

SOUTH AFRICA / JUDGMENT

Mtungwa v S (AR11/2019)

[2020] ZAKZPHC 21 (10 July 2020)

[2020] ZAKZPHC 21**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Chetty, Jappie

CASE / FILE NUMBER

AR11/2019

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Source record**IN THE****HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****DIVISION, PIETERMARITZBURG****CASE****NO. AR11/2019****In**

the matter between:

SIBANGANI

MNTUNGWA

APPELLANT

and

THE

STATE

RESPONDENT

This

judgment was handed down electronically by circulation to the parties' representative by email, and released to SAFLII. The date

and time for hand down is deemed to be 09h30 on 10 July 2020 .

ORDER

On

appeal from: Regional

Court, Pongola (sitting as court of first instance): The appeal

against the convictions and sentences is upheld to

the extent below:

1. The appeal against the conviction in count one of robbery with aggravating circumstances is upheld;
2. The conviction and sentence in respect of count one is set aside;
3. The convictions and sentences in respect of counts two, four, five and seven in respect of housebreaking with intent to steal and theft, are

upheld and substituted with the following:

- 'On counts two, four, five and seven the accused is acquitted on housebreaking with intent to steal and theft, but is convicted of a competent verdict of contravening section 36 of the General Laws Amendment Act 62 of 1955';
4. The appellant is sentenced to a period of 18 months' imprisonment on each count, resulting in an effective period of six years' imprisonment.
 5. The sentence in (4) above is antedated to 24 August 2015.

JUDGMENT

Chetty J (Jappie JP concurring):

- [1] The appellant and his co-accused were charged with the following counts in the Regional Court, Pongola, KwaZulu-Natal:
- (1) Robbery with aggravating circumstances, read with the provisions of section 51(2) and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 where a firearm was used in the commission of the offence and where the complainant, Zakhele Mthembu, was assaulted on 29 June 2012;
 - (2) Housebreaking with intent to steal and theft of the property of Hilma Fourie on 3 March 2012;
 - (3) Possession of a firearm without holding a valid licence or permit to possess it in terms of the Firearms Control Act 60 of 2000;
 - (4) Housebreaking with intent to steal and theft of the property of Eksteen Jacobs between 23 December and 31 December 2012;
 - (5) Housebreaking with intent to steal and theft of the property of Johannes Berg on 8 August 2012;
 - (6) Housebreaking with intent to steal and theft of the property of Dumisani Mhlongo on 16 July 2012; and

- (7) Housebreaking with intent to steal and theft of the property of Philip Lourens on 28 July 2012.
- (8) Housebreaking with intent to steal and theft of the property of Rayan Stoltz on 18 August 2012.
- [2] The appellant pleaded not guilty to all of the charges against him, and elected not to disclose the basis of his defence, with a bare denial of the charges against him. The appellant was found not guilty on counts three and six, but was found guilty of the remaining charges, for which he received an effective 12 years' imprisonment.[1]Although the appellant was convicted and sentenced on 24 August 2015, it was only on 14 June 2017 that an application for leave to appeal was brought against the conviction. By that time, the magistrate who presided over the trial had since retired. Leave to appeal was subsequently granted by another magistrate assigned to hear the application for leave to appeal. Accordingly, this matter comes before the court in respect of the convictions on counts one, two, four, five and seven.
- [3] I do not intend repeating in this judgment the evidence of the witnesses who testified in the trial court as their evidence is a matter of record. I shall only refer to some of the salient features thereof. In doing so, it is pertinent to note that it is an established principle that the trial court's evaluation of the evidence and acceptance thereof is presumed, in the absence of material misdirection, to be correct. As such an appeal court will not lightly interfere with those factual findings, particularly where credibility findings have been made. The trial court has had the advantage of seeing the witnesses in person and being able to observe their demeanour. An appeal court will interfere with such findings only when it is evident that there are demonstrable and material misdirections by the trial court.[2]
- [4] The complainant in respect of count one testified that intruders had kicked in the door to his home on the evening of 29 June 2012. He attempted to ward off one of the intruders with a bush knife, but was eventually overpowered. The intruders stole an amount of R800 and three (3) cellular phones, of which only one was recovered by the police. The witness identified this phone only by its model (Vodafone). He was unable to identify any of the intruders and said that he had not seen their faces. The complainant's girlfriend, Ms Fakude, then testified and made a dock identification of both accused, despite her evidence that she had not seen them since the incident which occurred approximately a year and a half prior to the trial. I will return later in this judgment to deal with the issue of the reliability of the dock identification which was permitted by the court. Even though the witness testified that she had spoken to the appellant for approximately 10 minutes during the course of the robbery, she was not asked nor did she provide any peculiarities in his speech that may have given weight to her dock identification. In respect of any distinguishing features in the physical appearance of the appellant, Ms Fakude recalled that the appellant had blackspots on his face but those were not clearly visible at the time when she was testifying.

