IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

CA NO.: 87/05

In the matter between:

THE STATE

AND

JAPHTA MOEKETSI

REVIEW JUDGMENT

MMABATHO

REVIEW JUDGMENT

TLHAPI AJ:

[1] The accused Japhta Moeketsi, appeared before the Magistrate's Court at Mankwe charged with housebreaking with intent to steal and theft. It was alleged that he unlawfully and with intent to steal, broke into the house of the complainant and stole 3 video cassettes and a video machine. He was convicted of theft and sentenced to three years imprisonment.

[2] The accused is the complainant's nephew. He paid a visit to the complainant's house and stayed there with her children for a few days. He stole the items after they had left for school. The complainant was not present.

[3] The following is recorded after the close of the State's case:

> "COURT: Yes, what about the first part, housebreaking with intent to steal, am I not supposed to acquit the accused sir, in terms of Section 174, housebreaking with intent …
>
> PROSECUTOR: And left with theft, that is correct. As the court pleases your worship.
>
> COURT: In terms of Section 174 of the Criminal Procedure Act the accused is found not guilty and discharged on the count of housebreaking with intent to steal. The theft charge still remains. On the theft charges we are proceeding. Mr Moeketsi the state is saying it is satisfied with those two witnesses.".

[4] The following queries were raised on Review:

> "4.1 The accused was charged with housebreaking with intent to steal and theft. This is one continuous act.
>
> 4.2 At the close of the State's case the Magistrate acquitted the accused of housebreaking with intent to steal in terms of Section 174 and proceeded with a charge of theft.
>
> 4.3 If at the close of the State's case the Court was of the view that the evidence was such that it failed to prove housebreaking with intent to steal and theft but only the offence of theft, the matter should have proceeded to its conclusion and if after hearing the accused the Court was satisfied that the offence of theft had been proved beyond a reasonable doubt, it could convict on the competent verdict – theft.

On Sentence:

4.4 Having regard to the facts and the fact that the accused had a previous conviction which sentence was postponed for three (3) years:

I find the sentence of three years too harsh even though he had a previous conviction (sentence not given).

I would recommend that at least one (1) of the three years be suspended for five years and that the record reflect that he be held at Rustenburg – Ramotshana which is in the North West Province as originally recommended and not at Leeuwkop Prison."

[5] In response the Magistrate;

5.1 conceded that housebreaking with intent to steal and theft was one continuous act, but then goes on to say that the accused was charged with two counts being:

> "(i) housebreaking with the intent to commit an offence of theft, and
>
> (ii) theft;"

I have perused the record and have come across only one charge sheet that reads "housebreaking with the intent to steal and theft."

5.2 explains further:

> "the words upon or about allows concessions to the state as relates the time of commission of the relevant offence. This is evident from the explanation by the court of competent verdicts in respect of housebreaking with intent to commit the crime of theft and further explanation of the competent verdict of theft."

5.3 suggests that I was incorrect in using the word "acquitted" with regard to his acquittal of the accused in terms of Section 174 of Act 51 of 1977("the Act"). He says that he only,

> "returned a verdict of Not Guilty. Acquittal is for the merits."

5.4 also states:

> "The wording of Section 174 provided that if….the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge viz (housebreaking with intent to commit a crime of theft) or any offence of which he may be convicted on the charge (viz competent verdict …..), it may return a verdict of not guilty. Therefore the verdict returned at the close of the state case encompasses even competent verdicts were left and after hearing accused's version/defence …….that of necessity, the court rejected that as inherently false and convicted him of theft that happened "upon or about" the 5.11.2004". After the return of the verdict in terms of section 174, it is my submission that the matter could not have proceeded to its conclusion in that the crime of theft will be left hanging."

[6] I find the explanation after plea regarding competent verdicts by the Magistrate to the accused to be in order. However, having read his responses, I can only come to the conclusion that the he does not have a clear understanding of the offence, housebreaking with intent to commit an offence and how to apply the competent verdicts that go with it.

[7] In my view, he is labouring under the wrong impression that when the evidence does not prove the offence of

housebreaking with intent to steal and theft, but only proves theft, the Court is entitled to acquit the accused of "housebreaking with intent to steal" in terms of section 174 of the Act, at the close of the States case and then to proceed with the theft offence. The splitting of the charges at the close of the State's case in this instance was incorrect. The Magistrate erred by interfering with the process at the close of the State's case.

