

SOUTH AFRICA / JUDGMENT

S v Qina (B488/2023) [2024] ZAECMKHC 29; 2024 (2) SACR 310 (ECMk); 2024 (2) SACR 580 (ECMk) (15 March 2024)

[2024] ZAECMKHC 29

COURT

Eastern Cape High Court, Makhanda

BEFORE

M Notyesi, L Rusi

CASE / FILE NUMBER

B488/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – MAKHANDA

REPORTABLE

Appeal

Case No: B488/2023

Date

Received: 26/02/2024

Date

Delivered: 15/03/2024

In

the matter between:

THE
STATE
and
ZOLANI
QINA
Accused
REVIEW

JUDGMENT

Notyesi AJ

Introduction

[1] These proceedings served before this Court by way of a special review ostensibly in terms of section 304A[1] of the Criminal Procedure Act, 51 of 1977, as amended (the Act)[2]. The matter was referred to this Court for review by the acting Magistrate for the Magistrate's District court of Humansdorp.

In that court, the accused had only been convicted of the offence charged. This referral is prior to the imposition of a sentence and therefore, section 304A is the correct section to be invoked.

[2] Although the Magistrate incorrectly referred to the provisions of section 304(4) of the Act in the referral, a careful consideration of the circumstances and facts, which had led to this referral, leads to a conclusion that the review must be in terms of section 304A. Despite the shortcomings concerning incorrect reference to the applicable section, the matter has been properly referred for review by this Court.

Background

[3] The accused appeared before the acting Magistrate facing a charge of housebreaking with the intent to steal. The details of the offence in the charge sheet are set out as follows -

‘Housebreaking with intent to steal –

In that upon or about 17/11/2023 and at or near 5[...] C[...] Street, H[...] in the SARAH BAARTMAN DISTRICT, SUB DISTRICT OF KOUGA AT HUMANSDORP, the accused did unlawfully and with the intent to steal, break open and enter the home of Sonopolo Gallant with intent to steal.’

[4] At the commencement of the trial before the acting Magistrate, the accused was legally represented by an attorney from the Legal Aid Board of South Africa. The charges were put to the accused and through his legal representative, he pleaded guilty. Consequent to the plea of guilty, the accused's legal representative handed the court a statement presumably prepared in terms of section 112(2) of the Act. The state accepted the plea, whereafter, the acting Magistrate convicted the accused for the offence of ‘housebreaking

with the intent to steal’.

[5] It is relevant to quote the material admissions of the accused as recorded in the section 112(2) plea statement. The statement is in the form of a pro forma of which I assume has been prepared by Legal Aid South Africa. It has blank spaces in which must be completed. In paragraph 1 of the ostensible plea statement, the accused had stated as follows-

‘I am the accused person in this matter and I understand the charge against me - housebreaking with intent to steal.’

[6] In paragraph 5.2 of the statement, the accused stated –

‘I admit that on this particular day, I unlawfully broke open the mentioned address by forcing the kitchen door open. I entered the

premises with the intention to see what I can steal there. I admit that I was then apprehended by the owner and handed over to the police. I apologise for my actions.’

[7] The acting Magistrate, who was in possession of the statement of the accused, convicted the accused after his consideration of the plea and the statement purportedly under section 112(2) which was in answer to the particulars of the charge that was put to him, and which the prosecution had accepted. The accused was convicted on 15 February 2024 and the request for review, according to the Registrar’s stamp, was received on 23 February

2024. The matter was brought before the reviewing judge on 26 February 2024.

The brief statement for request of the acting Magistrate

[8] In the referral, the acting Magistrate confirmed that the annexure to the charge sheet reads that the accused was guilty of the offence of housebreaking with the intent to steal. The acting Magistrate had convicted the accused on the charge presented by the state as set out in the annexure to the charge. The acting Magistrate stated that after convicting the accused, it was brought to her attention that the charge upon which the accused has been convicted, is defective. The acting Magistrate states that she had erroneously convicted the accused on a defective charge. She contended in her referral letter of the matter that, although the accused had been convicted on a defective charge, in her consideration of section 112(2) of the accused’s plea statement and the plea, the accused would be guilty of the offence of housebreaking with intent to steal and attempted theft.

[9] The acting Magistrate requests for this Court to set aside the conviction of the accused and to refer the matter back for the accused to be convicted afresh after a proper charge had been put up by the state against the accused.