- [5] The complainant in count two, Ms Hilma Fourie, testified that she had come home from work on 3 March 2012 to find that intruders had gained access to her home via a glass door which had been broken. She discovered that the intruders had taken various household items, including a video camera, two designer watches, a gold necklace and a Canon camera. It was evident that the intruders had left in a hurry, as they left without taking another bag which was filled with goods belonging to her.. She stated that all her belongings were subsequently returned to her after she was called to the police station to identify the items which had been stolen from her home. In so far as her camera bag was concerned, she confirmed that she was able to identify the item as it had her name on it. She was also able to identify her daughter's Fossil watch which had her name on the back as well as her Michel Herbelin watch which was scratched in a few places.
- [6] Mr Eksteen Jacobs, the complainant in count four testified that his house was burgled during the period between 23 December to 31 December 2011 while he was away of holiday. Amongst the items taken by the intruders was a pistol, a CX2 flight computer and a Contiki tour operators document pouch. He subsequently recovered these items about four months after the incident at the Magudu Police Station where he identified the computer from certain formulae on it. In his evidence he confirmed a list of items which were recovered. His evidence was uncontested.
- [7] Similarly, Mr Johannes Bergh, the complainant in count five testified that on 8 August 2012 he had locked his house and left for the day, leaving a small window open for his cat to enter and leave the house. On arriving back home later that day, he found the front door open and on entry into the house, found that it had been ransacked and a number of his items had been stolen by intruders, including his television set and certain grocery items taken from his cupboard. He confirmed that approximately two
- (2) weeks after the incident, he was asked to come down to the Magudu police station where he identified a camera which was taken from his house together with a watch, which was not on the list of items given to the police. He further indicated that approximately five (5) days later he received a call from a detective to attend the Pongola police station, where he was shown certain items and recognised that they included a pair of his Bronx shoes, a grey jacket and certain spices which had been taken from his kitchen. He also identified a Telefunken television as one of the items which had been stolen from his home.
- [8] Mr Phillip Lourens, the complainant in count seven testified that he had left his home in Pongola on 27 July 2012 , and recalled locking all windows and doors. He returned the following morning to find that one of the windows had been broken and a list of items which is attached to the charge sheet was taken from his home. He recalled that at some stage he was asked to attend at the Magudu police station where he identified certain items as those which had been stolen from his home, including a watch and a camera.

He was unable to recall any of the other items which were recovered, save for a list of items which had been read into the record and attached to the charge sheet.

- [9] Mr Ryan Stoltz, the complainant in count eight testified that he had left his home in Pongola on 18 August 2012 after ensuring that all the windows and doors were locked. On returning home on 20 August 2012, he found that the house had been ransacked. The appellant was not found guilty on this count.[3]
- [10] The investigating officer, Constable Mpanza from the Magudu police station testified that he was on duty on 18 August 2012 when he arrested the appellant at his home following information received from an informer. On arriving at the appellant's house with a fellow police officer, Mpanza found the appellant inside the house and informed him that he was being arrested on various counts of housebreaking and robbery emanating from the Magudu police station. After explaining to the appellant his constitutional rights and upon being granted permission to search his property, Mpanza found various items of clothing, various cellular phones, laptops, and other items which he recorded as being similar to those registered as being stolen items at the Magudu police station. I should point out that the State's case was conducted in a rather amateurish manner, with the prosecutor being assisted throughout the proceedings by the presiding magistrate, but only in respect of procedural matters. I do not agree with the submissions by the appellant's counsel which suggest that the presiding magistrate 'descended into the arena' and actively assisted the prosecutor in the presentation of his case. The record reflects that the magistrate repeatedly admonished the prosecutor for the shoddy manner in which he went about leading his witnesses.[4] If anything, the magistrate persistently interrupted the prosecutor in his line of questioning, possibly as a sign of him becoming

impatient at the manner in which the State's case was being presented. On a consideration of the record as a whole, I find that there is no merit in the submission that the magistrate actively assisted the State in its case.

