CASES / VONNISSE

OF HOUSEBREAKING AND COMMON PURPOSE:

S v Leshilo 2017 JDR 1788 (GP)[1]

1 Introduction

Some aspects of substantive criminal law generate more controversy than others. One of the features of the common-law crime of "housebreaking with the intent to commit a crime" is the possible difficulty of proving what "further intent" the accused harboured upon breaking into premises: what crime did the accused intend to commit within? To assist the prosecutor in this regard, the legislature intervened by extending the ambit of the common-law crime to include not just housebreaking where the "further intent" of the accused could be properly identified, but also housebreaking where the "further intent" of the accused could not be identified. Thus, in terms of the Criminal Procedure Act (51 of 1977), a charge of housebreaking with intent to commit a crime "to the prosecutor unknown" (s 95(12)), and a conviction in these terms (s 262) was established. (Similar legislative assistance dates back to the early 20th century. For further discussion, see Hoctor "Some Constitutional and Evidential Aspects of the Offence of Housebreaking with Intent to Commit a Crime" 1996 17 1 *Obiter* 160). These provisions have proved very controversial, with De Wet commenting that in providing this statutory extension to the common-law crime, the legislature miraculously created a representation of something that is conceptually impossible (De Wet *Strafreg* 4ed (1985) 369, on which, see further criticism below).

The common purpose doctrine also provides invaluable assistance to the State in situations where more than one actor has been involved in the commission of a crime, and where it is extremely difficult to ascertain which actor was responsible for which act. Typically, such crimes arise out of mob violence. A strict application of the rules of causation in such circumstances often makes proof of individual perpetrator liability extremely hard to establish. The consequence of the difficulty in establishing a causal link between the actor's conduct and the harmful result may be lesser liability or even no liability for the harm. (See discussion in Snyman *Criminal Law* 6ed (2014) 255−256). The common purpose doctrine (defined below) however provides that where the actors share a common purpose to commit a crime, and act to that end, the conduct of each actor is imputed to each of the other actors. Thus the difficulty with proof of causation is entirely circumvented.

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But at what cost? Despite a Constitutional Court judgment to the contrary (*S v Thebus* 2003 (2) SACR 319 (CC)), Burchell has consistently argued that the common purpose doctrine "is a contradiction of the fundamental rule that the prosecution must prove the elements of liability beyond reasonable doubt and, therefore, an infringement of the presumption of innocence" (Burchell *Principles of Criminal Law* 5ed (2016) 486).

In the case of *S v Leshilo* (2017 JDR 1788 (GP)), both these controversial aspects – the statutory extension to the housebreaking crime, and the common purpose doctrine – are drawn together, making a consideration of the judgment in this case both instructive and worthy of closer analysis.

2 Facts

The complainant and his wife, who ran a spaza shop from their residence, had unwanted visitors in the form of two men who broke into their dwelling in the early hours of the morning (par 4). One of the intruders was armed with a gun and pointed it at the complainant. The complainant threw a blanket at the armed intruder, wrestled with him for the gun and managed to dispossess him, whereupon this intruder ran away. The second intruder, the appellant, was apprehended in the dwelling by the complainant, who by then had gained control of the weapon, with the aid of a neighbour who had come to the complainant's assistance after hearing a shot go off. The intruders had entered the house by lifting the corrugated iron on one side of the dwelling (par 8−9). The appellant denied that he was the intruder, or that he had been apprehended inside the complainant's residence. Instead, he insisted that he had been walking in the street when a mob had apprehended him (par 5). This denial was rejected by the trial court (the Regional Court, Pretoria). Hence the appellant, who had been charged with housebreaking with intent to rob, and with robbery with aggravating circumstances, was ultimately convicted of housebreaking with intent to commit an offence to the prosecutor unknown (on count 1). In addition, he was found guilty of unlawful possession of a firearm (on count 2) and unlawful possession of ammunition (on count 3). He was sentenced to 15 years' imprisonment (par 1). The appellant's co-accused was acquitted of all charges (par 3). With the leave of the trial court, the appellant appealed against both conviction and sentence.

