

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 92/2008

In the review between:-

THE STATE

versus

OTHNIEL SELLO MAIEANE

CORAM: VAN ZYL, J *et* MOCUMIE, J

JUDGMENT BY: MOCUMIE, J

DELIVERED ON: 26 MAY 2008

[1] The accused was charged with housebreaking with intent to commit an offence unknown to the prosecutor. On 7 December 2007, he was convicted of “*housebreaking with intent to trespass and trespass*” and sentenced to

“R1000,00 or five months imprisonment: and further that accused be sentenced to ten (10) months imprisonment which is suspended for five (5) years on condition that accused is not convicted of housebreaking with intent to trespass and trespass or with intent to commit any other offence committed during the period of suspension.”

[2] The matter came before me on review in terms of section 302 read with 304 of the Criminal Procedure Act, 51 of 1977 (*“the CPA”*). I was not satisfied that the proceedings were in accordance with justice and sent a query in the following words:

- “1. ...
2. ...
3. *Why was the accused convicted of housebreaking with the intent to trespass and trespass? Was this offence proved?*
4. *Why was it necessary to impose an additional term of imprisonment?*
5. *Is the sentence on the face of it, taking into account the type of offence alleged to have been committed not excessive?*
6. *Is the condition attached to the suspended sentence not too wide and general?”*

[3] The Magistrate responded to the query and I thank him for that. There are however other peripheral aspects which will be addressed in the judgment without the benefit of any comment from the Magistrate.

- [4] The facts of the matter are simple. On 3 October 2007 an intruder broke into the house of Ms M J Melamu. The complainant was woken up by the sound of glass breaking. When she saw and identified the intruder as the accused, the latter ran away. A window pane was damaged. The cost of the damage was more or less R60,00. The accused did nothing else.
- [5] It is a fundamental principle of our criminal law that in order to secure a conviction the State is obliged to prove its case beyond reasonable doubt. On the facts presented, the State indeed proved that the accused had broken into the house of the complainant on the night in question. The issue is not about the housebreaking component but about whether the State had proved the second component i.e. the intention to commit a specific offence. It is prudent to mention two aspects at this early stage. Firstly in South Africa there is no offence called "*trespass*"- the offence is one of contravention of section 1 of the Trespass Act 6 of 1959. The conviction of the Magistrate is strictly speaking defective. See **S v Konyana** 1992 (1) SACR 451 (0); **S v Jasat** 1997 1 SACR 489 (SCA). Secondly in South Africa the offence of

housebreaking with intent to commit an offence unknown to the prosecutor is a recognised offence. It is futile to engage in debates around whether it makes sense to keep it on our statute books. If the State proves it beyond reasonable doubt, the accused ought to be convicted thereof.

- [6] In **S Motsomi** 2005 JDR 1080 (T) **Bosiello J** stated the following succinctly:

“It is a fundamental and time-honoured principle of our criminal law that every accused must be fully advised of the charge which he or she is facing with sufficient details to be able to answer thereto.(See section 35(3)of the Constitution).This hallowed principle is intended to avoid ‘a possibility of a trial by ambush’. This requires that where the State intends to rely on competent verdicts in terms of section 256 to 270 of the Code, that such an accused be informed of all relevant competent verdicts even before he pleads to the charge. Such a step will put such an accused in a position to know and make an informed decision inter alia as to how to plead, which facts to admit and how to conduct his defence. (See Velela 1979 (4) SA 581 (O) and Kester 1996 (1) SACR 461 ((B) at 469i.) Furthermore such an approach will avert any possible prejudice

to such an accused, particularly if he is illiterate, unsophisticated and unrepresented.”

- [7] Section 262 (2) of the CPA, in fact engraves this point by providing that:

“(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 or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specific offence, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.”

- [8] In this case the State had to prove beyond reasonable doubt that the accused
- (a) entered or was upon the premises;
 - (b) without the permission of the owner or the occupant thereof (unlawfully); and
 - (b) with the intention to remain on the premises (*mens rea*).