- [11] In response to the evidence of the investigating officer of the items recovered from the house of the appellant, including those reflected in the SAP13 register, the appellant's counsel placed on record during the course of the trial that the appellant 'denies ever being in possession of any items'. [5] Mpanza confirmed that he personally took the items which he recovered from the appellant's house to the Magudu police station where he recorded them in the SAP13 register under reference number 108/2012. He then proceeded to explain how he contacted each of the complainants under the respective case numbers, requesting that they come to the police station to identify items stolen from their homes. Mpanza stated that each of the complainants reported at the police station, and were able to identify items taken from their homes on the basis of lists which had been compiled at the time when the charges of housebreaking and theft had been opened. In addition to the cases opened at the Magudu police station, complainants who had opened cases of theft at the Pongola police station came through to identify items stolen from their homes.

[12] Under cross-examination, it was put to Mpanza that the appellant would deny that 'any of the items recovered were actually found in his possession', which was altered shortly thereafter to a denial that he was in possession of the items which the witnesses had testified to recovering. Pertinently, the court sought to interject and made the following observation:

'Court : ... this is a bit ambiguous.... Is he denying that he was in possession of the items that were found or is he denying that the

items were found from his house, which is which?'[6] It bears noting that the evidence tendered by Mpanza that he warned the appellant of his constitutional rights upon his arrest, was unchallenged.

[13] The only defence which appeared to be mounted against the evidence of Constable Mpanza was that he did not see the appellant bringing the items to the house nor was he aware of the date or time when such items were brought there. Neither of these submissions constituted a defence to the charges against the appellant, or more specifically, to receiving stolen property, or of contravening section 36 of the General Laws Amendment Act 62 of 1955 (Act 62 of 1955), which would be a competent verdict to the charges of housebreaking with intent to steal and theft. Mpanza then testified that many of the items were identified by their owners as they had peculiar attributes to them such as scratch marks, or in some cases serial numbers which corresponded to the items. Sergeant Khumalo from the Pongola police station also testified, confirming the evidence of Mpanza that after the complainants in the Magudu cases had identified items belonging to them from those recovered at the home of the appellant, it fell to the complainants within the Pongola area whose homes had been burgled, to identify their belongings.

[14] The evidence of Sergeant Khumalo related to Mpanza bringing the appellant and his co-accused to the Pongola police station, and whether Mpanza was under a duty to explain to the arrested persons their rights again, this time in relation to goods stolen from Pongola. This gave rise to a volume of needless exchanges between the State, the defence and the magistrate. The appellant was informed of his constitutional rights and was arrested on suspicion of being involved in housebreaking and theft. They apply

to all of the charges against the appellant. In any event, this point is not relied on by counsel for the appellant as a ground of appeal.

[15] The essence of Khumalo's evidence was that both the appellant and his co-accused were brought by Mpanza to the Pongola police station on the strength of statements made to Mpanza that some of the items which were recovered were taken from farms in the Pongola area. What then followed was a pointing out by the appellant and his co-accused of the different sites which they supposedly burgled. The pointing out by the appellant and his co-accused is fraught with problems relating to its admissibility. There is doubt that the appellant and his co-accused were alerted to the fact that there was no obligation on them to make a pointing out, and that they should have been informed that such pointing out can be used as evidence against them.[7] As noted in *S v Gasa & others*,[8] if there was no waiver of

rights by the accused with full knowledge of those rights, paintings out and admissions which flow from that waiver are inadmissible.