3 Judgment

The appellant raised three grounds of appeal (detailed in par 14.1−14.3). In relation to the "housebreaking" conviction (although inaccurate in describing the full crime, the term is used here for the sake of economy of expression), it was argued firstly that the appellant was not in the complainant's residence; however, if the court found that the appellant was on the premises, it was argued that he was not involved in the removal of the corrugated iron. In this regard, it was contended that even if the appellant was on the premises, he was not party to a common purpose to commit the crime of housebreaking. Secondly, it was argued that the common purpose doctrine could not properly be applied to the crime of housebreaking with intent to commit a crime to the prosecutor unknown. The third ground of

appeal, in relation to the other convictions of possession of a firearm and ammunition, was that the appellant did not in fact have possession of the firearm (and the ammunition with which it was loaded).

Each of these arguments on appeal was dismissed, in turn, by the court, per Khumalo J. With regard to the arguments pertaining to the housebreaking conviction, the court first set out the basis for the statutory extension to the common-law crime (par 15), based on the provisions of the Criminal Procedure Act 51 of 1977. These provide respectively for the bringing of a charge and for conviction of the crime of housebreaking with intent to commit a crime to the prosecutor unknown. (The court expresses this crime as "housebreaking with intention of committing a crime unknown to the prosecutor" (par 15) but the original legislative formulation is preferable since it excludes mere prosecutorial ignorance.) The court pointed out (par 15) that an alternative charge would be housebreaking with intent to trespass – typically, contravention of the Trespass Act 6 of 1959, although the charge could relate to any trespass legislation.

The court then dealt with the two arguments relating to the housebreaking conviction, although not in sequential order. First, the court rejected the contention that it is "improbable if not impossible" for common purpose to exist in relation to an unknown offence (par 16). In any event, the court held, this argument falls away in its entirety. Given that both the intruders (the appellant and the first intruder) were responsible for breaking into the premises (par 16) and both shared a criminal intent (par 17), each of the intruders had fulfilled the elements of the crime in his own right. Moreover, the court held, it was clear that the appellant was not merely a passive observer, but "actively participated in the actions which were geared towards realizing their intended criminal activity" (par 18). Thus, the court held, the appellant was a co-perpetrator with the first intruder, which once again allows for him to be held liable in his own right.

With regard to the convictions relating to possession of the firearm and ammunition, the court held that, while the doctrine of common purpose was not applicable, in terms of the doctrine of joint possession of a firearm, the appellant could be held to have the necessary possession to incur liability.

Thus, the court confirmed the convictions on appeal and, moreover, held that the sentence of 15 years' imprisonment (the charges being taken together for the purpose of sentence) was proportionate to the crime despite the appellant's youthfulness (he was 20 years old when the crimes were committed (par 28)) and his lack of a criminal record (par 24), as

> "any conduct that continues to put such safety at risk must be discouraged with the seriousness and urgency the situation calls upon [sic]. Violent conduct cannot be tolerated. The fact that the Appellant and his co-perpetrator intruded the complainant's abode, placing lives at risk by wielding a firearm which co-incidentally was discharged, aggravates the situation and increase [sic] the Appellant's moral blameworthiness" (par 29).

4 Discussion

There are a number of aspects of the case that are worthy of closer scrutiny. These are set out in the discussion that follows.