Legal framework

[10] Section 35(3) of the Constitution[3] provides that – every accused person has a right to a fair trial, which includes the rights –

- (a) to be informed of the charge with sufficient detail to answer it.
- (b) ...
- (c) ...
- (d) to have their trial begin and conclude without unreasonable delay.

[11] Section 35(3) underscores the procedural fairness of a trial and there is a symbiotic relationship between subsection 35(3)(a) and (b). Section 35(3), in essence, lists fifteen procedural rights of an accused that would accord with a fair trial of that accused. In *S v Jaipal* [4], a case dealing with the constitutional rights of an accused person to a fair trial, the Constitutional Court, after analysis of various cases referred to therein, held –

‘[26] Section 35(3) of the Constitution states that every accused person has a right to a fair trial. The basic requirement that a trial must be fair is central to any civilized criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness. The importance and universality of the right to a fair trial is evident from the fact that it is recognized in key international human rights instruments...

[29] The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.’

[12] Chapter 14 of the Criminal Procedure Act is dedicated to the charge. Section 84 of the same Act deals with the basic essentials of a charge. The section provides as follows –

‘(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.’

Discussion and analysis

[13] The accused faced a charge of housebreaking with the intent to steal, that being the charge preferred against him by the state. The accused can only plead to the charge put against him. The Annexure to the charge sheet indubitably set out the charge that had been preferred by the state. The summary of the accused’s response as set out in the section 112(2) statement is self-evident and I quote below –

[14] The proposition by the acting Magistrate that the accused could be convicted of, and punished for, housebreaking with intent to steal and attempted theft is wrong and lacks appreciation of the facts of the case and substantive law regarding specific offences. I elaborate below.

[15] The accused, in his plea statement, emphasized that he entered the premises with the intention ‘to see what he can steal there’. That was the only version provided in the statement of the accused. There are no other facts that were placed before the acting Magistrate other than those set out in the accused’s plea statement.

[16] It is indeed a long-standing practice that an accused who breaks in and enters premises at which he commits an offence would be charged with one composite offence of house breaking with intent commit such an offence, and of committing the specific offence concerned. However, it is instructive to issue a reminder that the offence of housebreaking with intent to commit an offence, whether under common law or statute, is separate a offence on its own.[5] Regarding the offence of housebreaking with intent to steal, that this is so, was held in *S v Zamisa*[6] when Thirion J said:

‘It is settled practice to charge as one count the crime of housebreaking with intent to commit a crime and the crime itself, which was committed in consequence to the breaking and for the purpose for which the breaking in was committed. So much so this is the practice that only one sentence is imposed in respect of a conviction of housebreaking with intent to commit a crime and the further crime, to commit which the breaking was effected. That circumstance, however, does not do away with the fact that the house-breaking with intent to commit the crime is in itself a distinct crime which is separate from, and not dependent upon, the crime committed after entry has been effected.’

[17] In *S v Cetwayo*[7] it was held:

‘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.’

[18] In the present case, the charge does not state that the accused is charged with ‘housebreaking with the intent to steal and

attempted theft.’ It must be remembered that ‘housebreaking’ entails “(a) ‘breaking’ in the legal sense of displacement of obstruction to entry of a structure or premises; (b) entering which is physical presence by any part of person inside the structure; and (c) acting unlawfully and intentionally.[8] It is the intention to commit a crime that makes housebreaking an offence.

[19] In his plea statement the accused makes it abundantly clear that he unlawfully entered the home of the complainant by forcing the kitchen door open, and that his intention in so doing was to steal. This, in my view, establishes the offence of housebreaking with intent to steal as a distinct offence. That he was caught by the owner of the house before he could steal anything does not establish an offence of attempted theft.

[20] An attempt to commit a crime requires that the actions of the accused had gone beyond mere preparation to commit that crime. No facts were placed before court to show that the accused’s actions had reached a stage of a complete and punishable attempt. In fact, in his plea statement, the accused does not state what he was doing once inside the house at the

time he was apprehended by the owner. It cannot, therefore, be correct that there would be any basis on which the accused would be convicted of attempted theft which would have resulted from his breaking in the complainant's house.

- [21] In the circumstances of the present review, I hold a view that the offence with which the accused was charged is complete as it stands. I can hold no otherwise than to confirm the conviction.