[16] What stems from the evidence of Khumalo is that the appellant and his co-accused were brought to Pongola as there were goods which were recovered by the police from Magudu, but which were unclaimed by the complainants from the district area of Magudu. Constable Mpanza then decided to bring the appellant and his co-accused to Pongola. In any event, the submission put to Khumalo under cross-examination was that the appellant would deny that the items found 'in a particular house or which he or his girlfriend [was] actually occupying'. It was put to Khumalo that it was only when the appellant was brought to the Pongola police station that he (the appellant) had been shown for the first time the items which he allegedly stole. This stands in direct contrast to the evidence given by Mpanza that the reason for taking the appellant to Pongola was that there were a number of items which had been recovered, and which had not been claimed after the complainants in the Magudu area had inspected them to claim their property.

[17] The State elected to close its case after which the appellant and his co-accused elected not to testify in their defence. In *S v Boesak*[9] it was stated that:

'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.'

[18] The trial court was therefore left to consider whether on the evidence presented to it, the appellant, who elected not to testify, could be found guilty on the charges against him, with the standard of proof beyond reasonable doubt to be met by the State.

[19] In assessing the evidence on count one, the court a quo concluded that the visibility on the night of the robbery was 'good' as there was an electric light on at the time. Ms Fakude testified that she observed both the appellant and his co-accused in the same lighting conditions. The difference between her observations of both persons is that she stated that she spent more time together with the appellant than his co-accused. In assessing the evidence, the court a quo found that the witness had contradicted herself in relation to the facial appearances of the appellant's co-accused, and did not find her evidence to be reliable in order to secure a conviction on count one. Despite the unreliability of her evidence in respect of accused one, the court a quo nonetheless found Fakude to be a reliable witness in identifying the appellant as one of the intruders. The court a quo placed much emphasis on the blackspots which the witness used to identify the appellant as one of the intruders, despite the fact that she did so in the context of a dock identification. She also conceded to having seen the appellant and his co-accused in court on prior occasions to that when she testified,[10] and was informed by the investigating officer as to who the accused person

was. The natural inclination of a witness would be to lean towards concluding that the persons in the accused dock must be the persons implicated in the commission of an offence. The trial court in my view misdirected itself in convicting the appellant on count one by taking into account the evidence that he was found in possession of goods suspected to be stolen, and therefore he must have been guilty of housebreaking with the intent to steal and theft.

[20] I am in agreement with the submissions made by Mr Masondo on behalf of the appellant, that the conviction on count one was based on an unreliable identification of the appellant. There was no evidence of an identification parade held at which the witnesses were asked to point out the appellant as one of the intruders. The court accepted the identification by Ms Fakude, as a single witness, to convict the appellant on count one. Section 208 of the Criminal Procedure Act 51 of 1977 (the CPA) provides for the conviction of an accused on the evidence of a single competent witness. The court made the classic error of warning itself to

apply caution when dealing with a single witness, but disregarded that warning in finding the witness to be reliable. In *R v Mokoena*[11] it was held that '... the evidence of the single witness [must be] clear and satisfactory in every material respect'. Ms Fakude, in the court's analysis was found to be unreliable in respect of one accused but reliable to secure the conviction of another. The locus classicus on identification is *S v Mthetwa*[12] where the court made the following observations regarding identification:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive.. !.

[21] The risks inherent in relying on a dock identification were set out succinctly in *S v Tandwa & others*[13] where Cameron JA stated the following:

'[129] This brings us to the question whether the accused's conviction can stand in the light of the exclusion of the real evidence against him. The principal remaining evidence against him is Dlamini's dock identification, which - in contrast to the same witness's

identification of accused 2 - was not reinforced by any preceding description of traits specific to the accused. Dock identification,

as our previous allusions to it in this judgment indicate, may be relevant evidence, but generally, unless it is shown to be sourced in an independent preceding identification, it carries little weight: "taken on its own it is suspect". The reason is apparent: (T)here is clearly a danger that a person might make an identification in court because simply by seeing the offender in the dock, he had become convinced that he was the offender.' (My emphasis.) (Footnotes omitted.)

[22] The court a quo paid scant regard to the fact that the appellant was the subject of a dock identification from a single witness. Moreover, I am not satisfied that the court applied the necessary caution before accepting her evidence to be credible and reliable to secure a conviction. In the result, I am of the view that there was insufficient evidence to convict the appellant on count one.

