

SOUTH AFRICA / JUDGMENT

Mkhetshane v S (CA&R 83/2020)

[2020] ZAECHGC 50 (7 May 2020)

[2020] ZAECHGC 50**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi, J Roberson

CASE / FILE NUMBER

CA&R 83/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE DIVISION-GRAHAMSTOWN)
Case No: CA&R
83/2020

Delivered:	07 May 2020 In
the matter between:	SIYABONGA ALAKHE MKHETSHANE Applicant vs THE STATE Respondent REVIEW

JUDGMENT**MALUSI J:**

- [1] This matter was placed before me on automatic review as envisaged in s302 of the Criminal Procedure Act 51 of 1977 (the Act).
- [2] The accused was arraigned on two counts of housebreaking with intention to steal and theft in the magistrate's court, Fort Beaufort. He pleaded guilty to both counts.

- [3] It was alleged that on 17 January 2020, he unlawfully and intentionally broke into and entered the warehouse of the complainant with the intention to steal and thereby stole 6 pairs of footwear and a duvet cover. He was questioned by the magistrate as provided in s112(1)(b) of the Act. The material aspect of the questioning is recorded as follows:

“Q: Yes. Just explain to us, how did you do this?”

A: The back window was open, Your Worship, so I just pulled the shoes, Your Worship and the duvet cover was also near, I just pulled it through the window, Your Worship.”

- [4] In the second count it was alleged that on 24 January 2020 the accused unlawfully and intentionally broke into and entered the house of the complainant with the intention to steal and stole 5 items. The following exchange between him and the magistrate occurred:

“Q: Just explain to this court how did you do this?”

A; It was late on that day and I went to collect wood at the back of the neighbour’s apartment and as I was entering the location at a certain house at Gommo Gommo location, I was then called by Big Boy, and then I went to that certain house where he was at with the wheelbarrow and then he asked me to accompany him taking the compressor to a house . . . [in the] location, I then removed the wood from the wheelbarrow and I put the compressor on the wheelbarrow. Then I took the wheelbarrow and I pushed it, Your Worship, and as I was exiting, Your Worship, he also came with extensions, Your Worship, and then I pushed the wheelbarrow, Your Worship. And then we were taking turns in pushing the wheelbarrow, Your Worship, and we pushed it down to a certain house, Your Worship, and in that house no-one was at home, Your Worship, that is where we left it, Your Worship, and then he gave the extension to me, Your Worship, he said I will see what to do with it, Your Worship. I can keep it, I can sell it and then I took it and kept it at home, Your Worship.”

- [5] The accused stated further that he had been arrested when he went to fetch the wood as ‘apparently there had been a housebreaking at that house’. He informed court that he was at the police station with Big Boy when the latter denied the accused was ‘assisting him and helping him with the compressor’. The accused said he felt compelled to admit the offence as the detective at the police station said the case fell upon him in face of the denial by Big Boy.
- [6] I directed a query to the magistrate whether in both counts the charge of housebreaking was proven against the accused. The magistrate conceded that in count 1 the charge was not proven. He stated that in count 2 ‘the accused ought to have seen that housebreaking had occurred based on the concepts of common purpose and *dolus eventualis*’. He drew inferences and suspicions on the facts disclosed by the accused.
- [7] The learned author CR Snyman has defined housebreaking as unlawfully and intentionally breaking into and entering a building or structure, with the intention of committing some crime in it.[1] It has been held the crime has the following elements:

“(a) breaking – it must be in the legal sense of displacement of obstruction to entry of a structure or premises;

- (b) entering – physical presence by any part of person inside the structure;
- (c) acting unlawfully and intentionally – conduct must relate to commission of an offence.”[2]

[8] It is trite that housebreaking with intent to commit an offence is in itself a substantive offence. It is a separate offence from the actual offence, for the purpose of which the housebreaking was committed, if such be committed.[3]

[9] The answer provided by the accused quoted in paragraph 3 above relating to count 1 clearly excludes the element of ‘breaking’. He stated the items were pulled through ‘an open window’. There was no removal or displacement of any obstacle by the accused. It has correctly been held in similar circumstances that housebreaking has not been proven.[4]

[10] It is clear from the long answer provided by the accused in count 2 quoted in paragraph 4 above that the housebreaking was not committed in his presence. He makes no mention of housebreaking only stating he was requested to load a compressor in his wheelbarrow. Due to the scanty detail it also cannot be said that he knew or ought to have known the compressor was stolen as theft is a continuing crime. The accused clearly stated he was compelled to admit the offence by the detective at the police station. Based on each of the answers provided the magistrate should have entered a not

guilty plea on the housebreaking and theft charge.

[11] The statement by the magistrate that he convicted the accused on the basis of common purpose and *dolus eventualis* is devoid of any merit. Common purpose was never mentioned at any stage of the proceedings nor was it alleged in the charge sheet. *Dolus eventualis* is simply not applicable on the facts. Furthermore a material element of the offence cannot be admitted by way of inference drawn by the magistrate on the answers given by the accused. [5] The conviction must be set aside in light of the above irregularities.

[12] It is necessary to reconsider the sentence imposed. It is prudent not to remit the matter to the magistrate as all the relevant facts are on record. The accused was 36 years old. He was single with a six year old child. His younger sibling depended on him for maintenance though she is an adult. He was unemployed surviving by washing cars and selling firewood. He has two previous convictions of theft, a robbery and a failure to appear in court.

[13] In my view a sentence of four (4) months’ imprisonment is appropriate in the circumstances.

[14] In the circumstances and for the above reasons, the following order will issue:

14.1 The conviction on count 1 is set aside and replaced with the following:

“The accused is found guilty of theft.”

14.2 The conviction on count 2 is set aside.

14.3 The sentence imposed on the accused is set aside and replaced with the following on count 1:

“The accused is sentenced to undergo four (4) months’ imprisonment.”

14.4 The sentence is antedated to 19 February 2020.

T MALUSI

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

J ROBERSON

[1] Criminal Law, 5th edition, p 549.

[2] S v Hlongwane 199

(2) SACR 484 (N) at 485A-E.

[3] S v Masweta 2014

(1) SACR 288; S v Cetywayo 2002 (2) SACR 319 (E) at 321; S v Kulati 2002 (2) SACR 406 (E).

[4] S v Bhengu 2011

(1) SACR 224 (KZP) at para 26; S v Moroe 1981 (4) SA 897 (O) at 899.

[5] S v Londi 1985

(2) SA 248 (E) at 251E-G.

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