



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No: R152/2019

In the matter between:-

FANA ISHMAEL MAZIBUKO

and

THE STATE

CORAM: MBHELE, J *et* MOLITSOANE, J

JUDGMENT BY: MOLITSOANE, J

DELIVERED ON: 19 SEPTEMBER 2019

- [1] This matter came before us as a special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977. The accused was charged with the offence of housebreaking with intent to steal and theft. He was legally represented. He pleaded guilty and was convicted as charged. He was sentenced to three years direct imprisonment.

[2] It would seem that during Judicial Quality Assessment pertaining to the appointment of the trial Magistrate, it was discovered that the section 112(2) statement accepted in evidence disclosed the offence of theft as opposed to housebreaking with intent to steal and theft for which the accused was charged and ultimately convicted. It is for this reason that this case was sent for review.

[3] The factual matrix underlying the conviction is encapsulated as follows in paragraph 5 of the 112(2) statement:

“On the day in question I went to the complainant's house, the windows were open. I went inside and took the said items listed above. I then took them to my sister's place because my shack is very small. The police came the following day and arrested me for the offence of housebreaking and theft. The stolen items were recovered.”

[4] The offence of housebreaking with intent to commit an offence consists in unlawfully breaking and entering premises with the intention to commit some other crime on the premises¹. The essential elements of this crime are namely, (i) unlawful; (ii) intention; (iii) breaking into (iv) entering; (v) premises; (vi) to commit some other offence.

[5] For the crime of housebreaking with intent to commit an offence to be complete, over and above the other elements, the entry into the premises must have been preceded by ‘breaking in’. Where the element of ‘breaking’ is lacking there is no crime of housebreaking committed. To ‘break into’,

¹ Principles of Criminal Law by Jonathan Burchell 3rd ed at page 857.

means to create a way into the premises by displacing some or other obstruction which forms part of the premises². The court in **S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO**³ said that an unlawful entry into the premises through an open window does not constitute a 'breaking'. In **S v Maunatlala**⁴ the accused entered the complainant's room through an open window, stole a bicycle and then left by opening a locked door from the inside. He was convicted in the lower court of housebreaking with intent to commit theft and theft. On review the conviction was altered to one of theft.

- [6] Returning to the matter in hand. If one were to have regard to the statement of the accused above, one cannot conclusively say that the accused entered the house of the complainant through a window. What the accused says is that upon arrival at the complainant's house he found the windows open. It is unclear if he entered through any of those open windows or how he gained entry into the premises. The 112(2) statement is silent as to how the accused gained entry into the premises. The Magistrate also did not question the accused on the 112(2) statement handed in evidence with reference to the alleged facts in order to satisfy herself that the accused admitted all the elements of the crime. I am, however, satisfied that the accused gained entry into the house of the complainant and stole the items listed in the charge sheet.

² See Burchell (*supra*) at 861.

³ 1989(3) SA 368 at 385.

⁴ 1982(1) SA 877.

- [7] In my view it has not been established that the accused broke into the premises in order to steal. Even if it may be accepted that he gained entry through the open window, it has still not been admitted or proven that he displaced any part of that window in order to gain entry. A conviction on a charge of housebreaking with intent to steal and theft can thus not stand and ought to be altered to one of theft.
- [8] The Court did not hold an enquiry into the fitness of the accused to possess a firearm. The Public Prosecutor, the defence lawyer and the Court were of the mistaken view that because the accused had already been declared unfit to possess a firearm it was unnecessary to hold a further enquiry. This assumption is wrong.
- [9] Firstly, it is clear from s104 (1)(b) of the Firearms Control Act(the Act) that the accused who has been declared unfit to possess a firearm may appeal such an order. If that is the case the previous order may, if the appeal is successful, be set aside. This in my view is one of the reasons why an enquiry should be held as a matter of course where applicable.
- [10] Secondly, in terms of 9(4) read with section 2(p) of the Act the disqualification contemplated in s103 of the said Act expires at the end of a period of five years calculated from the date on which the person became or was declared unfit, or the expiry of the period for which the declaration is valid, whichever occurs first. The fact that the period of declaration of invalidity

to possess a firearm expires makes it more of the reason to always hold an enquiry contemplated in sections 103(1) and (2).

- [11] Thirdly, where an accused is convicted for an offence and sentenced to direct imprisonment without an option of a fine he becomes *ex lege* unfit to possess a firearm. In **S Mkhonza**⁵ the following was said:

“The manner in which s103 (1) operates is that the disqualification of the accused is automatic unless the court orders otherwise. The source of the disqualification may therefore be seen as the statute, rather than an affirmative decision of the court. The implication seems to be that if the question is not raised before court then the convicted person ipso facto is unfit to possess because s103(1) says so.”

- [12] The accused was convicted and sentenced to direct imprisonment. He falls squarely under the provisions of s103 (1) of the Act. The court was obligated to have held an enquiry into the accused’s fitness to hold a firearm. He became unfit to possess a firearm automatically by operation of the law. The court failed to hold a peremptory enquiry into his fitness to hold a firearm. While the accused was legally represented, it would go against every principle of fairness to confirm the order of declaration of invalidity without having afforded him the opportunity to lead evidence or make representations. The order of declaration of invalidity cannot stand.

⁵ 2010(1) SACR 602 (KZP) at par [14].

[13] **ORDER**

I accordingly propose the following order:

1. The conviction on a charge of housebreaking with intent to steal and theft is set aside and is substituted with the following:
‘Accused is guilty of theft’.
2. The accused is not unfit to possess a firearm.

P.E. MOLITSOANE, J

I agree and it is so ordered.

N. M. MBHELE, J