



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

High Court Ref. No.: 46/2026
Review Case No.: C1199/2025
Serial No.: 07/2026

In the matter between:

THE STATE

V

DANVILLE JANTJIES

Summary: Charge: Housebreaking with intent to steal and theft - Two separate offences- Theft- elements - act of appropriation - depriving the lawful owner or possessor of his property- exercising the rights of the owner in respect of the property - which takes place unlawfully and intentionally - including the intention to appropriate - items collected and concealed in the shop - accused interrupted from taking the items by the law enforcement officer - items and bag left in the shop-no act depriving the owner of his control - only attempted theft - conviction altered - Housebreaking with intent to steal and attempted theft.

ORDER

The conviction is set aside and substituted with the following:

1. The accused is convicted of housebreaking with intent to steal and attempted theft.
2. The sentence is confirmed.

JUDGMENT

GXASHE, AJ

[1] The matter comes before me on review in terms of section 302 of the Criminal Procedure Act 51 of 1977 (the “CPA”). The accused was convicted in the Magistrates’ Court of Caledon for housebreaking with intent to steal and theft and was sentenced to 36 months imprisonment.

[2] During the proceedings, the accused was unrepresented. He pleaded guilty to the charge of housebreaking with the intent to steal and theft, in that on 16 December 2025 he broke open and entered the shop of Mr Lian King and stole cigarettes and lighters valued at R 7000 the property which was in his lawful possession. Consequently, the court invoked the provisions of section 112(1)(b) of the CPA and following the questions by the magistrate, he responded as follows:

‘Magistrate: [t]he State alleges that the reason why you broke open and entered the shop was to steal items kept inside?’

Accused: I confirm Your Worship.

Magistrate: [t]he State alleges further that when inside you took cigarettes and lighters valued at R 7000. Would you be able to agree or dispute that?

Accused: I confirm Your Worship.

Magistrate: Mr Jantjies, did you have any right or permission for your conduct?

Accused: [n]o, Your Worship.

Magistrate: Mr Jantjies, [can you] tell the Court what happened on 16 December 2025.

Accused: Your Worship, I just took a crowbar and opened the door.

Magistrate: [w]hat time of the day or night was this?

Accused: I cannot say exactly.

Magistrate: Sorry. But was it at night or during daytime?

Accused: [d]uring daytime, Your Worship.

Magistrate: [o]kay. You said you took the crowbar that was in your backpack, what did you do with it?

Accused: [o]pened the door and went straight inside.

Magistrate: [a]nd then?

Accused: I went straight to the cigarette shelves, Your Worship, and packed them in.

Magistrate: [a]nd then?

Accused: [a]nd gathered the lighters to a spot. I went at the back to the storeroom. I noticed that there also packets and a lot of packets of cigarettes. I took that as well. I could say I was about 30 minutes there at the back, Your Worship. I saw the law enforcement or rather they saw me. The law enforcement officer saw me between the shelves, Your Worship. I jumped over the balcony, Your Worship, and went around to where the pumps, Your Worship, and he caught up with me, Your Worship.

Magistrate: [o]kay, and the items [were] with you or still in the shop?

Accused: [i]n the shop, Your Worship.

Magistrate: [a]nd your backpack?

Magistrate: [a]lso, in the shop.'

[3] Relying on these facts, the magistrate convicted the accused for housebreaking with intent to steal and theft. A close examination of the plea proceedings reveals that the questioning did not establish all the elements of the offence of theft. Evidently, the act of removing the items and thereby depriving the owner of his property was incomplete although the intent was there.

[4] As a result on 2 March 2026 I enquired from the magistrate whether the offence of theft was completed in the circumstances and on 16 April 2026 he responded as follows:

'Theft is defined as the unlawful and intentional appropriation of property belonging to someone else with the intention to deprive the owner permanently of such property. The two requirements to be discussed are: (i) the intention to deprive the owner of his property and (ii) the act of removal of the thing.'

[5] In dealing with the first requirement, the magistrate stated that it was settled by the Appellate Division in *R v Sibiyi* 1955 (4) SA 247 (A) 246 that the accused cannot be convicted of theft unless he intended to deprive the owner permanently of the whole

benefit of his ownership. This means that there must be a clear intention to effect an appropriation of the said property (see also *S v Boesak* 2000 (1) SACR 633 (SCA)). Therefore, there must be an assumption of the rights of ownership and a concomitant exclusion of the owner from the enjoyment of his rights in the thing.

[6] The magistrate further stated that the intention to deprive the owner of his thing (removal of control over the thing) can be inferred from the conduct of the accused. The circumstances of each case will call for a careful evaluation to determine whether the accused had the necessary intention to deprive the owner of control permanently. This intention refers to the mental state of the accused and therefore calls for a subjective inquiry – a subjective test. According to the magistrate, it is clear from the accused's conduct, for instance by arming himself with a tool to gain forceful entry and carrying a bag, that he intended to remove whatever property he could find and take control over such property. The accused indicated in his plea that he only placed certain items in his bag, and this is a clear intention that he intended to deprive the owner control over those items permanently.

[7] In respect of the second requirement, the magistrate stated that one needs to take into consideration whether the removal was completed or not. He opined that the definite line between an attempt and a complete act of appropriation is a very thin line. The removal of a thing from the owner's control is a factual question and could be inferred from the circumstances of each specific set of facts. The magistrate also referred to Snyman, *Criminal law* 6ed, that the test to distinguish between completed and uncompleted appropriation is always whether at the time X was apprehended with the property the owner Y had already lost control of the property and X had gained control of it in Y's place. He found support from *Lujaba v S* 1987 (1) SA 226 (A) and stated that 'the moment the accused conceals the item in his clothing or other way, it ceased to be visible to the owner or other employees in the shop and in that specific moment the exercise of control of the item is removed from the owner'.

