



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

**JUDGMENT**

**Reportable/Not Reportable**

**High Court Ref: 140/26**

**Magistrate Serial No. Review No 37/2026**

**Magistrate's Case No: 17/84/2026**

In the matter between:

**THE STATE**

**v**

**EASTON SEAN AND ANOTHER**

**ACCUSED**

**And**

**High Court Ref: 141/26**

**Magistrate Serial No. Review No 39/2026**

**Magistrate's Serial No: 17/172/2026**

In the matter between:

**THE STATE**

**v**

**DAMIAN VAN WYK**

**ACCUSED**

**Neutral citation:** *S v Sean and Another; S v Van Wyk* (Case No. 140/26; and 141/26) [2026] ZAWCHC ... (18 August 2026)

**Coram:** HENNEY AND LEKHULENI JJ

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## ORDER

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1. The convictions and sentences of the two accused in case 140/2026 (Magistrate's serial No. 37/2026) for housebreaking with intent to steal and theft are hereby set aside. The matter is remitted to the Magistrate to confirm whether the state accepts the plea and deal with the matter accordingly. If not, the Magistrate shall enter a plea of not guilty and proceed with the trial.
2. The conviction and the 18-month sentence of the accused on count 2 (theft out of a motor vehicle) in case number 141/2026 (Magistrate Court Serial No. 39/2026) are hereby set aside. The matter is remitted to the Magistrate to enter a plea of not guilty and to proceed with the trial.
3. The magistrate concerned is directed to attend to these matters expeditiously within two months from the date hereof and to report to this court the outcome thereof.
4. A copy of this judgment must be directed to the Chief Magistrate of Cape Town to fast-track the expeditious hearing of these matters.

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## JUDGMENT

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**Lekhuleni J (Henney J Concurring):**

[1] This judgment deals with two separate review matters, namely, *S v Sean & Another* and *S v Van Wyk*. These two matters come before this court by way of automatic review in terms of s 303, read with s 304, of the Criminal Procedure Act 51 of 1977 (“*the CPA*”). In both cases, the accused were not legally represented but rather chose to conduct their own defences. For clarity and systematic analysis, I propose to deal with these two separate cases sequentially.

***S v Sean and Another* - High Court Ref: 141/26**

**Magistrate Serial No. Review No 37/2026**

[2] In *S v Sean and Another*, two accused were convicted by the Cape Town Magistrates’ Court of housebreaking with intent to steal and theft. It was alleged that on 1 February 2026, at B[...] Road, Table View, in the District of Cape Town, the accused unlawfully and intentionally, with intent to steal, broke and entered the house of the owner unknown to the State and there and then wrongfully and intentionally stole a light plug and cables, the property in the lawful possession of a person unknown to the State.

[3] At the commencement of the trial, the accused elected to conduct their own defences after their right to legal representation was explained to them. Subsequently, the charges were put to the accused, and both pleaded guilty. Thereupon, the trial court invoked the provisions of s 112(1)(b) of the CPA. The presiding magistrate convicted the accused after questioning them in terms of s 112(1)(b) of the CPA and subsequently sentenced each accused to 3 years' direct imprisonment. The trial court subsequently made an ancillary order in terms of s 103(1)(g) of the Firearms Control Act 60 of 2000, deeming the accused unfit to possess a firearm. This Court is now enjoined to consider

whether the proceedings before the trial court appear to be in accordance with justice.

[4] In questioning the accused in terms of section 112 (1)(b) of the CPA, the court asked both accused to explain in their own words what happened that led to their arrest. In response, accused 1 admitted that on the day in question he was with accused 2 and that they arrived at 4[...] B[...] Road, Table View.

[5] Upon arrival, they both jumped over the wall of the property and entered through the door, which they managed to open. While inside the property, they looked for something valuable to take. However, they noticed that the house was empty. Shortly thereafter, while they were inside the house, members of the South African Police Service (SAPS) arrived, and the two accused were subsequently arrested. Accused 1 explained that his guilty plea was made freely and voluntarily and without any undue influence.

