



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

JUDGMENT

Reportable

High Court Ref No: 123/26

Magistrate Serial No: 26/2026

Review Case No: 14/1070/2025

In the matter between:

The State

and

CHRISTOPHER ANDRIES

ABDURAAF ABRAHAMS

ACCUSED 1

ACCUSED 2

And

High Court Ref No: 124/26

Magistrate Serial No: 14/221/2026

Review Case No: 6/230/2026

In the matter between:

THE STATE

and

LWANDO MSIMELELO (SITHEMBELE ADAM) ACCUSED

Neutral Citation: *S v Andries and Another; S v Msimelelo* (Case No. 123/26; and 124/26) [2026] ZAWCHC.... (4 August 2026)

Coram: Pangarker J et Yake AJ

Delivered: 4 August 2026

Summary: Automatic review – Section 302(1) of the Criminal Procedure Act 51 of 1977 – Theft out of motor vehicle – questions posed to accused 2 soliciting responses that conform to a preconceived decision must not be put to the accused when conducting enquiry in terms of section 112(1)(b) of the CPA - purpose of the enquiry is to elicit factual admissions from the accused upon which the court may draw legal conclusions – where the presiding officer frames questions in a manner that predetermines the outcome, the enquiry is rendered defective – conviction of accused 2 not in accordance with justice and thus set aside.

Housebreaking with intent to steal and theft - two separate offences- elements of theft not proven - only attempted theft had been proved - conviction altered - housebreaking with intent to steal and attempted theft.

ORDER

Case no. 14/1070/25:

1. The conviction and sentence in respect of accused 1, Mr Christopher Andries are confirmed.
2. The conviction and sentence in respect of accused 2, Mr Abduraaf Abrahams are set aside.

Case no. 14/221/26:

3. The conviction in respect of accused 2, Mr Lwando Msimelelo is set aside and substituted with the following order:
 - (a) The accused is convicted of housebreaking with intent to steal and attempted theft.
4. The sentence of Mr Lwando Msimelelo is confirmed.

REVIEW JUDGMENT

YAKE AJ (PANGARKER J CONCURRING)

Introduction

[1] The two matters presently under consideration were placed before me in chambers for automatic review in terms of section 302(1) of the Criminal Procedure (the CPA”).¹ The purpose of the referral was to enable the Court to determine whether the convictions and sentences imposed were in accordance with justice.

[2] The two matters are *S v Andries and Another* (“the Andries matter) and

¹ Section 302 (1) of the Criminal Procedure Act 51 of 1977

S v Msimelelo (“the *Msimelelo* matter”). Both matters were adjudicated upon by the same presiding officer (“the magistrate”) sitting in the Cape Town Magistrates’ Court.

[3] Upon perusal of the records of proceedings, I deemed it necessary to invoke the provisions of section 304(2)(a) of the CPA by directing queries to the magistrate.

[4] In the *Andries matter*, the magistrate was specifically requested to address the fact that the record does not reflect whether accused 2’s plea of guilty was tendered freely and voluntarily, and, if not, whether the proceedings were conducted in accordance with justice.

[5] Similarly, in the *Msimelelo matter*, the magistrate was requested to clarify whether the personal circumstances of the accused were adequately canvassed, particularly in light of the limited scope of the three questions posed during the sentencing stage.

[6] I pause to record that, at the time these two matters were transmitted for review, no transcribed record of the proceedings accompanied the referral. The documents submitted comprised only the charge sheets together with the pro forma annexures.

[7] In response to the queries directed, the magistrate furnished the transcribed records of proceedings, accompanied by a covering letter in which an apology was tendered for the late submission thereof. Notably, however, no substantive explanation was provided addressing the specific queries raised in respect of either the *Andries matter* or the *Msimelelo matter*.

[8] In light of the foregoing considerations, and for reasons of practicality, I deem it appropriate to address both matters simultaneously. For purposes of clarity, however, I shall set out the factual matrix as well and the applicable law in respect of each case separately, before proceeding to deal with the issues that arise therein.

The Andries Matter

[9] The two accused were arraigned on a charge of theft out of a motor vehicle. It was alleged that on 24 September 2025, at or near 1[...] Rosa and Wale Street, within the district of Cape Town, they did unlawfully and intentionally steal one red spare wheel, a silver jack, one wheel spanner, a silver eye bolt contained in a black bag, and an emergency triangle contained in a blue bag, from a parked motor vehicle bearing registration number C[...], the ownership or lawful possession of which was vested in a person unknown to the State. The State further alleged that the accused acted in concert and with common purpose in the commission of the offence.

