

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

High Court Ref. No.: 061488/06
Magistrate's Serial No. 69/2006
Case No: SHA75/2006

In the matter between:

THE STATE

and

ALBERT SLABB

Accused

REVIEW JUDGMENT: 11 SEPTEMBER 2006

A L E G R A N G E A J :

1]The Magistrate sitting in the Regional Court, Wynberg has referred this matter to the High Court in terms of section 116(3) of Criminal Procedure Act 51 of 1977 (“the Act”) on special review.

2]The accused was convicted in the district court of Wynberg on 23 March 2006 on a charge of housebreaking with intent to steal. The facts, which the district court magistrate, in my view, correctly accepted can be summarised as follows: the complainant and her three minor children were asleep in the bedroom when they

were awoken after midnight by a falling plate and spoon in the kitchen; a curtain separates the kitchen and the bedroom; the complainant saw the accused who lives in the area and is known to her, in the kitchen; the accused unlawfully gained entry to complainant's premises by using a screwdriver to prise open the front door; the accused's movements were confined to the kitchen area where items of value were kept; he fled the scene upon being discovered; the complainant was not able to testify whether the accused removed or attempted to steal any of her goods in the kitchen, neither was any item missing from the kitchen.

3]The district court convicted the accused of housebreaking with the intent to steal and referred the matter to the regional court for purpose of sentence as the accused's list of previous convictions ran into a number of pages, many of which, relate to crimes of dishonesty.

4]The regional court magistrate, seized with the matter, after perusal of the record was dissatisfied that the proceedings in the district court were in accordance with justice. He requested further reasons from the district court magistrate for her conviction.

5]In her reply the district court magistrate commented as follows:

"It is clear from the evidence which the court accepted that the Accused indeed broke into the house. The only other question to be answered is was it his intention to steal. It is clear from the evidence of the complainant that the Accused did not take anything."

However the accused entered her premises was in the kitchen and was disturbed by the falling plate and spoon. Which resulted in him checking if anyone was awoken by the noise.

It is clear that he did not enter the premises to assault or rape (the) complainant, his movements were confined to the kitchen area. The complainant testified that she had a TV, kettle and an iron.

It is sufficiently clear to the Court that there were items of value on the premises.

The Accused could not complete the act of stealing any item because the complainant had awoken by noise of the falling plate and spoon and started screaming for help.

I therefore am of the view that in the light of these facts the only conclusion to be drawn is that the Accused entered the premises with intention to steal.”

6]The regional court magistrate, however, is of the view that there is insufficient evidence to draw the only reasonable inference that the accused had the intention to commit theft or any crime, when he was found on the premises of the complainant.

7]In his memorandum to the High Court, the magistrate referred to section 262(1) of the Act, as well as S v Woodrow 1999(2) SACR 109(C) where the Court held that the validity of a charge of housebreaking with the intent to commit an offence to the prosecutor unknown had long been the subject of criticism by our courts and the academic writers. As a result the courts usually sought to find some criminal intent on the part of the accused, when the charge against him was housebreaking with the intent to commit an offence to the prosecutor unknown. The Magistrate also made reference to the requirements for a conviction of housebreaking with the intent to

trespass.

8]The referring Magistrate further expressed the view that as a result of the decision in *S v Woodrow* (*supra*), the accused in this matter did not commit any offence and therefore the conviction of the District Court Magistrate should be set aside.

9]I cannot agree with the conclusion reached by the Regional Magistrate. Firstly, the facts in the *Woodrow* case differ significantly from the facts in the present matter on review. Secondly, to regard the reasoning in the *Woodrow's* case as authority not to convict an accused person of housebreaking with the intent to commit an offence unknown, as provided in section 262 of the Act, is misplaced. Thirdly, for a successful conviction of housebreaking with the intent to trespass as envisaged in section 1(1) of the Trespass act 6 of 1959, the prosecution needs not only to prove that the perpetrator(s) unlawfully entered the premises with the intention 'to remain' on the property but also that the perpetrator 'was' on the property and intended 'to be' on the property. (See Snyman *supra* at 546 also footnote 111 and at 547 – 548).