[6] Accused 2 provided a plea explanation similar to that of Accused 1. In addition to the explanation already placed on record by Accused 1, Accused 2 stated that they gained entry to the property through a sliding door, which they managed to open. After questioning both accused in terms of s 112(1)(b) of the CPA, the court noted that it was satisfied that the two accused admitted all the elements of the offence and accordingly found them guilty as charged of housebreaking with intent to steal and theft. The court then heard submissions in mitigation and aggravation of sentence from both accused and from the prosecution. Having considered these submissions, the court imposed a sentence of 3 years direct imprisonment on each accused.

[7] After reviewing the record, I became concerned about both the conviction and the sentence imposed by the trial court. Accordingly, I addressed a query to the magistrate, requesting specific comment on whether

the offence of housebreaking with intent to steal and theft had been established on the facts, and, if so, what property, if any, had been stolen from the complainant's premises. I further asked the magistrate to indicate whether the accused should not instead have been convicted of housebreaking with intent to steal and attempted theft. In addition, I requested clarification on whether the two accused were afforded an opportunity to address the court or to present evidence before the automatic application of s 103(1)(g) of the Firearms Control Act 60 of 2000 was invoked.

[8] In a prompt and candid response, the magistrate conceded that she erred in convicting the accused of housebreaking with intent to steal and theft. The magistrate further confirmed that, under s 112(1)(b) of the CPA, the plea explanations given by both accused showed that no property was found inside the premises and that nothing was in fact stolen. The magistrate also explained that the accused were interrupted by the police arriving at the scene before they could remove any property. In light of these facts, the magistrate stated that the appropriate conviction should have been housebreaking with intent to steal and attempted theft.

## **Discussion**

[9] Housebreaking is not a crime *eo nomine*.<sup>1</sup> It must be accompanied by the intention to commit another actual offence, or a substantive offence on the premises entered.<sup>2</sup> This further offence which the accused intends to commit must be a different one from the housebreaking itself. The “breaking” consists of the removal or displacement of any obstacle which bars entry into the

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<sup>1</sup> Kruger A *Hiemstra's Criminal Procedure* (2019) at 26-18(1).

<sup>2</sup> *S v Bam* 2020 [2020] ZAWCHC 68; 4 All SA 21 (WCC) para 76.

structure, and which forms part of the structure itself.<sup>3</sup> The entry is completed the moment the wrongdoer has inserted any part of his or her body, or any instrument he or she is using for that purpose, through the opening with the intention of thereby exercising control over some contents of the building or structure.<sup>4</sup> Simply put, there exists no offence, either at common law or in statute, which consists of mere 'housebreaking' without some concomitant intent to commit a substantive offence.<sup>5</sup>

[10] In this matter, the accused unlawfully broke into and entered the complainant's premises. The state alleged that the accused, whilst inside the premises, stole a light plug and cables. They were found inside the structure and arrested before they could remove any property. Their plea explanation makes clear that they entered the premises with the intent to steal: they stated that once inside, they searched for items of value to take but found the house empty. Their plan to steal was ultimately thwarted by the arrival of the police.

[11] On these facts, the accused possessed the requisite intent to steal, but the offense of theft was not completed. What compounds the difficulty in the accused's plea explanation is that the State alleged that the two accused stole light plugs and cables while inside the premises. The accused did not admit this fact. Before the Court could convict the accused, it did not ask the prosecutor whether the State accepted the accused's plea. Significantly, the accused stated that there was nothing of value in the premises that they could take, and the police arrived before they could take anything from the property. The accused's plea explanation contradicted what the State alleged in the charge.

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<sup>3</sup> *S v Lekute* 1991 (2) SACR 221 (C) at 222F-G; *S v Hlongwane* 1992 (2) SACR 484 (N) at 466G-I; *S v Madini* [2000] 4 All SA 20 (NC) at p.22.

<sup>4</sup> *R v Melville* [1959] 3 All SA 461 (E) at 545E-F.

