



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Case No: CA&R 56/13
Heard: 17/04/2014
Delivered: 30/05/2014

In the matter between:

PETRUS JOHANNES BOSHOFF

Applicant

v

THE STATE

Respondent

Coram: Kgomo JP; Williams J et Phatshoane J

JUDGMENT ON APPEAL

KGOMO JP et PHATSHOANE J

ORDER

The appeal on conviction is dismissed.

- [1] Williams and Phatshoane JJ could not agree on the outcome of the appeal on conviction that they heard on 09 December 2013. That gave rise to the constitution of Full Court hearing on 17 April 2014. The district Magistrate, Ms P R Prinsloo, convicted the appellant of Housebreaking with the intention to contravene s 1(1)(a) of the Trespass Act, No 6 of 1959 (the Trespass Act), and trespass. The sentence imposed was R5000-00 or in default of payment the appellant was to serve

one year imprisonment wholly suspended for five years on certain conditions.

- [2] Williams J is of the view that the appellant's explanation that he was dragged into the complainant's (Ms Desirè Boshoff's) house by the latter's partner, Mr Gustav Brink, through a bedroom window is reasonably possibly true. We disagree. Williams J overlooked a number of common cause or undisputed or acceptable factors adverted hereinafter.
- [3] The appellant claimed that his visit to the complainant's house (which they did not share as they were divorced) was lawful because he merely exercised his right of access to the minor child who was 22 months old at the time of the incident on 01 December 2011. The appellant arrived at the complainant's house at the ungodly hour of 23h40 and was removed from the house at 01h00 the following morning when the police arrested him.
- [4] The appellant pressed the buzzer several times but the complainant refused to let him in. She told him several times to leave her premises but he would not barge. As the appellant was causing a nuisance the complainant removed the batteries of the buzzer to silence it.
- [5] The complainant and the appellant are *ad idem* that the appellant went round the house to a bedroom window. The complainant says he "banged" on the window. The appellant stated that the window stood half-open. He pushed it further open and swiped the blinds to a side in order to see his child. If he gained entry in this manner this would have constituted a displacement of a structure of the house and therefore

conformed to the definition of housebreaking. The appellant intimates that the complainant shut the window in his face. He infact invaded the occupants' privacy in this manner:

"(E)k het toe in Mnr Gustav Brink se gesig vasgekyk waar hy in sy onderklere gelê het. Ek het toe aan hom gevra asseblief, gee my net die kans ek wil net my kind sien. En die volgende ding terwyl ek nog besig was om met hom te praat het Desirè verbygekom en die hoofslaapkamer venster in my gesig toegemaak."

- [6] Undeterred by the complainant's protestations the common cause facts shows that the appellant went to the next window. It was partly opened. He admits:

"(I)n my verbygang het ek gesien die slaapkamer se kleinvenstertjie, hy is oop. Ek het toe op die boom geklim en skuins oorgehang en die venster met my hand opgetel en met my ander hand het ek so vasgehou aan die vensterbank."

This is the window through which the appellant gained entry. In the process the window was broken and he sustained a cut-wound to his head for which he received medical treatment.

- [7] The appellant's version which, as I stated earlier, Williams J accepts, is that Mr Brink pulled him into the house through this window. Mr Brink who had been present when the case was previously postponed was not available on this occasion. The State closed its case as Mr Brink was engaged elsewhere out of town. For what conceivable reason would Mr Brink have pulled the appellant into the house? It must be borne in mind that the complainant phoned the police to evict the appellant from the premises even before he gained entry into

the house. This is also where the police arrested him: in the house.

- [8] The appellant testified that it was in fact he who phoned the police because he received a report through unspecified sources that the child was being ill-treated. However, he did not report the matter to the police or the Social Welfare Department before or after the night of drama. Nor did he make any attempt to have the child medically examined. Mr Nel, for the appellant, could not explain why the appellant would phone the police to meet him at the complainant's place at that late hour when there was no emergency or why the appellant did not report the alleged abuse at the police station and not at complainant's residence.
- [9] On his own admission the Deed of Settlement which was made an order of Court decreed that the appellant could have the child with him on Tuesdays and Thursdays when the pre-school came out in the afternoon until 18h00 when he was supposed to return the child or when the complainant had to fetch the child from his place. The nocturnal visit was therefore totally uncalled for. In fact the visit smacks of jealousy against the friendship that the complainant had established with someone else.
- [10] What could also not be explained by the appellant's counsel is why Mr Brink did not assault or fight the appellant after he had allegedly forcefully pulled him inside. The Magistrate found that the appellant's explanation of and demonstrations on how he was hauled inside the house is improbable. She reckoned that Mr Brink would have had to lift up the appellant which would have been more arduous by the applicant's

resistance. These are observations which are made by the Magistrate who was imbued with the trial and enjoyed a distinct advantage over us as a court of appeal. In **S v Hadebe and Others** 1997(2) SACR 641 (SCA) at 645e-f the Court per Marais JA held:

"(I)t would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary." See also **R v Dhlumayo and Another** 1948(2) SA 677 (A) at 705 -706.

