



Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

VICTORIA WEST CASE NO: 229/2015
REVIEW NO: 17/2016
DATE DELIVERED: 04/11/2016

In the matter between:

THE STATE

and

ERASMUS, CLAUDE

Accused

Coram: Olivier J et Erasmus AJ

JUDGMENT ON REVIEW

Olivier J:

[1.] In this matter the annexures to the charge sheet reflect a charge of housebreaking with intent to steal and theft, an alternative charge of theft and a second alternative charge of trespassing¹.

¹ In contravention of section 1(1) of the **Trespass Act**, 6 of 1959

- [2.] Before any charge was put to the accused, Mr Claude Erasmus, the prosecutor indicated that the main count of housebreaking with intent to steal and theft was withdrawn. The record reflects the following statement by the prosecutor:

"We will be withdrawing count 1, the main count posing (sic) to the alternative been (sic) the theft charge your worship and the trespassing charge".

- [3.] The word "*been*" is most likely a transcription error and should probably have read "*being*", but it is more difficult to understand or find an explanation for the word "*posing*" in the particular context.
- [4.] The record reflects, after the note "*PROSECUTOR PUTS ALTERNATIVE COUNT*", the wording of the first alternative count, presumably as put to the accused, and immediately thereafter the note "*PROSECUTOR PUTS SECOND ALTERNATIVE*", followed by the wording of the second alternative count (again presumably as put to the accused).
- [5.] Attempts by Adv T E Barnard of the Office of the Director of Public Prosecutions to have the *ipsissima verba* of the prosecutor transcribed, with a view to determining whether the two alternative counts were put to the accused in the alternative or as two substantive counts, were unsuccessful.
- [6.] I agree, however, with Mr Barnard's submission that all indications are that the two alternative counts were put to the accused as two substantive counts, and not the one in the alternative to the other.
- [7.] The accused, who had been legally represented, pleaded guilty to both the theft and the trespassing charges, himself referring to them as respectively count 2 and count 3.

- [8.] In his written statement in terms of section 112(2) of the **Criminal Procedure Act**² the accused admitted the elements of both crimes, and explained that he had entered into the premises (“yard”) without permission and that he had removed a handbag through an open window, and then from the handbag a cell phone. He concluded his statement by declaring that he pleaded guilty “*to both charges of theft and trespassing*”.
- [9.] The legal representative of the accused, Mr Mabaza, confirmed that the pleas of guilty to both counts were in accordance with his instructions from the accused.
- [10.] The accused was subsequently convicted on both the charge of theft and the charge of trespassing.
- [11.] It is clear that the understanding of all concerned was that, after the withdrawal of count 1, the two alternative counts would apply and remain as two separate and substantive counts. The two counts were, as already mentioned, referred to in the section 112(2) statement as count 2 (theft) and count 3 (trespassing). The same approach was adopted in the judgment, when the accused was convicted “*op aanklagte 2, diefstal en klagte 3 oortreding*”.
- [12.] The annexure containing the theft charge describes or numbers it, immediately after the words “*Count no/Aanklag nr*”, as “*Alt*”, while the annexure pertaining to the trespassing charge reflects the description “*2nd Alt*” as the number or reference of that charge. These references would have made sense at the time when the main charge of housebreaking still applied, but after its withdrawal there was no charge left in respect of which the theft and trespassing charges could be first and second alternative counts. These parts of the wording of the theft and trespassing charges are therefore obviously not an accurate reflection of how the parties and the Magistrate eventually understood the position.

² 51 of 1977

- [13.] This anomaly can be cured by simply amending the particular two annexures to substitute the numbers or descriptions "Alt" and "2nd Alt" with, respectively, the numbers 1 and 2.
- [14.] Such a formal amendment could cause no conceivable prejudice to the accused and is competent on review³.
- [15.] That is not, however, the end of the matter. The Magistrate also raised the question whether the two convictions do not amount to a duplication. I am indebted to Adv Jansen of the Office of the Director of Public Prosecutions for her legal opinion in this regard.
- [16.] Over time different tests have crystallised in this regard. One approach would be to consider whether the evidence on the one charge would also prove the other, and another would be to consider whether the different acts were committed with a single intent and as part of one criminal transaction⁴. The definitions and elements of the different offences would also be a valid consideration⁵.
- [17.] In **S v Whitehead and Others**⁶ these tests were referred to as "*simply useful practical guides*" and it was held that "*if these tests fail to provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the court*"⁷.
- [18.] Although the elements and definitions of the statutory offence of trespassing and the common law offence of theft differ, the accused in the present matter clearly acted with a single intent, namely to steal, and the trespassing and the eventual

