



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Review case number: R 98/2019

In the matter between:

THE STATE

and

LUCKAY KASA

CORAM: MOLITSOANE, J et OPPERMAN, J

JUDGMENT BY: MOLITSOANE , J

DELIVERED ON: 8 AUGUST 2019

REVIEW JUDGMENT

- [1] This matter came before us on automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977 (the CPA). The accused was convicted on a charge of housebreaking with intent to commit an offence unknown to the prosecutor and sentenced to nine months imprisonment of which six months thereof was suspended for five years on certain conditions.

[2] The following is the summarised factual matrix elicited during questioning in terms of section 112(1)(b) of the CPA upon which the conviction is based: The accused indicated that on one rainy Friday he went out to look for food at the taxi rank in Bloemfontein. He did not find the food. Upon return he went past Ultra Liquors Store. He entered the gate and took stones and broke the window of the said store. He thereafter entered the premises through the said broken window. An alarm went off and he also saw a security guard walking outside. He ran towards the back of the premises and hid in the ceiling. He was later arrested. He explained to the court that the reason that he broke and entered into the store was because he wanted to go and steal as he thought that he would get money to buy corrugated iron sheets in order to build himself a shack.

[3] Upon receipt of this matter I caused the following query to be sent to the Honourable Magistrate:

“1. During questioning in terms of section 112(1)(b) of Act 51 of 1977 the accused admitted that he entered the store in order to go and steal;

On what basis was he convicted of a crime unknown when he expressly said he was going to steal. For which offence should accused have been convicted.”

[4] The Honourable Magistrate promptly replied to the query raised for which I am grateful. He replied as follows:

“1) It is indeed correct that the accused admitted, during questioning that he entered the store in order to go and steal, expressly so.

- 2) It is however my understanding that the prosecutor is *dominis litis* until, at least, the court makes a ruling.
- 3) The Honourable Judge will note that I specifically asked the Prosecutor as to what charge should the accused be convicted of. In this regard I refer the Honourable Judge to the last sentence of page 11 of the transcribed records.
- 4) It is my humble submission that the accused was correctly convicted of Housebreaking with intent to commit a crime unknown to the state, as that is what the prosecutor accepted.
- 5) My decision is based on my reading and understanding of the following cases, to wit, S v Brown 2015(1) SACR 211 SCA; S v Cardozo 1075 1 SA 635 (T) and S v Ngubane 1985 3 SA 677 (A)."

[5] In common law it was impermissible to convict an accused of an offence of housebreaking in circumstances where it was unknown what his intentions were when he broke and entered the premises. The position is now governed by sections 95(12) and 262 of the CPA. Section 95(12) provides as follows:

"A charge relating to housebreaking or the entering of any house or premises with intent to commit an offence, whether the charge is brought under the common law or any statute, may state either that the accused intended to commit a specified offence or that the accused intended to commit an offence to the prosecutor unknown."

Section 95(12) must be read with sections 262 and 263, of the CPA.

Kruger¹ opines that section 263 referred to the pre-1910 provincial legislation of which most or all of it has been repealed by the Trespass Act 6 of 1959. According to him these provisions (s263) may safely be ignored. I share the same sentiments.

¹ Hiemstra's Criminal Procedure Act-Lexis Nexis at 26-24.

- [6] While s95(12) creates an offence of housebreaking with intent to commit an offence unknown, s262 allows and empowers the court to convict an accused where the evidence, and/ or the responses elicited during questioning in terms of s112(1)(b)², proves the commission of housebreaking with intent to commit a specified or an unspecified offence. Section 262(2) specifically provides that:

“If the evidence on a charge of housebreaking 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 housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specified offence or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.”

- [7] It is unnecessary to seek an amendment of the charge in terms of section 86 of the CPA where the charge alleges that housebreaking with intent to commit an unknown offence was committed but the evidence later proves that such housebreaking was committed with the intention to commit a known or specified offence³. Commenting on this type of offence, **Jonathan Burchell**⁴ says the following:

“At common law such an offence was not permitted, but the Criminal Procedure Act sanctions it. It would seem that if X is charged with housebreaking with intent to commit an offence unknown to the Prosecutor he cannot be convicted unless the evidence proves that he intended to commit some offence known to our law.”

² See *S v Andrews* 1984(3) SA 306(ECD) where the court, *inter alia*, dealt with the issue of whether the answers during s112(1)(b) constitute evidence.

³ Hiemstra (*supra*) 26-19.

⁴ Principles of Criminal Law-Juta. 3rd ed at 863.

It has to be borne in mind that housebreaking, standing in isolation, is not an offence. For it to attract criminal sanction, it must be accompanied by an intention to commit a known offence.

Buchell⁵ goes on further to say:

“But if the evidence reveal such an intent, then it is logically contradictory and farcical to convict of housebreaking with intent to commit an offence unknown, because the offence is known.”

[8] Returning to the facts at hand, it is clear from the questioning that the accused expressly said that when he broke and entered Ultra Liquor store his intention was to go and steal. He expressly said that he thought that he would find money to enable him to go and buy some corrugated iron sheets in order to build himself a shack. It would be illogical and wrong to accept this evidence where the intention is expressly revealed but ignore it in returning the verdict. The court in this case should have convicted the accused on a charge of housebreaking with intent to steal in view of the express intention he revealed during questioning.

[9] In **S v Kesolofetse and Another**⁶ the accused were charged with housebreaking with intent to commit a crime unknown to the prosecutor. They pleaded guilty and during questioning they indicated that they had broken into the premises in order to steal. They were convicted ‘*as charged*’. On review, in setting aside the conviction the court said the following:

“[6] In my view, the magistrate was therefore wrong to convict the accused in this case of the crime of housebreaking with intent to

⁵ Supra at 863.

⁶ 2004(2) SACR 166 (NC) at 168

commit a crime to the prosecutor unknown, for the simple reason that the 'evidence' did not prove that offence."

[7] Quite apart from this it would obviously be senseless, and in fact misleading for record purposes, to convict an accused on the basis of his or her having had the intention to commit a crime to the prosecutor unknown, where, at the end of the day, it is known to not only the prosecutor but indeed also to the court what the intended crime was."

(See also the unreported decision of this court by Daffue, J Case 186/2012 delivered on 18 September 2012)

[10] The magistrate seems to be under the mistaken impression that he is bound by the decision of the prosecutor on the issue of which charge should the accused be convicted of. This mistake seems to arise on the aspect of the right of the prosecutor to accept a plea on a lesser charge. There is no dispute that the prosecutor as *dominus litis* has the right to accept a plea on any charge. That is the prerogative of the state. If the state accepts certain facts by the accused, then in that case the court is bound by those facts. The court, however, in returning a verdict on the accepted plea must be satisfied that the facts in support of such a plea correlate with the charge the state accepted. If the facts do not support the charge preferred, the court cannot convict on the said charge but may elect to convict on a competent verdict or may enter a plea of not guilty in terms of s113 of the CPA.

[11] The court was alive to the provisions of s262 of the CPA and to illustrate the effect of the said section it even gave an example to the accused to understand the import of the provisions of this section. In my view the conviction on a charge of housebreaking with intent to commit an offence unknown to the prosecutor must

be set aside and substituted with the conviction of housebreaking with intent to steal. The sentence imposed is in my view in accordance with justice and stands to be confirmed. I make the following orders:

[12] **ORDER:**

1. The conviction is set aside and substituted with the following:
Accused is found guilty of housebreaking with intent to steal.
2. The sentence is confirmed.
3. The order in terms of s103(1) is confirmed.

P. E. MOLITSOANE, J

I concur.

M. OPPERMAN, J