[23] In respect of all of the remaining counts of housebreaking with intent to steal and theft, there are no eye witnesses and the State relies on circumstantial evidence, namely that most of the goods stolen were subsequently recovered by the police, and found to be in the possession of the appellant and his co-accused. The court relied on *R v Blom*[14] in order to conclude that the only inference which can be drawn from the evidence before it, consistent with all the proven facts, was that the appellant was guilty on counts two, four, five and seven which all pertained to housebreaking with intent to steal and theft. It is no coincidence that in arriving at this conclusion, the court a quo took into account that there was a 'causal link between the items that were found in his. possession and the housebreaking cases'.[15] In the absence of any testimony from the appellant, the question arises whether the State succeeded in adducing evidence beyond reasonable doubt which linked the appellant to the commission of the various counts of housebreaking. As stated earlier, there are no eye witnesses in respect of counts two, four, five and seven. The State's entire case is based on circumstantial evidence, in which the evidence that the appellant was found in possession of goods stolen during the course of the various housebreakings, forms the foundation for his conviction. If one accepts the testimony of the investigating officer that he found various items of property which are itemised in the judgment of the court a quo,[16] and which were subsequently found to have been stolen, the question to be asked is whether the appellant can be found guilty on the main counts of housebreaking, or whether he is guilty of any other competent verdict.

[24] The appellant did not testify in his defence. The court a quo found that the evidence against him, in particular that of the investigating officer, was unanswered or at best met with a

bare denial by the appellant. Counsel for the appellant submitted that there was no evidence upon which the conviction on counts two, four, five and seven could be sustained, and further that it was not permissible for the appellant to be convicted on any competent verdict as none was explained to the appellant. The record confirms that the magistrate did not explain to the appellant that he could be convicted on a lesser charge in the event of the evidence not disclosing a conviction on the main charge. However, the appellant was represented at all times by his attorney. In my view the failure of the magistrate to explain every conceivable competent verdict, where an accused is faced with multiple counts of housebreaking with intent to steal and

theft, may constitute an omission but does not constitute an irregularity or misdirection which justifies the court ignoring the evidence against the accused. The point advanced on behalf of the appellant ignores the fact that the appellant was legally represented at the time of his plea, and throughout his trial. I accordingly find this ground of appeal to be without merit.

[25] Returning to the question of whether the appellant could be convicted on a competent verdict, as opposed to the main count of housebreaking with intent to steal and theft, competent verdicts on a charge of housebreaking with the intention to steal and theft are listed under section 262 of the CPA. The crime of housebreaking with the intention to steal and theft has always been seen as two separate crimes committed through a single act. In *S v Maswetswa*,^[17] Wepener J was concerned with the formulation of the charge of housebreaking with the intent to steal and theft, and disassociated himself from the often cited decision of *S v Cetwayo*^[18] as authority for the separation between the crime of housebreaking and theft.^[19] Wepener J was more concerned, as I interpret *Maswetswa*, with the application of the Criminal Law Amendment Act 105 of 1997 (CLAA), which prescribes minimum sentences for offences falling within the ambit of the CLAA where an accused has prior convictions of offences which constitute competent verdicts on a count of housebreaking with intent to steal and theft. Wepener J associated himself with the approach taken by Stegmann J in *S v Maunye & others*,^[20] namely that:

'An incident of housebreaking with intent to steal and theft, committed with a single intention, is to be regarded as essentially the crime of theft, with housebreaking as a factor that tends to aggravate the seriousness of the offence of theft and therefore the severity of the sentence'.

It is not necessary for the purposes of this decision to have to consider the correctness or otherwise of the views by Wepener J, and his disagreement with the approach taken in *Cetwayo*.