[10] On 13 March 2026, the charge was duly put to both accused, whereupon they tendered pleas of guilty. The magistrate invoked the provisions of section 112(1)(b) of the CPA, and, after questioning the accused in terms of that section, returned verdicts of guilty. The accused were accordingly convicted on the strength of their pleas and sentenced on the same day. Each accused was sentenced to undergo 180 days' imprisonment, wholly suspended for a period of five years, on condition that they are not convicted and sentenced for theft out of a motor vehicle committed during the period of suspension.

[11] It not necessary for this Court to interrogate the conviction of accused 1, as in my view he was correctly convicted and his conviction accords with

justice. The difficulty arises in respect of accused 2, Abduraaf Abrahams. After completing the questioning of accused 1, the magistrate proceeded to put questions to accused 2. The record of proceedings reflects the questioning and answers elicited by the court in terms of section 112(1)(b) of the CPA, which culminated in his conviction.

[12] In order to determine whether accused 2 was correctly convicted, it is incumbent upon this Court to scrutinise the records of proceedings. The enquiry must be directed at the manner in which the magistrate conducted the questioning of the accused during the plea stage. Only by reference to the verbatim exchanges can it be ascertained whether the magistrate adequately canvassed the factual substratum so as to establish all the essential elements of the offences to which the accused purported to plead guilty. The record will accordingly be quoted in extenso, with particular regard to the nature, scope, and sufficiency of the questions posed and the answers elicited. This exercise is indispensable to determine whether the plea was properly taken and whether the conviction can safely stand.

Record of Proceedings

[13] The relevant exchanges are reproduced below²:

“Court: Now accused 2, Mr Abdurrahman Abrams, you heard what accused 1 said. How this crime was committed. Do you confirm or agree with what he said?

Accused: I agree, your honour. I would like to take. Before he could finish, the court intervened.

Court: **Just a minute. Do you also admit that it was you who opened the boot?**

² Page 14 to 16 of the transcribed record

Accused: Yes, your honour. That I was under the influence, your honour.

Court: No, you will be interested to know. Wait, before you even start with that defence, our law says if you take alcohol or drugs and you go out and commit a crime, you can still be punished like any other person who is sober (indistinct) because the mere taking of alcohol (indistinct) that you are not afraid of anything. You understand?

Accused: Yes, your honour.

[14] The magistrate continued to lecture the accused, making reference to case law. He then continued with his questioning as follows:

‘Court: So, you said you opened the boot. And he further said that you took out the things out of the boot, the wheel spanner and the triangle in that blue bag and you handed these over to him.

Accused: Yes, your honour.

Court: and you were then arrested by law enforcement when you started to leave the area.

Accused: Yes, your honour.

Court: I am just (indistinct) what he said, you know, to cut the whole story short. The law enforcement also told you they were watching you on CCTV. And we have video footage of you committing the crime. You will remember that.

Accused: Yes, your honour

Court: Now the same question, like accused 1, did you know it was wrong to do so?

Accused: Yes, your honour

Court: And he further said his intention was that you were going to sell these things to get money for food. Because you agree with what he says. Does the State accept the plea of accused 2 as tendered?

Prosecutor: Confirm, your worship, state accepts the plea.

Court: If the state prosecutor accepts your plea because you admit all the elements of this crime, you both had no valid defence but to come to court and play open cards and plead guilty. You are both found guilty of the theft out of the motor vehicle, a Renault.'

Evaluation

[15] It is manifestly clear that the magistrate did not ascertain whether accused 2 is pleading guilty freely and voluntarily. Further, the record reflects that magistrate did not afford accused 2 an opportunity to narrate the events of the day in question, nor did he pose questions designed to elicit the factual substratum of the offence. Instead, the magistrate merely confirmed the version of events as they had been given by accused 1. It appears that he was already persuaded of accused 2's guilt on the strength of accused 1's statement. This approach is demonstrated at page 15 of the record, where the magistrate remarked:

'To cut the whole story short. The law enforcement also told you that they were watching you on CCTV. And we have the video footage of you committing the crime. You will remember that.'

[16] These remarks were unfortunate. They may reasonably be perceived as coercive, amounting to a suggestion that if accused 2 did not plead guilty, video footage would be produced to prove his commission of the offence. Such

comments undermine the voluntariness of the plea and cast doubt upon whether the conviction was secured in accordance with justice.

[17] What is further striking in this matter is that accused 2 appears to have raised a defence, indicating that he was under the influence of alcohol at the time of the offence. This assertion was, however, immediately dismissed by the magistrate, who informed him that intoxication did not constitute a defence.