[8] In **S v Buthelezi 1961 (4) SA 376 (N) at 376G-H**, Henochsberg J said that:

> "Although housebreaking with intent to commit a particular offence and the committal of that offence are two separate crimes, they are chargeable only as one count in an indictment, and should not be prosecuted separately. . . . . Upon a charge of housebreaking with intent to commit theft and theft there can be but a single conviction. . . . . An accused person who pleads guilty to both housebreaking and theft which are incorrectly charged separately, cannot be sentenced on each count as the charges are improperly split."

(**my underlining**)

[9] In the discussion by **Hunt (South African Law and Procedure) 2nd Edition, Volume 11**, on competent verdicts, he states at 725 under paragraph (3):

> "where **X** has been charged with housebreaking with intent to steal and theft. . . . .he can be convicted of receiving of stolen property. . . . .or of theft alone"

Snyman's (Criminal Law 4th Edition) at 541 says the

following:

> ""housebreaking with intent to steal", is a crime in its own right, **X** is charged with two crimes if he is charged with "housebreaking with intent to steal and theft". However, it is still uncertain whether a conviction of "housebreaking with intent to steal and theft" is a conviction of a single crime or of two crimes. In practice this is unimportant, for even if one holds that two crimes have been committed they are treated as one crime for the purpose of punishment. It is submitted that the better view is that two crimes have been committed."

[10] I am of the view that Snyman's explanation may create confusion especially where the court is faced with the offence housebreaking with intent to steal and theft and where at conclusion it has to convict on a competent verdict as provided for in Section 262(1) of the Act.

Cowling, at 224 SACJ (2003) 16, under the heading "Competent Verdict – splitting of charges" gives a better explanation with which I agree. He says:

> "A great deal of confusion continues to surround this area of the law. Section 262(1) of the Criminal Procedure Act 1977 provides that if the evidence on a charge of housebreaking with intent to commit a specified offence does not prove the latter specified offence but some other offence instead, then the accused can be convicted of the offence so proved. Specific mention is also made of the offence malicious injury to property-presumably because most forms of housebreaking would result in damage to the building that has been broken into. To a large extent this confusion centres on whether the offence of housebreaking with intent to commit a specified offence constitutes more than one offence. The problem arises from the fact that various authors and judicial decisions have adopted an ambivalent

> approach by holding that although housebreaking with intent constitutes two separate offences, there is a tendency to charge and punish an accused with just one offence . . . . . this is an unacceptably sloppy line of thinking and contributes to the confusion surrounding competent verdicts on charges of housebreaking with intent."

In my view the above gives a better explanation on how the Magistrate should have dealt with the offence.

[11] The accused had a previous conviction of housebreaking. However, on the 14 December 2003 sentence was postponed for three years . The offence in this matter was committed during that period. The Magistrate sentenced the accused to three years imprisonment at a facility for juveniles at Ramotshana-Rustenburg North West Province, but incorrectly recorded the prison as Leeuwkop which is in the Gauteng Province.

Further, I find the sentence to be too harsh even though sentence in the previous matter had been postponed for three years.

[12] Justice will be served if (a) the finding of not guilty in terms of section 174 of the Act in respect of "housebreaking with intent to steal" is expunged from the record at the close of the State's case; (b) that the conviction of theft is reflected as a conviction in terms of section 262 (1) of the Criminal Procedure Act; (c) the sentence is altered.

In the circumstances, the conviction and sentence as recorded is set aside and substituted with the following:

> "The accused is found guilty of theft and is sentenced to 2 years imprisonment whereof one year is suspended for 3 (three) years on condition that the accused is not convicted of an offence involving dishonesty committed during the period of suspension and in respect of which the accused is sentenced to a term of imprisonment without the option of a fine.
>
> The accused is to be detained at the facility for juveniles at Ramotshana in Rustenburg."

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V V TLHAPI
ACTING JUDGE OF THE HIGH COURT

I agree

_____
A A LANDMAN
JUDGE OF THE HIGH COURT

DATED : 8 SEPTEMBER 2005