



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

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

Review number: R160/2016

In the matter between:

THE STATE

and

TSHOKOLO JOHN PHATSA

CORAM: DAFFUE, J *et* REINDERS, J

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 5 JANUARY 2017

**AUTOMATIC REVIEW IN TERMS OF SECTION 302(1)
OF THE CRIMINAL PROCEDURE ACT, 51/1977**

- [1] This is an automatic review. The accused was convicted on two counts, to wit count 1, being housebreaking with the intent to steal

and theft and count 2, possession of dagga in contravention of s 4(b) of Act 140 of 1992.

- [2] On 1 June 2016 the accused was sentenced as follows and I quote *verbatim* from the J15 which corresponds with the transcribed record:

“Count 1 fined R4000 (four Thousand Rand) or 3 (Three) years imprisonment. On count 2 3 (Three) months imprisonment. Both sentences are wholly suspended for a period of 5 (Five) years, on condition that the accused is not convicted of housebreaking with the intent to steal and theft, committed during the period of sentence (sic) and or contravention of section (4)(a) and 4(b) of Act 140 of 1992, committed during the period of sentence (sic).”

The accused was also declared unfit to possess a firearm whilst the dagga was forfeited to the State in terms of s 25 of Act 140 of 1992.

- [3] Jordaan, J queried the sentence as long ago as 26 July 2015 and I quote:

- “1. On what basis can the sentence on the charge of housebreaking be suspended on condition that accused do not contravene sections 4(a) or (b) of act 140 of 1992?
2. The converse applies to the sentence for possession; how can the suspension be conditional on the accused not committing housebreaking?”

- [4] On 19 October 2016 the magistrate responded in writing as follows and I quote *verbatim*:

“I confirm that the accused appeared in person before me on 1 June 2016.

1. I concede that that (sic) the rights to appeal were not fully explained as per the records *ex facie*;
2. I further concede that the rights to deferred fine were explained even though the rights to deferred fine were not fully explained.

The oversight is regretted and will never be repeated.

It is my submission that the conviction and sentence were in order and thus be confirmed.”

- [5] The magistrate’s response was immediately dealt with by Jordaan, J on 19 October 2016 and I quote:

“Both sentences were suspended on the same condition, which therefore applies to both sentences. Therefore question 1 and 2 were posed!

Please answer those questions!

Your comment on the aforesaid is required.”

- [6] The magistrate responded and apologised for his late replying due to his working conditions. In his written response dated 22 November 2016 he stated the following:

- “1. I meant to say that on count 1, the sentence is suspended on condition that the accused is not convicted of housebreaking with intent to steal and or theft committed during the period of suspension; and
2. On count 2 the sentence is suspended on condition that the accused is not convicted of contravention of section 4(a) or 4(b) of Act 140 of 1992, committed during the period of suspension.

It is my humble submission that the conviction and sentence were in order and thus be confirmed.”

Although the magistrate clearly admitted fatal errors as indicated in his responses, he still expressed the view that the convictions and sentences were in order. Unfortunately the approach is flawed.

[7] I am satisfied that the convictions are in order, but the sentences should be set aside to give due effect to the intention of the magistrate, but in particular to accord with the principles applicable to the suspension of sentences. The offence(s) mentioned in the condition must be connected to the offence for which sentence is imposed. See Kruger A, *Hiemstra's Criminal Procedure*, Issue 9 at 28-78.

[8] Consequently, the followings orders are issued:

1. The convictions on counts 1 and 2 are confirmed.

2. The sentences on both counts are set aside and substituted with the following:

Count 1: Housebreaking with the intent to steal and theft:

The accused is sentenced to payment of a fine of R4000 or 3 years' imprisonment, wholly suspended for a period of 5 (five) years on condition that the accused is not convicted of housebreaking with the intent to steal and theft during the period of suspension.

Count 2: Contravention of s 4(b) of Act 140 of 1992:

The accused is sentenced to 3 (three) months' imprisonment, wholly suspended for a period of 5 (five) years on condition that the accused is not convicted of contravention of s 4(a) or 4(b) of Act 140 of 1992 committed during the period of suspension.

3. The further orders in respect of the provisions of s 103 (2) of Act 60 of 2000 and forfeiture of the dagga in terms of s 25 of Act 140 of 1992 are confirmed.

JP DAFFUE, J

I concur

C REINDERS, J