<sup>5</sup> *S v Maseko and Another* 2004 (1) SACR 22 (T) at 22G.

[12] In my view, the magistrate erred in convicting the accused in circumstances where *lis* still existed between the State and the accused. It must be stressed that the State is in charge of the process. The State delineates the *lis* between it and the accused by deciding to accept a plea on a lesser charge.<sup>6</sup> As Makgoka JA noted in *S v Kekana*,<sup>7</sup> the acceptance by the prosecutor of the plea of guilty on the alternative charge has the result of removing the main charge from the indictment. It follows that a conviction on the main charge can not stand. In other words, in such a case, it is up to the State to determine the offence that the accused is convicted of. The court has no say in that and must sentence the accused in accordance with the accepted plea. But if the prosecutor does not accept the plea of guilty in respect of an alternative or lesser charge the court must note a plea of not guilty in respect of the main charge and act in terms of s 115.

[13] As stated above, the prosecutor did not accept the accused's plea. The court did not even ask the prosecutor whether the State accepted the accused's plea. In these circumstances, the court should have entered a plea of not guilty in terms of s 113 of the CPA. Consequently, the conviction and the resultant sentence imposed upon the accused cannot stand. Both must be set aside, and the magistrate must proceed with the trial and enter a plea of not guilty on the accused in terms of s 113 read with s 115 of the CPA.

[14] I am mindful that the accused has been in custody and has served part of the sentence. Section 312(1) of the CPA provides:

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<sup>6</sup> *S v Tshilidzi* 2013 JDR 1356 (SCA) para 9.

<sup>7</sup> 2019 (1) SACR 1 (SCA) para 17.

‘(1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)(b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.’

[15] A careful reading of s 312 of the CPA reveals that two jurisdictional requirements must be met before the section finds application. *First*, the provision is triggered where an appeal or review court sets aside a conviction and sentence imposed following a plea of guilty and the subsequent invocation of s 112. *Secondly*, the setting aside of the conviction and sentence must occur because the trial court failed to comply with any of the provisions of s 112(1)(b) or s 112(2), or failed to record a plea of not guilty in terms of s 113 when it ought to have done so.

[16] In the present matter, the irregularities observed, in particular, relate to a failure to comply with s 112(1)(b) of the CPA, and therefore the matter should ordinarily be remitted to the court a quo in terms of s 312 of the CPA. However, I am mindful of the guidance of the Supreme Court of Appeal in *S v Mshengu*,<sup>8</sup> where the court observed that s 312 should not be invoked if compliance with the section would be unfair. To this end, I find the following excerpt from that judgment apposite. The court stated:

[17] The purpose of s 312 is to prevent an injustice which may occur if an accused person were to escape punishment for his or her crime only because his or her conviction was set aside on the ground that there was a failure to comply with s 112 of the Act. *But an injustice cannot occur where the accused has served the entire sentence by the time the conviction is set aside on appeal.* Nor can it occur where a fresh conviction cannot be achieved following a remittal to the trial court. . . . *There can be no justification for ordering that an accused*

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<sup>8</sup> 2009 (2) SACR 316 (SCA).

*person, who has already served the entire punishment, be subjected to a second trial. Such an order would be inconsistent with the right to a fair trial. In my view it could never have been the intention of the legislature that a court is obliged to comply with the section irrespective of the injustice or unfairness that it may cause. I therefore conclude that s 312(1) is not peremptory.'*

[17] The charge of housebreaking with intent to steal and theft against both accused is serious. It would be a failure of justice if both accused could escape the consequences of their indiscretion because of mere technicalities.<sup>9</sup> The circumstances of this case evince that the two accused would not be prejudiced, and justice would be achieved, if the proceedings are again continued against the accused before the trial magistrate.