- [11] The appellant was also not nearly as caring as his counsel made him out to have been or would have us believe. He made lots of noise and woke up the child at the dead of night. He prised away the child from the complainant causing her to cry and squirm with pain to the point where Mr Brink implored complainant to let the child rather go lest she be seriously injured. When the appellant got hold of the child he rummaged through the complainant's and the child's clothing without the complainant's consent. He did not leave thereafter but laid on the child's bed for something approximating an hour, when the police removed him at 01h00. The appellant stated that he could not leave the house because Mr Brink prevented him to. Having regard to his obstreperous conduct throughout we are, respectfully, unable to fathom on what basis Williams J accepts his explanation on this aspect (at para 29 below).

[12] The fallacy of the appellant's defence is so far-fetched and has only to be stated to be rejected. To the extent that the defence counsel and Williams J suggest that the State relies on circumstantial evidence only the evidence proves otherwise. For example, the complainant heard the shattering of the windowpane and the appellant bears the scars thereof. The complainant intimates that she saw the appellant breaking into the house. She may have been ambivalent on this point. It should nevertheless be understood that she was not static as she checked on the well-being of child from time to time whilst keeping an eye on the movements of the appellant. What matters is that the appellant supports her partly on two occasions on this aspect when he testified in-chief:

"Mr Liebenberg: Die ruit was oop en u het hom oopgemaak. --- Dis korrek ja, ek het hom toe oopgestoot met my regterhand. --- Ek het vir – uit my linkeroog het ek gesien Desirè staan so skuins voor my. Ek het toe aan hulle probeer verduidelik hoekom ek daar is.

Is daar gordyne of enige iets voor daardie venster? --- Daar is 'n blinder voor die venster gewees. So basies wat gebeur het, waar ek my vasgehou het met my – ek het die venster oopgehou met hierdie hand en met hierdie linkerhand het ek die "blinds" so met my hand so weggestoot.

Ja. --- So dis hoekom ek kon nou nie hulle volledig gesien het daar wie almal presies in die kamer is nie. So ek kon net die gedeelte waar ek kon deurgesien het, die hoekie van die blinder wat ek weggeskuif het, kon ek vir Desirè so met my linkerkant van my oog, want ek het so skuins gekyk, kon ek gesien het daar staan sy."

[13] Our approach, which diverges from Williams J's reasoning, accords with the dictum by Navsa JA in **S v Trainor** 2003(1) SACR 35 (SCA) at 40f – 41C (paras 8 and 9) where he stated: "[8] *The passage from the magistrate's judgment quoted in para [6] demonstrates a misconception of how evidence is to be evaluated. In S v Van Aswegen*2001 (2) SACR 97 (SCA) Cameron JA (at 101a - e), after observing that this misconception has its origins in cases like *S v Kubeka* 1982 (1) SA 534 (W) at 537F - G and *S v Munyai* 1986 (4) SA 712 (V) at 715G, referred with approval to *S v Van Tellinghen* 1992 (2) SACR 104 (C) at 106a - h and *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449h - 450b. In the latter case Nugent J, with reference to the dictum in the *Kubeka* case, said the following (at 449h - 450b):

'It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and unshaken". The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so inherently contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. . . .

The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the

evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[9] A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."

- [14] See also **S v Chabalala** 2003(1) SACR 134 (SCA) para 15 where the following is said:

"[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh I up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning

an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. B Once that approach is applied to the evidence in the present matter the solution becomes clear.”

- [15] The foregoing are the proved facts. The circumstantial part of the evidence which appellant’s counsel relied so heavily upon forms an almost insignificant part of the case. Even so that aspect of the evidence is compelling and leaves no escape route to the appellant. See **S v Reddy and Others** 1996(2) SACR 1 (SCA) at 8c-9f. It would have been prudent for the Magistrate to have invoked her powers in terms of s 186 of the Criminal Procedure Act, 51 of 1977, to call Brink as a witness. The fact that Brink was not called is not fatal for the State case though. We are satisfied that the appellant was an out-and-out liar and that the Magistrate correctly rejected his version.