[8] According to the magistrate, the mere fact that the accused collected different items from different areas of the store and in the storeroom, placing them in a bag and placing the bag in a certain area of the shop is an indication of taking control of the items. In the end, he was satisfied that the accused did everything possible to complete housebreaking with intent to steal and theft and the interruption to get away cannot negate his intention to permanently deprive the owner of ownership of his items.

[9] The magistrate correctly pointed out that the accused had the intention to steal the items. However, he was wrong in his reasoning to imply that theft was completed because the accused left everything he was intending to steal inside the shop when he was interrupted by the law enforcement officer. He appears to be of the view that the moment the accused conceals the item in his clothing or other way it ceased to be visible to the owner or other employees in the shop and at that specific moment the exercise of control of the item is removed from the owner. In the circumstances he found support from *Lujaba v S* 1987 (1) SA 226 (A).

[10] With respect, the Court in *Lujaba* at page 234 para (a) disagreed with this proposition and held that “however, Friedman R’s statement is worded in such a way that it is susceptible to the interpretation that the mere fact of an article being concealed on her person justifies the inference beyond reasonable doubt that she did not intend to pay for it. With such broad interpretation I cannot agree with respect. If a customer takes an article in the shop and hides it under her jacket, or even her pocket, or for example she puts it in her bag, and she is stopped before she reaches the checkout, an inference that she did not intend to pay for it and is therefore guilty is certainly not justified. Whether that inference is justified beyond reasonable doubt depends of course on all the circumstances of a particular case...”

[11] The test to determine intention in the circumstances is subjective, however it is inconceivable to conclude that removing the items to different areas of the shop, placing them in a bag and concealing the bag in a secluded place establishes that the owner of the shop no longer had control of the items. It is worth pointing out that the accused’s

admissions clearly indicated that he did not take control of the items he intended to steal, instead control was still ceased with the owner.

[12] This was the rationale of this division in *S v Mzandi* 2011 (1) SACR 253 (WCC) at 225 par (a) where the court held that “it was clear from the various definitions employed in our case law and well-known textbooks on the crime of theft that an appropriation of the property must take place before theft could be said to have been committed. The facts of the present case justified an inference that the accused intended to steal the hi-fi system, as well as some clothes. These had been gathered together which act constituted at least the beginning of the execution of a crime of theft, but there had been no act that deprived the owner of the items or his control of them. The crime had thus not been completed, and only attempted theft had occurred”.

[13] For an act of appropriation to constitute theft, it is accordingly necessary that the rightful owner or possessor must be excluded from his property, and the offender must assume control over the stolen item. I consider however that the court errs in concluding that, when the accused concealed the item beneath his clothing, the owner of the shop no longer exercised control over the said item. On the contrary, the evidence establishes that the security guard at the premises had observed the intended offence, and the accused recognized that it would not be possible for him to leave the premises with the bottle of whisky. It was precisely because he recognised that the owner through the security continued to exercise effective control over the bottle. He made no attempt to remove the bottle from the building, clearly because he realized that he could not do so without surrendering the bottle to the control of the security guard. *S v Mekula* 2012 (2) SACR 521 (ECG) para 7 to 8.

[14] The questioning in plea proceedings is for the purpose of determining whether the accused person admits all the elements of a particular offence. Particular attention needs to be given to the elements of specific offences when magistrates consider plea proceedings, especially where the accused is unrepresented. To avoid injustice against the accused person it is imperative that magistrates adhere to the constitutional

requirement of fairness when considering plea proceedings. See *section 35(3) of the Constitution*. To this end, I am of the view that the owner in the circumstances was still in control of the items because the accused actions were interrupted before he could succeed in completing the offence. I am therefore not satisfied that the accused admitted all the elements of the offence proffered against him. Ordinarily, the accused should have been convicted for housebreaking with intent to steal and attempted theft.

Sentence

[15] It is trite that the imposition of sentence is pre-eminently a matter that falls within the discretion of the trial court.¹ This court, however, is at liberty to consider the sentence afresh.² It can therefore be expected that the sentence imposed by the trial court be substituted with a lesser sentence considering the court's finding that the accused should have been convicted for house breaking with intent to steal and attempted theft. However, the accused is convicted of a serious offence, and he committed this offence at the same premises he had broken into in 2024 as a result, he was convicted and sentenced to 30 months imprisonment. On 16 December 2025, after his release on parole, he went back to the same premises and committed this offence. Except for this conviction, he has a lengthy list of previous convictions which reflect among others theft dated 26 June 2017 and housebreaking with intent to steal and theft dated 18 August 2018. I am satisfied that the court a quo in the circumstances considered and balanced the factors as enunciated in *S v Zinn* 1969 (2) SA 737 (A) appropriately and I am of the view that the sentence imposed should not be disturbed.

Order

[16] In the result, I make the following order:

¹ *S v Kgosimore* 1992 (2) SACR 238 (SCA).

² *S V Mekula* 2012 (2) SACR 521

The conviction is set aside and substituted with the following:

1. The accused is convicted of housebreaking with intent to steal and attempted theft.
2. The sentence is confirmed.

Court

N. Gxashe
Acting Judge of the High

I agree, and it is so ordered.

N.E Ralarala
Judge of the High Court