***S v Damian Van Wyk: High Court Ref – 141/2026***

**Magistrate Serial No: Review No. 39/2026**

[18] The same magistrate who presided in *S v Sean and Another* also presided in *State v Van Wyk*. In the *Van Wyk* matter, the accused faced three charges, namely two counts of theft out of a motor vehicle (counts 1 and 2) and a count of possession of drugs (count 3). The accused pleaded guilty to all three counts. The court sentenced the accused to 18 months' imprisonment in terms of s 276(1)(i) for count 1 and 18 months' imprisonment in terms of s 276(1)(i) in respect of count 2. The court cautioned the accused and discharged him in respect of count 3. Upon perusing the record, I was satisfied that the conviction and sentence for counts 1 and 3 were in accordance with justice. However, I was concerned about the conviction on count 2.

[19] The charge on count 2 was that the accused was guilty of the offense of theft out of a motor vehicle in that on or about 3 March 2026, and at or near

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<sup>9</sup> *S v Ndzisho and Another* 2023 (2) SACR 419 (WCC) para 29.

Blauberg Road within the District of the City of Cape Town, the accused unlawfully and intentionally steal goods or property namely a Bluetooth speaker and clothing whose value is to the State unknown out of a parked motor vehicle, Opel Corsa, the property in the lawful possession of Leslie Ahmad.

[20] In his plea explanation, the court asked the accused on count 2 to explain, in his own words, what led to his arrest. In response, the accused stated that on 3 March 2026, he came from Dunoon and walked from Table View to Bloubergstrand. As he walked, he saw a white Opel Corsa parked on the left side of the road. He opened the car door and entered the vehicle. Subsequently, a young boy and his father came out of a nearby house after hearing the accused inside the car. The boy's father then apprehended the accused and hit him with a baseball bat. A neighbourhood watch patrol vehicle arrived, and later the police arrived and arrested the accused. The accused explained that he broke into the car with the intention of stealing clothing and a Bluetooth speaker. The court subsequently convicted the accused of theft out of a motor vehicle and sentenced him accordingly.

[21] After perusing the record, I sent a review query to the magistrate, inquiring whether the offense of theft out of a motor vehicle in count 2 was completed, or whether the answers the accused gave supported a finding of theft out of a motor vehicle. In response, the magistrate stated that the offence of theft out of a motor vehicle was not completed and noted that notwithstanding, competent verdicts were put to the accused when he pleaded.

[22] As stated above, the State alleged that the accused stole 1Bx Bluetooth speaker and clothing from a motor vehicle. The accused did not admit that he stole the speaker listed in the charge sheet as alleged by the State. The court did not confirm with the prosecutor whether the State accepted the accused's plea.

According to the accused, he was inside the car when the complainant came and apprehended him. He wanted to steal the said speaker. Nevertheless, the court convicted him of theft out of a motor vehicle.

[23] Simply put, the State alleged that the accused stole the speaker from the vehicle. The accused did not admit this fact. Even if one were to consider a conviction for attempted theft out of a motor vehicle, the State did not accept the competent verdict. Similarly, in this matter, the conviction and sentence on count 2 must be set aside. The magistrate should enter a plea of not guilty and proceed with the trial.

### **Order**

[24] In view of all these considerations, I propose the following order:

1. The convictions and sentences of the two accused in case 140/2026 (Magistrate's serial No. 37/2026) for housebreaking with intent to steal and theft are hereby set aside. The matter is remitted to the Magistrate to confirm whether the State accepts the plea and deal with the matter accordingly. If not, the Magistrate shall enter a plea of not guilty and proceed with the trial.
2. The conviction and the 18-month sentence of the accused on count 2 (theft out of a motor vehicle) in case number 141/2026 (Magistrate Court Serial No. 39/2026) are hereby set aside. The matter is remitted to the Magistrate to enter a plea of not guilty and to proceed with the trial.
3. The magistrate concerned is directed to attend to these matters expeditiously within two months from the date hereof and to report to this court the outcome thereof.
4. A copy of this judgment must be directed to the Chief Magistrate of Cape Town to fast-track the expeditious hearing of these matters.

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**LEKHULENI JD**  
**JUDGE OF THE HIGH COURT**

**I agree, and it is so ordered:**

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**HENNEY**  
**R**  
**JUDGE OF THE HIGH COURT**