THE CORRECTNESS OF THE CONVICTION

- [16] Appellant’s counsel took issue with the fact that the trial Magistrate convicted the appellant of housebreaking with intent to contravene s 1(1) of the Trespass Act, No 6 of 1959, and the contravention thereof. He argued that in effect the appellant was convicted of two offences. According to counsel regard being had to the competent verdict in s 262(2) of the Criminal Procedure Act the Magistrate should not have convicted the appellant of the substantive offence of trespassing in addition to the housebreaking. Reliance for this view was placed on **S v Konyana en `n Ander** 1992(1)

SACR 451 (O). The *dictum* by the Free State Court is that where an accused is charged with housebreaking with the intent to commit an offence to the prosecutor unknown and the evidence shows that the accused entered the house to take shelter there, he/she can be convicted of housebreaking with the intent to trespass but not also of the substantive offence of trespassing. The **Konyana case** does not show that the accused faced and was convicted on two charges.

- [17] We have to agree with the Magistrate who has invoked the decision in **S v Jasat** 1997(1) SACR 489 (SCA) at 493b-d where Nienaber JA (Scott et Plewman JJA concerning) stated: *"The appellant's first line of attack was that trespass as such is not recognised as a crime by the common law. It is a statutory offence, enacted by the Trespass Act 6 of 1959,---. But that does not mean, as was contended on behalf of the appellant, that a conviction of housebreaking with intent to commit trespass and trespass is an incompetent verdict and that the appellant is for that reason alone entitled to be acquitted. To uphold that contention would be to defer to extreme formalism. The appellant, after all, was not convicted of an offence which in law did not exist; he was convicted of an offence which did exist but which was too tersely formulated in the judgment. The correct description of the offence would have been 'housebreaking with intent to contravene s 1(1)(a) of the Trespass Act 6 of 1959 and the contravention thereof'. There could never have been any doubt in the minds of anyone concerned with the trial that in essence that was the result the trial court sought to achieve. Counsel for the appellant fairly conceded that if the appeal should otherwise fail no reason exists why this Court*

should not substitute a proper description of the offence for the less accurate one of the trial court."

The SCA then made the following order:

"1. The following wording is substituted for the wording used by the trial court in convicting the appellant:

The accused is convicted of housebreaking with the intent of contravening s 1(1)(b) of the Trespass Act, 1959, and the contravention thereof."

- [18] The contention by counsel for the appellant lacks substance because housebreaking with the intent to commit a crime is defined as follows in the **South African Criminal Law and Procedure**, Vol 11, Hunt, 2nd Edition, p 707:

"The common law crime of housebreaking with intent to commit an offence consists: (1) in the removal or displacement of some part of the structure of a house, or of premises in the nature of a house, with the object of gaining admission thereto and committing some crime therein and (2) in the entry of the offender into the house or premises broken, or the insertion by him into the house or premises of any part of his body or any instrument with which he proposes to exercise control over anything within the house or premises."

Snyman, Criminal Law, 5th Edition, p549, comments in this manner on this crime:

"Housebreaking alone not a crime

Housebreaking per se is not a crime (although the act of housebreaking as such may, depending upon the circumstances, amount to the crime of malicious injury to property). To constitute the crime the housebreaking must be accompanied by the intention of committing some other

crime. In practice housebreaking is mostly committed with the intention to steal, and charged as such, but in principle charges of housebreaking with intent to commit any crime are competent. The legislature has even sanctioned charges of housebreaking with the intention of committing a crime unknown to the prosecutor.”

[19] Housebreaking is a composite offence which invariably consists of two substantive offences: Malicious damage to property or the breaking in and/or entering. Once inside the building or structure the second offence would be committed: Eg, theft or rape or robbery or murder etc. Therefore to the extent that **S v Konyana en `n Ander** 1992(1) SACR 451 (O) is inconsistent with S v Jasat 1997(1) SACR 489 (SCA) we consider it to be overruled on the basis of the precedent system. See **Ex Parte Minister of Safety: In Re S v Walters** 2002(4) SA 613 (CC) at 644D – 645A (para 57). Alternatively, we regard S v Konyana as wrongly decided and we decline to follow it.

[20] The appeal must therefore fail. The following order is made:
The appeal on conviction is dismissed.