[26] I am satisfied that the crime of theft can be seen as a separate and independent offence from housebreaking. There is no evidence on record to associate the appellant with having committed the crime of theft in regard to the property stolen in counts two, four, five and seven. It should be noted that the investigating officer testified that upon discovering the goods in the house of the appellant, he asked the appellant where he received these goods from. The appellant's response was that the goods were stolen. Under cross-examination of the investigating officer, this evidence was disputed. However, one has no explanation from the appellant, in circumstances which called for him to explain how he came to be in possession of property which was stolen in the

course of various housebreakings. In my view, his failure to provide an explanation as to how he came to be in possession of the goods is sufficient to find him guilty on a competent verdict stemming from the charges of housebreaking with the intent to steal and theft. See *S v Nell*^[21] which held that a contravention of section 36 of Act 62 of 1955 (possession of suspected stolen goods without being able to give a satisfactory explanation for such possession) was a competent verdict on a charge of housebreaking with the intention to steal and theft. I agree with this approach and am therefore satisfied that the offence of receiving stolen property, while knowing

it to be stolen, is a competent verdict on a charge of housebreaking with the intention to steal of theft. See too Hiemstra's Criminal Procedure[22] citing with approval the dicta in *S v Maunye* in support of the view that receipt of stolen property is a competent verdict on a charge of housebreaking with intent to commit an offence. In *Doma v S*[23] Sutherland J referred to section 36 in the following terms:

'... [It] is a quintessential example of what might be called a 'policeman's crime'. The purpose of the section is to afford an alert police officer the right to lawfully stop and interrogate a person who is honestly and reasonably suspected by the police officer of wrongdoing. It is not a device to circumvent evidential problems on a charge of theft. It is quite unlike, for example, the crime of Assault with intent to do grievous bodily harm, where, if it is unproven that the accused had the requisite specific intent, the scale of the wrongdoing can be ratcheted down to Common Assault. The offence created in terms of Section 36 is not a logical progression from theft. It is an artifice conceived by the legislature to address a different set of circumstances, and simply for policy reasons is it, in terms of Section 264 of the CPA, declared to be a competent verdict on a charge of theft.'

- [27] I am not persuaded by the argument that the girlfriend of the appellant ought to have been charged as she could have been the person in possession of the stolen property. The police had information that the appellant was in possession of the stolen property at his home. He did not dispute this evidence or suggest that he was passing through or that other persons reside on the property with him, thereby creating the possibility that someone else could have possessed the property. He gave the police no satisfactory account for being in possession of the property.[24]
- [28] For all of the above reasons, I am satisfied that the appellant ought to have been found guilty of a competent verdict under section 36 of Act 62 of 1955, rather than housebreaking with intent to steal and theft in respect of counts two, four, five and seven.
- [29] With regard to sentence, having set aside the convictions of robbery as well as four counts of housebreaking with intent to steal and theft, for which the appellant was sentenced to an effective 12 years' imprisonment,- this court is at large to impose a new sentence having regard to the personal circumstances of the appellant, which are a matter of record. Despite the fact that receiving stolen property as contemplated in section 36 of Act 62 of 1955 is a lesser crime than that of housebreaking and theft, it nonetheless is a serious offence, as it enables the ill- gotten gains from criminal activity to find an economic hub. It is a matter of record that in this case most of the complainants recovered their belongings. The items taken were not reflective of someone acting out of desperation or hunger, or to escape from poverty. Luxury items such as cameras, laptop computers, watches and other goods which could easily pass from one person to another were found with the appellant. Any person possessing goods along this chain is complicit in enabling the continuation of a cycle of crime against property.

[30] In my view, taking into account the personal circumstances of the accused, the nature of the offence and the interests of society, an appropriate sentence is one

of direct imprisonment. A sentence of 18 months' imprisonment on each count is considered fair and just in the circumstances. This equates to an effective term of six years' imprisonment.

[31] In the result the following order is made:

1. The appeal against the conviction in count one of robbery with aggravating circumstances is upheld;

'On counts two, four, five and seven the accused is acquitted on housebreaking with intent to steal and theft, but is convicted of a competent verdict of contravening section 36 of the General Laws Amendment Act 62 of 1955';

4. The appellant is sentenced to a period of 18 months' imprisonment on each count, resulting in an effective period of six years' imprisonment.

CHETTY J

I agree.