[18] While the magistrate may have been correct in principle, it was not for him to summarily reject the defence at that stage of the proceedings. The proper course would have been to enter a plea of not guilty in terms of section 113 of the CPA and to allow the State to discharge its burden of proof.

[19] The failure to do so exemplifies the broader concern that the magistrate appeared to have pre-judged the guilt of accused 2, relying upon the plea and version of accused 1 rather than independently canvassing the factual substratum of accused 2's plea. This approach undermines the integrity of the proceedings and raises doubt as to whether the conviction was secured in accordance with justice.

[20] In *S v Nyanga*,³ Moosa J articulated the proper approach to section 112(1)(b) pleas and observed as follows:

‘Section 112(1)(b) questioning has a twofold purpose: firstly, to establish the factual basis for the plea of guilty and, secondly, to establish the legal basis for such plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning (*S v Nkosi* 1986 (2) SA 261 (T) at 263H–I; *S v Mathe* 1981 (3) SA 664 (NC) at 669E–G; *S v Jacobs* (supra at 1117B)). The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions

³ *S v Nyanga* 2004 (1) SACR 198 (C) 201B-E

of unlawfulness, *actus reus* and *mens rea*. These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty. (See *S v Lebokeng en 'n ander* 1978 (2) SA 674 (O) at 675G–H; *S v Hendricks* (supra at 187b–e); *S v De Klerk* 1992 (1) SACR 181 (W) at 183a b; *S v Diniso* 1999 (1) SACR 532 (C) at 533g–h.)’

[21] In *S v Lebokeng*,⁴ the Court held that the presiding officer should be satisfied not only that the accused committed the act but that he committed it unlawfully and with the necessary *mens rea*.

[22] Similarly in *S v Mshengu*⁵, Jafta JA (Ponnan JA and Mhlantla JA concurring) articulated the proper approach to section 112 pleas. The learned Judge of Appeal observed:

‘Section 112(2) requires that the statement must set out the facts which he admits and on which he has pleaded guilty. Legal conclusions will not suffice. The presiding officer can only convict if he or she is satisfied that the accused is indeed guilty of the offence to which a guilty plea has been tendered. If not, the provisions of section 113 must be invoked.’

[23] The above principles underscore the dual enquiry required under section 112(1)(b) of the CPA: the factual substratum must be adequately canvassed and admitted. A mere recital of legal conclusions is insufficient. Where the admissions do not establish criminal liability, the presiding officer is duty-bound to enter a plea of not guilty in terms of section 113 of the CPA and require the State to prove its case.

[24] Applied to the present matters, the magistrate’s truncated questioning of accused 2 in the *Andries matter*, demonstrates departures from the careful approach mandated in *Lebokeng and Mshengu*. By immediately informing

⁴ *S v Lebokeng en 'n ander* 1978 (2) SA 674 (O).

⁵ *S v Mshengu* 2009 (2) SACR 316 (SCA) at para 7.

accused 2 that intoxication did not constitute a defence, the magistrate demonstrated awareness that the accused was in fact raising a defence.

[25] The duty of a judicial officer under section 112(1)(b) of the CPA is to pose questions that invite the accused to furnish facts, upon which the court may then draw the necessary legal conclusions. It is not the function of the presiding officer to solicit responses that conform to a preconceived decision. That is precisely the mischief which section 112(1)(b) is designed to avoid.

[26] The magistrate ought to have asked the accused whether, notwithstanding his state of intoxication, he was aware of what he was doing. Depending on the answers received, further probing questions should have been posed in a direct manner to elicit the relevant facts. Only once the factual substratum was adequately canvassed could the court properly determine whether the essential elements of the offence were admitted.

[27] As it stands, in my view the magistrate convicted accused 2 on the strength of the plea of accused 1 implicating him in the offence. Such reliance is impermissible, as the plea of one accused cannot serve as admissible evidence against another.⁶ Accused 2 was never afforded an opportunity to explain himself or to articulate the role he allegedly played in the commission of the offence. The failure to canvass his version deprived him of a fair opportunity to place facts before the court. I accordingly find that the conviction of accused 2 was not in accordance with justice.

The Msimelelo Matter

⁶ Schwikkard PJ and Mosaka TB Principles of Evidence 5th Edition (2023) 498-9; Ex Parte Minister of Justice: In re R v Demingo and Others 1951 (1) SA 36 at 45D-F

[28] The accused was arraigned on a charge of housebreaking with intent to steal and theft. It was alleged that on 2 March 2026, at or near 1[...] C[...] Street, within the district of Cape Town, the accused did unlawfully and intentionally, and with the requisite intent, break open and enter the house of Louis Bouli-Nama. Thereafter, the accused wrongfully and intentionally stole one vintage jacket valued at R600, one sweater valued at R300, and a pair of sneakers valued at R1 800, being the property or in the lawful possession of Louis Bouli-Nama.