F DIALE KGOMO
JUDGE PRESIDENT
 High Court of South Africa
 Northern Cape Division, Kimberley

M V PHATSHOANE
JUDGE
 High Court of South Africa
 Northern Cape Division,
 Kimberley

WILLIAMS J:

21. I have read the majority judgment of Kgomo JP and Phatshoane J in this appeal and respectfully disagree with their findings.

There can be no doubt that the appellant made a nuisance of himself by persistently ringing the doorbell at the complainant's house in the middle of the night despite her requests for him to leave the premises. He also invaded the privacy of the occupants of the house by pulling aside the curtains of one bedroom window and the blinds of another to peer inside. His justifications for these acts i.e. that he was concerned for his young child's welfare was on the evidence correctly rejected by the magistrate.

The appellant's unacceptable behaviour in this regard and the magistrate's obvious sympathy for the complainant unfortunately, in my view, led to several misdirections in assessing the evidence relating to the main issue in dispute between the parties - whether the appellant broke into the complainant's house by climbing through the bedroom window or whether he was pulled through the window by the complainant's male friend, a certain Mr Brink.

The magistrate failed to consider the contradictory evidence of the complainant who was a single witness. Contradictions appear not only between two statements made by the complainant to the police after the incident but also between these statements and her versions given during examination-in-chief and cross-examination.

22. The different versions of the complainant as to the manner in which the appellant entered her house can be extracted from the evidence as follows;

- 22.1 Her first statement to the police shortly after the incident that the appellant broke the window in order to climb through it;

"Petrus het aangehou klop teen die venster en hy het die klein venster in die kamer gebreek en daar deurgeklim. Ek het begin skree op hom om uit te gaan maar hy't my gesê hy kom haal sy kind.

Ek het dadelik na my 22 maande dogter se kamer gehardloop en haar uit haar bed gehaal en haar vasgehou."

- 22.2 Her second statement to the police during the day following the incident that the window broke while he was climbing through it;

"Hy het omgeloop na my kleiner venster geloop waar daar geen diefwering op is nie. Hy het die venster verder oopgemaak en het deur die venster geklim, terwyl hy deurklim het sy een voet vasgehaak en het sodoende die venster uitgeskop. Ek het na my dogter se kamer gegaan aangesien sy wakker geword het van die geraas."

- 22.3 Her evidence-in-chief that she did not see the appellant climbing through the window;

"AANKLAER Die Hof behaag u Edele. Het u gesien hoe Mnr Boshof deur die venster klim" --- Ek het gehoor – ek was op daardie stadium toe hy begin deurklim het Leané gehuil, so ek was in haar kamer gewees wat ek haar gaan optel het want sy slaap – haar kamertjie is net langs ons slaapkamer.

HOF: So u hoor dit, u was nou nie by om te sien hoe klim hy nie?

---Nee U Edelagbare.

Deur die venstertjie nie? --- Nee Edelagbare.

AANKLAER: Hof behaag Edelagbare. Okay, u hoor hy klim deur en u is nou nog besig in Leané se kamertjie met haar terwyl sy huil, wat gebeur toe? --- Toe Mnr Boshof – want ek het toe met Leané uit haar kamer uitgekom, toe kom Mnr Boshof toe in die gang af uit ons kamer uit en toe gaan ek met Leané in haar kamer in wat ek toe op die bed gaan sit het met haar. Mnr Boshof het my teen die bed ... (tussenkoms).

Net so 'n bietjie vashou. U sê u gaan terug – toe hy in die gang afkom gaan u terug met Leané in haar slaapkamer in" --- Dis korrek," and

22.4 Her evidence during cross-examination when confronted with her statements made to the police;

"As u hom nie deur die venster sien kom het nie, hoe is dit dat u hom sien dat hy die venster uitskop? --- Want hy was alreeds binne gewees en sy voet het vasgehaak aan die vensterraam waar hy hande viervoet alreeds binne in was.

Ek wil vir u dit so stel, dis 'n redelike belangrike punt.

Dis reg.

Nou waarom sal u dit nou vir die Hof 'n verduideliking gee daaromtrent as u die geleentheid gehad het om dit in hoofondervraging te doen en u het nie? --- Ek het seker maar net nie – ek het nie rêrig 'n rede nie. Jy het my gevra of ek hom gesien inkom het, maar ek het hom nie gesien inkom nie, ek het gesien hy was alreeds in, sy voete het vasgehaak en hy was hande viervoet alreeds op die mat gewees.