[9] The Magistrate conceded, correctly so, that the accused fled immediately upon the complainant identifying him and thus it was difficult for him to determine the intention of the accused. In my view, that should have been the end of the story. The State did not prove the intention to commit a specific offence of “trespassing” beyond reasonable doubt in this case but the offence of housebreaking with intent to commit an offence unknown to the prosecutor. There is no indication from the circumstances of this case what the accused intended doing inside the house. The complainant’s view in this regard was not even canvassed. The conviction on housebreaking with intent to commit a specific offence cannot stand. The fact that the accused was not informed of the applicable competent verdict referred to of which he was convicted exacerbates the whole situation and is an irregularity.

[10] The last aspect that needs specific mention is the meaning of section 262(2) of the CPA. A great deal of confusion continues to surround this area of the law as is evidenced by this case because of different interpretations by different authors in criminal law. It is thus important to reiterate what

was said by the Court in **S v Blaauw** 1994 (1) SACR 11 (E) where an accused was charged with housebreaking with intent to commit an offence unknown to the prosecutor and convicted of housebreaking with intent to steal and theft after the evidence proved that he had intended to steal a slice of bread. **Zietzman JP** then stated at 13 c - f:

“Na my mening is die betekenis van die genoemde subartikel duidelik. Op 'n aanklag van huisbraak met die opset om 'n aan die aanklaer onbekende misdryf te pleeg kan die beskuldigde aan byvoorbeeld huisbraak met die opset om te steel skuldig bevind word indien daar bewys word dat dit die beskuldigde se bedoeling was, toe hy ingebreek het, om te steel. Die beskuldigde kan ook aan opsetlike saakbeskadiging skuldig bevind word as daardie misdryf bewys is. Die artikel bepaal egter nie dat so 'n beskuldigde aan twee misdade skuldig bevind kan word soos byvoorbeeld huisbraak met die opset om te steel en diefstal nie.

'n Skuldigbevinding aan twee misdade waar die beskuldigde slegs van een misdaad aangekla word sal verkeerd wees. In die sake waarna die landdros verwys, naamlik S v Andrews 1984 (3) SA 306 (OK); S v M 1989 (4) SA 718 (T) en S v Zamisa 1990 (1) SASV 22 (N) is dit ook duidelik so gestel. Ek stem saam met die genoemde beslissings en dit volg dat die

passasie deur Hiemstra op 569, waarna ek hierbo verwys het, na my mening verkeerd is.”

- [11] The thrust of the judgment is simply that it not competent in terms of section 262 of the CPA to convict the accused of housebreaking with intent to commit a specific offence and also of the specific offence. The principle is well known that an accused cannot be convicted of the two offences which in effect were committed during a single incident as that would be tantamount to improper duplication of convictions.
- [12] In regard to the sentence imposed, it is trite that sentencing is in the discretion of the trial Court. The Court on review or appeal may only interfere with such sentence if the trial Court misdirected itself or did not apply its mind judiciously to the facts put before it on sentence. Despite the Magistrate's indication that he considered all factors before him, it is clear from his reasons for sentence that he overemphasised the interests of the society. There is no basis why the Magistrate took into account and to the prejudice of the accused his previous convictions which are not even relevant in this

particular case apart from showing a propensity to assault people.

[13] It is wrong to move from the premise that because an offence is of prevalence and serious, the only suitable sentence is that of direct imprisonment. Each case must be determined on its own merits. Sentence must be individualised to a great extent not only to suit the offence but to rehabilitate the accused as well. I am of the view that the additional 10 months imprisonment, even if it may be imposed in similar cases, is not justified in this case.

[14] In the circumstances I make the following order:

Order:

1. The conviction on ***“housebreaking with intent to trespass and trespass”*** is hereby set aside and substituted by the following:

“The accused is convicted of housebreaking with intent to commit an offence unknown to the prosecutor.”

2. The sentence imposed by the Magistrate on 7 December 2007 is set aside and substituted by the following:

“R1000,00 (one thousand rand) or 5 (five) months imprisonment wholly suspended for five years on condition that the accused is not convicted of housebreaking with intent to commit any offence committed during the period of suspension.”

B.C. MOCUMIE, J

I concur.

C. VAN ZYL, J