[29] On 8 April 2026, the charge was duly put to the accused, whereupon he tendered a plea of guilty. The magistrate invoked the provisions of section 112(1)(b) of the CPA, and, after questioning the accused in terms of that section, returned a verdict of guilty. The accused was accordingly convicted on the strength of his plea and sentenced on the same day to undergo twenty-four months' direct imprisonment.

[30] The record reflects that the accused admitted that he gained entry into the house through an open window. He further acknowledged that, once inside, he took a vintage jacket, a sweater, and a pair of BMW sneakers, intending to remove them from the premises. He was, however, apprehended inside the bathroom by members of the police.

[31] The issue for determination is whether the accused admitted all the elements of the offence that culminated in his conviction. In order to make such determination, this Court must have regard to the records of proceedings. The enquiry is directed at whether sufficient answers were furnished by the accused to the questions posed by the magistrate, thereby indicating that he admitted all the essential elements of the offence. It is accordingly imperative that the exchanges be scrutinised in their verbatim form, so as to ascertain whether the magistrate adequately canvassed the factual substratum to establish all the

essential elements of the offences to which the accused purported to plead guilty.

Record of Proceedings

[32] The record of proceedings, reflecting the court's questioning and the accused's responses in terms of section 112(1)(b) of the CPA, is accordingly reproduced below, with reference to the relevant portions.⁷

'Court: And what did you come out with in his house?

Accused: Yes, I want to exit, your worship. The owners of the property arrived. This is where I had to go and hide in one of their rooms, your worship (indistinct) in the house.

Court: And then what did you do?

Accused: As I was in the room. Your worship, they were fidgeting with the door that I had locked to secure myself, as they had noticed that window curtain was moved and was not left in that position, realising that an intruder had been in the house.

Court: How did you get out?

Accused: Your worship, after they had noticed the intruder, they stepped up and called the police. This is where I found an opportunity to move from the room to the bathroom, your worship. The police arrived. When the police arrived, this is where the owners also noticed that the room that they had first checked was no longer locked, but the bathroom was locked. Then they realised that the intruder had moved in the time that

⁷ Page 6 and 7 of record

they were outside calling the police, informing them of what was happening.

Court: Now at that stage, where were the (indistinct) that were in the house? That is the vintage jacket, the sweater and the one pair of BMW sneakers. Where were they?

Accused: In my possession, your worship, I was wearing them.

Court: While you were hiding in the house, James was with you.

Accused: Yes, your worship.

Court: So, you had the jacket on, you had the sweater on, and the BMW sneakers on.

Accused: Yes, your worship

Court: And you intended to go out.

Accused: Yes, your worship, about his intent in a way to exit the premises.

Court: And what happened then? Why did you eventually get caught?

Accused: Yes, your worship, they forcefully opened the door of the bathroom. When they realised that every time they pushed forward, I would push back. So, this is where they then pushed it all the way in, your worship and found me crying or in a foetus position behind the door, your worship behind the door, your worship.

Court: The toilet door.

Accused: Yes...'

[33] After this response, the court proceeded to pass a judgment in which it convicted the accused on each case.

Evaluation

[34] The accused was convicted of housebreaking with intent to steal and theft. This composite offence encompasses two distinct criminal acts which are

combined into a single charge for purposes of trial. It is therefore imperative that the elements of housebreaking with intent to steal, as well as the elements of theft, must each be established before a conviction on the consolidated charge can properly follow.

[35] As far back as *R v Sibiya*,⁸ the Appellate Division held that an accused cannot be convicted of theft unless he intended to deprive the owner permanently of the whole benefit of ownership of the property. This requires a clear intention to effect an appropriation of the property in question.⁹ In this context, appropriation entails the assumption of the rights of ownership coupled with the exclusion of the owner from the enjoyment of such rights. The mere fact that the accused unlawfully broke and entered the complainant's house with the intent to steal does not, without more, establish that the offence of theft was completed.

[36] I align myself with the dictum in *S v Mzandi*,¹⁰ 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.”*

[37] Applied to the present matter, the accused's admission that he entered through an open window and intended to leave with the items must be carefully scrutinised to determine whether appropriation was effected. On close examination of the plea, the proceedings do not reveal that all the elements of the offence of theft were proven. The difficulty that arises is whether the act of theft was completed in law.