4 1 *Housebreaking with intent to commit a crime to the prosecutor unknown*

The statutory extension to the common-law housebreaking crime has been subjected to stringent academic criticism (see De Wet *Strafreg* 369; Milton *South African Criminal Law and Procedure Vol II: Common-Law Crimes* 3ed (1996) 806; Snyman *Criminal Law* 549−550) on the basis that the crime has no right to existence. The nub of the criticism is clearly expressed by Snyman (549, emphasis in original):

> "Housebreaking on its own is not a crime. What in effect happens here is that a person is charged with having committed something which is not a crime (namely housebreaking) with allegation that the act was accompanied by an intention to commit another, unknown, crime. The mere intention to commit even a known crime is not punishable. After all, the law does not punish mere thoughts. To charge somebody with such a crime is therefore to charge him with something which conceptually cannot constitute a crime. What is more, a charge or conviction of housebreaking with intent to commit an unknown crime contains a contradiction: how can a court find as a fact that X intended to commit *a* crime if it is impossible for that court to determine *what* this intended crime was?

This criticism was mentioned in the case of *S v Woodrow* (1999 (2) SACR 109 (C)), where a conviction for housebreaking with intent to commit a crime to the prosecutor unknown was overturned. It should however be noted that criticism of this form of the crime has not been uniform in nature. Some writers do not refer to such criticism in their discussion of the common-law crime (Burchell *Principles of Criminal Law* 771; Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 2ed (2015) 427). In any event, it has been argued by the present writer that this form of the crime is in accordance with the precepts of the Constitution (Hoctor 1996 *Obiter* 160), which indeed has also been accepted by the South African Law Commission as it then was in its Report on *Project 101: The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing* (May 2001) 86−91. The Law Commission therefore recommended (91) the continued existence of the statutory extension to the crime.

Further support for the statutory form of the housebreaking crime can be found in the case of *S v Slabb* (2007 (1) SACR 77 (C)). In this case, following a conviction of housebreaking with intent to steal, the trial (district) court referred the matter to the regional court for sentencing. The regional court magistrate doubted whether there was in fact sufficient evidence of intent to steal, and taking into account the doubts expressed in the *Woodrow* case about the correctness of a verdict of housebreaking with intent to commit a crime to the prosecutor unknown, referred the matter to the High Court on special review (in terms of s 116(3) of the Criminal Procedure Act 51 of 1977). The court (per Le Grange AJ, Veldhuizen J concurring) disagreed with the conclusion reached by the regional magistrate. The basis for this decision, in respect of the housebreaking crime, was that the facts in this case differed significantly from those in *Woodrow* (par 9). The court explained that the facts in *Woodrow* related to a domestic dispute, in which the accused, having been denied access to his former lover's residence,

bent back the burglar bars and entered the residence. This led to a conviction of housebreaking with intent to commit a crime to the prosecutor unknown. The court set this aside, given that the accused's intention in unlawfully entering was indeed "known" to the prosecutor (par 10–11). In the *Slabb* case, the accused obtained unlawful entry into the premises with a screwdriver that he used to open the front door of the dwelling. He was then discovered in the kitchen area when a plate and spoon fell to the floor (par 2). At this stage, no removal of any item or attempt to steal anything had taken place, and therefore the accused's intended criminal activity remained "unknown".

Secondly, and concomitantly, the court in *Slabb* held that in any event the *Woodrow* case did not constitute authority not to convict an accused person of housebreaking with intent to commit a crime to the prosecutor unknown (as per s 262 of the Criminal Procedure Act 51 of 1977), since, despite the reference to academic criticism of the crime, the verdict did not negate the validity of the charge and conviction but was, rather, a considered finding based on the application of the law to the facts (par 11). Hence the court indicated its support for the continued existence of this statutory extension of the common-law crime in the following terms (par 12–13, emphasis in original):

> "The definition of housebreaking with the intent to commit an offence unknown may seem questionable … 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 … 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 s 262 of the Act redundant."