JAPPIE JP

- [1] The presiding magistrate failed to formally declare the appellant not guilty on count 8. It is evident from page 279, line 7 of the record that the magistrate found that the State had failed to prove beyond reasonable doubt the charges on counts 6 and

8. The convictions against the appellant are recorded on page 283, lines 20-23 and page 284, lines 2-3.

- [2] See *S v Hadebe & others* 1998 (1) SACR 422 (SCA); *S v Monyane & others* 2008 (1) SACR 543 (SCA); *S v Francis* 1991 (1) SACR 198 (A); *S v Bailey* 2007 (2) SACR 1 (C); *R v Dhlumayo & another* 1948 (2) SA 677 (A).

- [3] See footnote 1.

- [4] Record, page 112, lines 14 - 19; page 113, lines 6-10; pages 122-123.

- [5] Record, page 119, lines 1-3

- [6] Record, page 139, lines 17-19.

- [7] *S v Melani & others* 1996 (2) BCLR 174 (E).

- [8] *S v Gasa & others* 1998 (1) SACR 446 (D).

- [9] *S v Boesak* [2000] ZACC 25; 2001 (1) SACR 1 (CC) at 11E-F.

[10] See also *Mafikili v S* (2009) ZAECBHC 11 para 8 where Plasket J noted that: 'As with all evidence of identification, dock identifications carry with them dangers of which a trial court must be acutely aware. There is a danger that a lay person on seeing accused persons in the dock, "feels reassured that he is correct in his identification, even though this may not have been the position were they not there": and that "[t]o any member of the public ... the fact that an accused is standing in the dock must naturally be suggestive of him being one of the parties involved in the crime, and no witness can be blamed for making such an assumption, even though it is incorrect"' (Footnotes omitted.)

[10] See also *Mafikili v S* (2009) ZAECBHC 11 para 8 where Plasket J noted that:

'As with all evidence of identification, dock identifications carry with them dangers of which a trial court must be acutely aware. There is a danger that a lay person on seeing accused persons in the dock, "feels reassured that he is correct in his identification, even though this may not have been the position were they not there": and that "[t]o any member of the public ... the fact that an accused is standing in the dock must naturally be suggestive of him being one of the parties involved in the crime, and no witness can be blamed for making such an assumption, even though it is incorrect"' (Footnotes omitted.)

[11] *R v Mokoena* 1932 OPD 79 at 80.

[12] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.

[13] *S v Tandwa & others* 2008 (1) SACR 613 (SCA) para 129.

[14] *R v Blom* 1939 AD 188.

[15] Judgment, page 280, lines 7-9.

[16] Judgment, pages 266-268.

[17] *S v Maswetswa* 2014 (1) SACR 288 (GSJ).

[18] *S v Cetwayo* 2002 (2) SACR 319 (E).

[19] *S v Cetwayo* at 321C-G states as follows: 'It is trite that housebreaking with intent to commit an offence is in itself a substantive offence (see s 262 of Act 51 of 1977) and that it is a separate offence from the actual offence, for the purpose of which the housebreaking was committed, if such be committed. The practice is, however, that, if the offences relate to what is in effect a single incident, they are, unless there is good reason to the contrary, charged as a single offence and a single punishment is imposed. In confirmation of the above I need only refer, firstly, to *R v Chinyerere* 1980 (2) SA 576 (RA) where at 580A - C Lewis JP said the following: "One has to bear in mind, however, that housebreaking with intent to steal and theft are separate offences. This is made clear in *Hunt South African Criminal Law and Procedure* vol II. The learned author traces the history of housebreaking with intent to steal and theft and points out that under the old Roman-Dutch law housebreaking with intent to steal and theft was simply regarded as an aggravated form of theft. However, in the

modern South African law this is no longer the case. The learned author at 644 says this: "The effect of this development is that, unlike Roman Dutch law, house-breaking is no longer regarded as an aggravated form of theft. The house-breaking with intent to steal and theft are two separate offences, though they are in practice charged and punished as one offence, so that in such cases the result is the same."

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[20] S v Maunye & others 2002 (1) SACR 266 (T) at 277G-278A.

[21] S v Nell 2009 (2) SACR 37 (C).

[22] A Kruger Hiemstra's Criminal Procedure (May 2020 - Service Issue 13) at 26-18(1).

[23] Doma v S [2013] ZAGPJHC 116 para 36.

[24] S v Langa & others 1998 (1) SACR 21 (T).

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