⁸ *R v Sibiya* 1955 (4) SA 247 (A) 246

⁹ *S v Boesak* [2000] ZASCA 112; 2000 (1) SACR 633 (SCA)

¹⁰ *S v Mzandi* 2011 (1) SACR 253 (WCC) at 225 para (a)

[38] The questioning demonstrates that the accused admitted entering the complainant's house through an open window and intended to leave with the items. He was, however, interrupted before he could succeed in completing the offence and apprehended whilst still inside the complainant's house. At that time, he had not yet removed the property from the premises, thereby permanently depriving the complainant of her ownership. The fact that he was apprehended inside the bathroom before exiting the premises indicates that the offence of theft was not completed. Accordingly, it is my considered view that the act of removing the items from the complainant's house, and thereby depriving her of her property, was incomplete, notwithstanding the presence of intent.

[39] It must be borne in mind that the questioning in plea proceedings under section 112(1)(b) of the CPA serves the purpose of determining whether the accused admits all the elements of the particular offence. Particular attention must therefore be directed to the constituent elements of specific offences when magistrates conduct such enquiries, especially as the accused is unrepresented. To avoid injustice to the accused, it is imperative that magistrates adhere scrupulously to the constitutional requirement of fairness when conducting plea proceedings. The magistrate must elicit facts from the accused upon which legal conclusions may properly be drawn, rather than imposing conclusions or curtailing the accused's opportunity to place his version before the court,¹¹ as occurred in these matters.

[40] I am therefore not satisfied that the accused admitted all the elements of theft as charged. In my view, the proper conviction should have been for housebreaking with intent to steal and attempted theft, rather than the composite charge of housebreaking with intent to steal and theft.

¹¹ Section 35(3)(a) of the Constitution of the Republic of South Africa, 1996

The Sentence

[41] It is trite that the imposition of sentence lies pre-eminently within the discretion of the trial court.¹² The sentencing court is best placed to evaluate the circumstances of the offence and the offender, and to impose a sentence that is just and proportionate. This Court, however, retains the liberty to consider the sentence afresh¹³ where it is satisfied that the discretion was not judicially exercised, or where the sentence imposed is vitiated by misdirection, irregularity, or is disturbingly inappropriate. In such instances, the appellate or review court is entitled to intervene and substitute a sentence that accords with justice.

[42] In the *Andries matter*, the magistrate took into account the personal circumstances of accused 1, the interests of society, as well as the seriousness of the offence. He considered, inter alia, that the accused was not a first offender, having five previous convictions for possession of drugs. In my view, the magistrate properly applied his mind to the relevant considerations and exercised his sentencing discretion judicially. I accordingly find that the sentence imposed on accused 1, Mr Andries was in accordance with justice.

[43] In the *Msimelelo matter*, given my finding that the accused ought properly to have been convicted of housebreaking with intent to steal and attempted theft, the question arises whether the sentence imposed by the magistrate remains appropriate.

[44] Housebreaking in relation to another's property is a serious offence, as it constitutes a grave invasion of the owner's right to privacy as envisaged in

¹² *S v Kgosimore* 1992 (2) SACR 238 (SCA)

¹³ *S v Mekula* 2012 (2) SACR 521 (ECG)

section 14 of the Constitution. Notwithstanding the adjustment in the conviction, it is expected that the sentence imposed by the trial court be reconsidered in light of the lesser offence.

[45] However, the seriousness of the conduct cannot be understated. The accused's criminal record speaks for itself: a conviction for theft in May 2017, robbery in October 2017, housebreaking in January 2020, and theft in October 2023. These prior convictions demonstrate a persistent pattern of offending and an entrenched disregard for the rights of others.

[46] Although the record does not reveal that the magistrate expressly balanced the triad of considerations enunciated in *S v Zinn*,¹⁴ namely, the nature of the offence, the interests of society, and the personal circumstances of the offender. The seriousness of the offence and the interests of society weigh heavily against the accused's personal circumstances. In the result, I find no reason to interfere with the sentence imposed by the trial court. It is my view that the sentence imposed is in accordance with justice.

Order

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

Case no. 14/1070/25:

- (a) The conviction and sentence in respect of accused 1, Mr Christopher Andries are confirmed.
- (b) The conviction and sentence in respect of accused 2, Mr Abduraaf Abrahams are set aside.

Case no. 14/221/26:

¹⁴ *S v Zinn* 1969 (2) SA 737 (A)

(c) The conviction of Mr Lwando Msimelelo is set aside and substituted with the following order:

The accused is convicted of housebreaking with intent to steal and attempted theft.

(d) The sentence of Mr Lwando Msimelelo is confirmed.

(e) The Registrar is requested to forward a copy of this judgment to the Chief Magistrate, Cape Town, for her attention

S. YAKE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M. PANGARKER

JUDGE OF THE HIGH COURT