10]In the *Woodrow's* case the accused was charged in the district court *inter alia* with housebreaking with the intent to commit an offence to the prosecutor unknown. The accused had gone to the home of the complainant with whom he had had an intimate relationship with the intention to speak to her and fetch his clothes. The relationship had soured and the complainant would not admit him to her premises. The accused thereupon broke a window, bent back the burglar bars, and climbed into

the premises. A scuffle ensued inside, during which the accused pushed the complainant around, and broke a telephone in respect of which separate charges of assault and malicious injury to property respectively were preferred against him. The magistrate then convicted the accused of housebreaking with intent to commit an offence to the prosecutor unknown as well as the other charges.

11]The Court in Woodrow correctly set aside the conviction of housebreaking with the intent to commit an offence to the prosecutor unknown, as the intention of the accused, when he committed the unlawful entry, was not “unknown” to the prosecutor. The Regional Court Magistrate’s reliance on the Woodrow’s decision that a conviction of housebreaking with the intent to commit an offence unknown is undesirable and therefore, so it seems from his memorandum, to be irregular, is misconceived. The reference to the comments of the academic writers and in particular to the work by De Wet and Swanepoel *Strafreg* 4th ed at 369 cannot, in my view, be regarded as authority to disregard the provisions of section 262 of the Act. (See also Snyman, *Criminal Law* 4th ed at 545 – 546).

12]It is necessary to refer to Section 262 and in particular subsection (1) of the Act, which is applicable in this matter. It provides as follows; *‘if the evidence on a charge of housebreaking with the intent to commit an offence specified in the charge, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with the intent so specified but the offence of housebreaking with the intent to commit an offence other than the offence so*

specified or the offence of housebreaking with the intent to commit an offence unknown or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.' The definition of housebreaking with the intent to commit an offence unknown may seem questionable (Snyman, *supra*) but the crime of housebreaking, as commonly understood, constitutes a major invasion of the private lives and dwellings of ordinary citizens. The purpose of this crime is to protect and preserve the sanctity of people's homes and property and to punish those perpetrators who unlawfully gain entry into a home or other premises with the intention of committing a crime on the premises. There are numerous instances where perpetrators break into premises and commit heinous crimes. A common sense approach is therefore called for in determining the intention of perpetrators when they face a charge of housebreaking with the intent to commit an offence unknown to the prosecution and the ordinary principles of law must apply. (See S v Wilson 1968(4) SA 477 (AD) at 481 F).

13]Where, however, perpetrators are caught after unlawfully breaking and entering into premises and the evidence is overwhelming that their intention was to commit (a) crime(s), but it is impossible for the prosecution to prove what crime(s) they intended to commit, the allegation that they intended to commit an offence unknown and to pronounce a verdict accordingly is, in my view, the proper one. To view it any differently will in effect force the State to resort to trespass prosecutions, or to speculate in respect of some known offences, which may lead to questionable decisions. This clearly will place the prosecution in an untenable position and will

make section 262 of the Act redundant.

14]A perusal of the full record of the hearing in the district court the inescapable conclusion to be drawn is that the accused gained unlawful entry to the premises of the complainant to commit a crime. The facts, however meagre, support the only inference that the accused intended to commit theft. The magistrate in the district court was, in my view, correct to convict the accused of housebreaking with the intent to steal.

15]In the result I will make the following order.

1. The conviction of housebreaking with the intent to steal is confirmed.
2. The record is herewith returned to the Regional Magistrate to continue with sentence proceedings.

A L E G R A N G E

V E L D H U I Z E N , J : I agree and it is so ordered.

1]

2]PAG

E

A H V E L D H U I Z E N