³ **Commentary on the Criminal Procedure Act**, du Toit et al, 14-24A

⁴ Compare **S v Benjamin en 'n Ander** 1980 (1) SA 950 (A) at 956F - G

⁵ Compare **S v Grobler en 'n Ander** 1966 (1) SA 507 (A) at 511G - 512A

⁶ 2008 (1) SACR 431 (SCA) ([2008] 2 All SA 257)

⁷ **Ibid**, para [35]

act of removing the handbag, and from it the cell phone, formed part of one "continuous criminal transaction"⁸.

- [19.] In his section 112(2) statement the accused made this abundantly clear, when he stated that he had entered the premises (and therefore trespassed) after having noticed an open window, and that he had done so in order to commit the crime of theft.
- [20.] The facts of the present matter are on all fours with those in **S v Jazperson**⁹, where the accused had to trespass in order to gain access to the bag that he wanted to steal from. The single intent test was applied and it was held¹⁰ that, even though "*the two acts... each, standing alone, would constitute criminal conduct*", they "*were committed... with a single intent, namely, to steal from the bag in the tea garden*".
- [21.] In my view the ultimate goal of the accused in the present matter was clearly to steal. The act of trespassing was merely incidental to the act of stealing, and no more than a step towards achieving that ultimate goal.
- [22.] To this extent the facts of the present matter are distinguishable from those in **Setlholo v The State**¹¹. There it was found¹² that "*The very offence of fraud was used to lure Bredenkamp to agree to pay the bribe*"¹³, and the act of fraud could therefore clearly not be said to have been no more than incidental to the act of corruption.

⁸ Compare **S v Maneli** 2009 (1) SACR 509 (SCA) para [8]

⁹ 2013 JDR 1227 (Nm)

¹⁰ **Ibid**, para [10]

¹¹ An unreported judgment on appeal in this Division, delivered on 19 June 2015 under case number 3/14.

¹² **Ibid**, para [41]

¹³ There the two counts concerned were fraud and corruption (in contravention of section 4(1)(a) of the **Prevention and Combating of Corrupt Activities Act**, 12 of 2004)

[23.] It is clear that theft was the dominant intention of the accused in the present matter¹⁴ and the conviction of trespassing therefore in my view amounts to a duplication of charges and should be set aside.

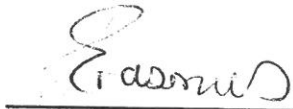
[24.] The conviction on the theft count is in accordance with justice and the following orders are therefore made:

1. IN THE SECOND ANNEXURE TO THE CHARGE SHEET, SETTING OUT THE CHARGE OF THEFT, THE REFERENCE TO THE COUNT NUMBER AS "ALT" IS SUBSTITUTED WITH THE NUMBER "1".
2. IN THE THIRD ANNEXURE TO THE CHARGE SHEET, SETTING OUT THE CHARGE OF TRESPASSING, THE REFERENCE TO THE COUNT NUMBER AS "2ND ALT" IS SUBSTITUTED WITH THE NUMBER "2".
3. THE CONVICTION ON THE RENUMBERED COUNT 2 (TRESPASSING) IS SET ASIDE.
4. THE CONVICTION ON THE RENUMBERED COUNT 1 (THEFT) IS CONFIRMED.
5. THE MATTER IS REMITTED TO THE VICTORIA WEST MAGISTRATES' COURT FOR FURTHER PROCEEDINGS.


CJ OLIVIER
JUDGE
NORTHERN CAPE DIVISION

¹⁴ Compare *S v Skwari* 1998 JDR 1002 (CkH) at p8

I concur.

A handwritten signature in black ink, appearing to read 'S L Erasmus', written over a horizontal line.

**S L ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION**

