

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 186/2012

In the review of:-

THE STATE

and

MARSHALL DE KOK

CORAM:

DAFFUE, J *et*

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

18 SEPTEMBER 2012

[1] This matter was send to the High Court for special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1997 ("CTA").

[2] The accused was charged with and convicted on 22 May 2012 of housebreaking with the intent to commit a crime unknown to the state. He was sentenced to 8 months imprisonment of which was suspended for a period for 4 years on condition that he is not convicted of housebreaking with the intent to commit any crime or

attempt thereto of theft or attempted theft and for which the sentence to unsuspended imprisonment without the option of a fine committed during the period of suspension. The accused was represented by an attorney, Mr Z Luntinto.

[3] A statement in terms of section 112(2) of the CTA was prepared for and on behalf of the accused by his legal representative which statement was read into the record and handed in as exhibit A. The accused confirmed that he signed the statement and the correctness of the allegations contained therein. The prosecutor confirmed that the facts as avert were in accordance with the state's case and the plea was accepted on that basis.

[4] It appears from the section 112(2) statement that the accused was caught red-handed by the complainant whilst he was already inside his house after obtaining excess through a window, the handle of which had been broken by the accused. The statement *inter alia* contains the following admissions:

“4.2 On the said date I went to the above address and then I

broke the handle of the window. I entered to (sic) the house at about 02am in the morning.

...

5. I admit that after I entering to (sic) the house I checked the items in order to steal it.
6. I admit that the owner of the house came and caught me inside the house.
7. I admit further that I had no reason in law to break into the said premises with intent to steal.”

[5] The presiding magistrate submitted that the conviction was not in accordance with the law and requested the High Court to amend the conviction and to convict the accused of housebreaking with the intent to steal and further, to confirm the sentence. The court *a quo* relied on the judgments of **S v BLAAUW** 1994 (1) SACR 11E and **S v KESOLOFETSE AND ANOTHER** 2004 (2) SACR 166 (NC).

[6] Section 262 of the CPA reads as follows:

- “2. 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 of the common law, does not proof the offence of housebreaking with intent to commit an offence to the prosecutor unknown, but the offence housebreaking with intent to commit a specific offence, or the offence of malicious injury to property the accused maybe found guilty of the offence so proofed.”

[7] The allegations contained in section 112(2) statement presented the evidence on which the accused was found guilty. That evidence indicated the accused’s intention at the time and that was to steal. It was not necessary amend the charge at that stage, but to convict the accused on the known facts of housebreaking with the intent to steal. As state by Du Toit *et al* commentary on the Criminal Procedure Act 26/9 it would be senseless and also misleading for criminal record purposes to held otherwise.

[8] In conclusion I confirm that I am in agreement with the judgements referred to by the presiding magistrate as well as his present viewpoint. The judgment and sentence were recorded in Afrikaans and therefore the order therein will be in Afrikaans.

[9] Consequently, the following orders are issue:

1. Beskuldigde se skuldigbevinding word ter syde gestel en vervang met die volgende:

Beskuldigde word skuldig bevind aan **huisbraak met die opset om te steel.**

2. Die opgelegde vonnis word bekragtig.

J. P. DAFFUE, J

I concur.

/eb