Net om dit weer aan u te verduidelik, nie toe ek u ondervra het nie, toe die aanklaer u ondervra het, het sy u pertinent gevra, het u gesien dat hy by die ruit inkom? --- Nee ek het hom nie gesien by die ruit inkom nie, hy was alreeds binne en sy voet het vasgehaak by die ruit en sy hande was op die mat gewees.

Maar dit was 'n baie belangrike punt, hoekom het u dit nie vir die aanklaer gesê in hoofondervraging nie? --- Maar ek het seker maar vergeet, ek het nie – ek het seker maar vergeet, dit is nie aspris gewees nie

En dan in die tweede verklaring, die een met die klein lettertjies nie, het u ook gesê: Petrus het aangeklop teen die venster en hy het die klein venster in die kamer gebreek en daardeur geklim.” Nou dit is nou weer 'n ander weergawe as wat u in die eerste verklaring en in die hof getuig het. --- Hm.

Hier sê u dat hy die venster gebreek het en toe ingeklim het, verduidelik vir die Hof dit asseblief --- Mag 'n mens 'n demonstrasie wys u Edelaagbare?

HOF: Ja u kan. Die getuie klim uit die getuiebank uit - Toe ek hom gesien het, het ek nie gesien hy klim in die venster in nie. Ek het op daardie stadium – dit was 'n lang gang, ek het na my dogtertjie toe gegaan want sy wil begin huil. Toe ek uitkom wat die deure was nie toe

gewees nie, toe sien ek Mnr Boshof in hierdie posisie staan al, met sy voete al daar, en toe hy die laaste – toe hy die laaste skop gee, toe skop hy die venster uit. Want hy het die venster opgelig, wat dit was 'n warm somers aand, ons het nie gesluit nie. Hy het die venster opgelig, hy het seker deurgeklim, en ek het hom op daardie posisie gesien.”

23. As to the latter version during cross-examination, that the appellant kicked out the window as he entered the bedroom it is important to note that during her evidence-in-chief, when asked by the prosecutor when she noticed for the first time that the window was broken, the complainant's answer was “dieselfde aand toe die polisie gery het. Logic dictates that the complainant could not have seen the appellant kick at and break the window if she only noticed the broken window after the police had left the house.

24. The view expressed in the majority judgment, that the appellant supports the complainant partly in her evidence that she saw him breaking into the house, is not correct and the extract of the appellant's evidence-in-chief which purportedly supports this view is not contextualised. Immediately after the extract of the appellant's evidence quoted in paragraph 13 of the majority judgment the appellant continues his evidence as follows:

"Goed. --- Ek het myself toe – nie een van hulle twee het my geantwoord nie. Desiré het omgedraai en ek kon gesien het sy stap af in die gang wat die venster is reg in die middel van die gang of jy kan in die middel van die gang afsien. Sy het

omgedraai en weggeloop. Ek kon nie sien wat die ligte was alles af, ek kon nie sien waarna toe sy loop nie.

U ken die huis, as sy in die gang afstap, is daar 'n klomp verskillende kamers waarna toe sy kan gaan of . . . (tussenkoms). ---Dis korrek ja, sy kan regs draai dan gaan sy in die badkamer en die stort, daar is twee badkamers, een wat 'n badkamer en 'n stort en 'n toilet is, so sy kon regs gedraai het soontoe of sy kon links gedraai het in baba se kamer, dan is daar nog drie ander kamers wat sy kon ingedraai het.

Goed, so maar u haar nie gesien nie, sy was net in donker verkwyn. --- Sy, ek kon haar nie gesien het op daardie stadium, sy het in die donker ingegaan."

It was only after the complainant had walked down the passage away from the bedroom that the appellant on his version was pulled through the window by Brink. His version does therefore not support the version of the complainant that she saw the appellant breaking into the house through the bedroom window.

25. Brink did not testify and the contradictions in the version of the complainant cannot simply be disregarded as the magistrate did. It impacts on the reliability of the evidence of the complainant as a single witness. Such evidence should always be treated with caution and a conviction will normally follow only if the evidence is substantially satisfactory in every material respect or if there is corroboration.
26. The magistrate instead, concentrated on tearing apart the appellant's version and found on probabilities and inferences, some not even based on proven facts, that the appellant's

version should be rejected. For instance she found, based on her own observation when she warned Brink on two occasions to be present at court as a witness, that it was improbable that Brink would have the strength to pull the appellant through the window. The magistrate also found it improbable that once Brink had pulled the appellant through the window that he would stand around with arms folded and, other than invoking profanities, do nothing to the appellant. The appellant's evidence is however that Brink, after pulling him through the window stood in the doorway of the bedroom, with arms folded, and said "ons sal maar sien hoe kom jy hierso uit" which is why, the appellant explained, he forced his way past Brink to the child's bedroom, since he did not want to be cornered in the main bedroom with Brink.

