V B Cooke, who is now seized with this case, had the matter referred to this Court for an order setting aside the conviction in respect of count 1 and substituting same with a conviction of theft.

12. In the circumstances this court exercises its powers in terms of section 304(4) of the Act in ensuring that the proceeding are in accordance with justice and sets aside the conviction in count 1 of housebreaking with intent to steal and theft and replaces it with theft.
13. The sentence imposed by the magistrate's court took counts 1 and 2 as one for purpose of sentencing. The sentence imposed was eighteen (18) months correctional supervision in terms of section 276(1) (h) of the Act. In arriving at this sentence a correctional supervision report was procured and this report declared the accused "fit to be placed under correctional supervision as sentenced".
14. This case was brought before the magistrate, Mr V B Cooke, for reconsideration of the sentence in terms of section 276A (4) (a) of the Act. The magistrate seeks of this court to "infer that the accused is not fit to be subjected to correctional supervision" and that the sentence in count 2 be confirmed in terms of the provisions of section 276A (4) (a) of the Act. It further seeks that the sentence in



count 1 be set aside and referred back to the magistrate's court, after the setting aside of the initial conviction to that of theft.

15. In terms of section 275 (1) of the Act this court may after consideration of the record vary, add to or pass sentence afresh. In the circumstances this court has the power to confirm the sentence imposed for count 2 of correctional supervision in terms of 276 (1) (h). The sentence in respect of the conviction on count 1 of theft in terms of section 275 (1) can be referred back to the magistrate who is now seized with this case.



16. In the circumstances I make the following order:

- 16.1 The conviction in respect of count 1 housebreaking with intent to steal and theft is set aside, replaced with a conviction of theft and is in terms of section 275 (1) of the Act remitted to the magistrate for sentencing.

- 16.2 The sentence of correctional supervision in terms of section 276(1) (h) in respect of count 2 for a period of eighteen (18) months is confirmed.

  
  
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W. Hughes Judge of the High Court

I concur and it is so ordered:

  
  
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V. V. Tlhapi Judge of the High Court