Conclusion

- [22] It is worth remarking about the acting Magistrate's suggestion in her referral, that the accused would suffer no prejudice if the matter is remitted back to the court a quo. On careful scrutiny of the record, the accused is prejudiced. The accused first appeared at Court B on 20 November 2023. The case was remanded to 27 November 2023. On 27 November 2023, the case was further postponed to 29 November 2023. On 29 November 2023, the case was further postponed to 6 December 2023. On each occasion, the accused was remanded in custody.
- [23] On 6 December 2023, the case was postponed to 8 January 2024. Still, the accused was remanded in custody. On 8 January 2024, the case was postponed to 30 January 2024 for SAP69. The accused was to remain in custody. On 30 January 2024, the case was remanded to 1 February 2024 for attorney and possible plea. On 1 February 2024, the case was postponed to 14 February 2024 for a plea. On 14 February 2024, the case was remanded for 15 February 2024. On 15 February 2024, the accused and he was called upon to plead. According to the record, the accused was represented by a Legal Aid attorney who on many occasions had sought for postponements, abandoned the launch of bail and in each occasion, promising that the accused would plead to the charge.
- [24] I have no doubt from the reading of the presented record that the Legal Aid attorney had conducted the case of the accused carelessly and in an extremely casual manner. The accused had languished in jail in circumstances where both the state prosecutor and the legal representative of Legal Aid Board of South Africa were the cause of the delay. All these circumstances, in my view, had seriously prejudiced the accused.
- [25] Self-evidently, the postponements in this case, were simply granted without any form of enquiry by the presiding Magistrate. Throughout these administrative mishaps, the accused was languishing in jail. I conclude that the accused had been severely prejudiced.
- [26] The acting Magistrate seeks to mitigate this apparent enormous prejudice by asserting that the accused was in custody in respect of another matter, where he had not yet pleaded. Unfortunately, the suggestion of the acting Magistrate cannot be sustained. Section 35(3)(d) of the Constitution stipulates that an accused person has a right to a fair trial which includes the right to have their trial begin and conclude without unreasonable delay.

[27] For the reasons set out above, this judgment should be brought to the attention of the head of the relevant justice centre of the Legal Aid South Africa and the Director of Public Prosecution in the Eastern Cape for investigations on the role of the public prosecutor and the Legal Aid attorney in causing the delays of the trial and the failure of justice in the matter.

Order

[28] For all the reasons stated above, I would accordingly make the following order–

1. The conviction of the accused Mr Zolani Qina of the offence of ‘housebreaking with the intent to steal’, in proceedings held under case number B488/2023, Humansdorp District court, is confirmed.
2. The matter is remitted back to the Acting Magistrate who convicted the accused to proceed with sentencing of the accused, subject to the provisions of section 275 of the CPA[9] in the event of the Acting Magistrate no longer being available.
3. The Registrar of the High Court, Makhanda, is directed to make a copy of the judgment available to both the head of the Legal Aid Board of South Africa justice centre responsible for Humansdorp Magistrate’s Court and the Eastern Cape Director of Public Prosecution for their consideration and remedial actions, if any, relating to the circumstances set out under paragraphs 22 to 24 of the judgment.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT

I agree

L RUSI

JUDGE OF THE HIGH COURT

[1] Section 304(4) provides – ‘If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.’

[2] Act No 51 of 1977, as amended

[3] Constitution of the Republic of South Africa, Act 108 of 1996,

[4] S v Jaipal (CCT21/04)

- [2005] ZACC1[2005] ZACC 1; ; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC) (18 February 2005), paras 25 & 26
- [5] Principles of Criminal Law, 5th Edition, by Johan Burchell, at p765-771
- [6] 1990 (1) SACR 22 (N) where at 23 d-e.
- [7] 2002 (2) SACR 319 (E) at 321; see also S v Kulati 2002 (2) SACR 406 E.
- [8] S v Hlongwane 1992 (2) SACR 484 (N) at 485A-E.
- [9] Section 275 (1): If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a superior court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a lower court or to pass sentence afresh in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be, and after consideration of the evidence recorded and in the presence of the accused, pass sentence on the accused or take such other steps as the judicial officer who is absent, could lawfully have taken in the proceedings in question if he or she had not been absent.

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Prepared on 9 October 2026 · Esheria