27. The appellant's version, that he opened the window wider and pushed aside the blinds to peer inside the room when he was grabbed around the neck by Brink and pulled into the room, stands uncontradicted. The complainant could not deny that he had entered the house in this fashion. She was also aware that the appellant had laid a complaint of assault against Brink. The appellant's evidence that he had obtained certain injuries as a result of being pulled through the window is supported by photographs which had been taken of the injuries and a statement by a police officer upon his arrest. The statement notes the injuries observed by the police officer as being on "*linker been onder, regter en linker arm beseer met blou merke.*" The magistrate's finding that the injuries were a neutral factor since it could just as well have been incurred when he squeezed himself through the small window is indicative, in my view, of the fact that she did not apply her mind in assessing the appellant's version. In such a situation

the appellant is entitled to the benefit of the doubt, whether the magistrate subjectively believed him or not.

In **S v Mafiri** 2003(2) SACR 121 (SCA), at paragraph 9 thereof, the Supreme court of Appeal reiterated the test to be applied in assessing the explanation given as:

“there is no obligation upon an accused person, where the State bears the onus, *“to convince the court”*. If his version is reasonably true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused’s version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused’s evidence may be true.”

28. I am of the view, based on the evidence, that the appellant’s version in this regard is reasonably possibly true and should be accepted.
29. A further problem which presents itself in this matter is that of the magistrate relying on **S v Jasat** 1997(1) SACR 489 (SCA) in convicting the appellant of housebreaking with intent to contravene s 1(1) (a) of the Trespass Act, No 6 of 1959, and a contravention thereof as a competent verdict to the main charge of housebreaking with intent to commit an offence unknown to the state.
30. Mr Nel for the appellant correctly argued that **S v Jasat** has no application in the present case. In Jasat the appellant who

had been charged with housebreaking with intent to steal and theft had been convicted of "*housebreaking with intent to trespass and trespass.*" The appellant in that case argued that since "*trespass*" was not recognized as a crime by the common law, the conviction thereof should be set aside. The SCA held that the correct description of the offence Jasat was found guilty of is "housebreaking with intent to contravene s 1(1)(a) of the Trespass Act and the contravention thereof" and accordingly substituted the wording of the trial court therewith.

31. The issue in *casu* is not whether the offence the appellant was convicted of exists in law, or whether it is correctly worded, but whether it is a competent verdict on a charge of "housebreaking with intent to commit an offence unknown to the state". This is exactly what is dealt with in **S v Konyana** en 'n Ander 1992(1) SASV 451(O), and which in my view states the correct position in this regard. In the Konyana case the two accused were charged in the magistrates court with housebreaking with intent to commit an offence to the prosecutor unknown. They were convicted of housebreaking with intent to trespass and trespass. On review it was held that the accused could be convicted of housebreaking with intent to be on the premises broken into without permission in contravention of s 1(1) of the Trespass Act, but not also of the separate statutory and substantive offence of trespassing. See also **S v M** 1989(4) SA 718(T) and **S v Zamisa** 1990(1) SASV 22 (N) which are referred to in the Konyana case.
32. I am of the further view that since, on the evidence, the "entering" component of housebreaking cannot be found to be intentional, and since the appellant cannot be found to

have unintentionally entered the house with the intention of committing some or other offence inside, that the appellant can only safely be convicted of the alternative charge of a contravention of s 1(1)(a) of the Trespass Act, No 6 of 1959. The evidence has clearly shown that he unlawfully and intentionally entered upon the land of the complainant without her consent. The sentence should be adjusted accordingly.

33. I would therefore set aside the convictions and sentence and replace it with a conviction of the alternative charge of contravening s 1(1)(a) of the Trespass Act and sentence the appellant to a fine of R1000, 00.

C C WILLIAMS
JUDGE

High Court of South Africa

<u>On behalf of the Applicant :</u>	Adv I. J NEL (Elliott, Maris, Wilmans & Hay)
<u>On behalf of the Respondent:</u>	Adv J. S MABASO (Director Public Prosecutions)