The counter-argument to this rationale would be that charges of housebreaking with intent to commit a crime to the prosecutor unknown are potentially prejudicial to the accused, and "smack very much of fishing expeditions" (Milton *South African Criminal Law and Procedure* 807). Nevertheless, although the remarks of the court in *Slabb* were *obiter* in nature, it is evident that such a charge and conviction will in future be allowed in the courts provided a separate intent is required from the intent to break and enter the premises unlawfully (*S v Mitchell* 2000 JDR 0047 (C)). Further evidence for this approach is provided by the *Leshilo* case. Nevertheless, it is clear that the court in *Slabb* draws a distinction between trespass prosecutions and prosecutions for the statutory form of the housebreaking crime, and that the court evidently views the latter as more

serious. A similar distinction could be drawn between housebreaking with the intent to commit trespass, and the statutory form of housebreaking: in the former case, as stated in the *Slabb* case (par 9), it would have to be proved that the accused entered the premises with the intent to remain on the property, and also that the accused "'was on the property and intended 'to be' on the property"); the statutory form of housebreaking, on the other hand, would clearly be regarded as deserving of more serious punishment, which at first glance seems hard to justify without proof of precisely *which* crime the accused intended to commit on the premises. As is clear from the court's rationale (as set out above) in the *Slabb* case, the general functioning of the common-law crime as a type of anticipatory crime also plays a very significant role in the decision to countenance the extension to the common-law crime, despite the principled objections thereto.

4 2 Common purpose

A feature of the judgment in *Leshilo* was the approach of the court to the question of common purpose. Burchell's definition of this doctrine (*Principles of Criminal Law* 477), which was affirmed by the Constitutional Court in *S v Thebus* (2003 (6) SA 505 (CC) par 18), may be usefully employed:

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime."

As Snyman correctly points out (*Criminal Law* 257−258), whilst the common purpose doctrine has typically been applied in respect of the crime of murder, its application is not restricted to this crime. In respect of the housebreaking crime, the common purpose doctrine has found application on a number of occasions (*S v Malinga* 1963 (1) SA 692 (A); *S v Maelengwe* 1999 (1) SACR 133 (NC); *S v Dube* 2010 (1) SACR 65 (KZP)).

As indicated earlier, the appellant sought to argue that he was wrongly convicted, essentially because the common purpose doctrine ought not to have been applied to him. The first question that the court addressed in respect of the application of the common purpose doctrine was not whether the doctrine was wrongly applied to the appellant on the facts, but indeed whether the doctrine could be applied to the statutory formulation of the crime. The appellant argued that it was not logically defensible to find common purpose where the specific crime intended within the premises cannot be established. As indicated above, the court gave short shrift to this argument (par 16), indicating that it had "no merit". It is submitted that the court's conclusion on this point is correct, since proving a charge of "housebreaking with intent to commit a crime to the prosecutor unknown" involves not so much showing what the accused specifically subjectively intends, but rather whether it can be established beyond reasonable doubt that the accused intended *some* crime within the premises. Proof is on the basis of inferential reasoning, flowing from the breaking and entering, in which the circumstances of the entry may be determinative of the nature of the accused's intent. (See discussion in Hoctor 1996 *Obiter* 165−166). As mentioned earlier in this regard, the court in *Leshilo* was convinced that,

since "even the sanctity of the home" provides no guarantee of safety, "any conduct that continues to put such safety at risk must be discouraged with … seriousness and urgency", particularly violent conduct (par 29). These remarks were made in respect of sentencing; however, they are revealing of the court's conclusion that even though the appellant's particular intent could not be identified beyond reasonable doubt, nevertheless it could certainly be established that his intent was criminal in nature.

The second question the court was required to address was whether the appellant was correctly convicted on the basis of the common purpose doctrine. As mentioned above, the court dismissed the need for reliance on the common purpose doctrine in respect of the housebreaking conviction, holding that the appellant's liability was established on the basis of being a co-perpetrator (par 16). However, it is evident from the judgment that it was not entirely clear who lifted the corrugated iron to facilitate entry into the dwelling, and how this was done. There was apparently no evidence in this regard – merely inferential evidence confirming how the intruders entered (by bending the corrugated iron), and that they were on the premises. The thickness and strength of the corrugated iron was not discussed in the judgment. The court concluded that the "only inference that can be drawn is that the two were each responsible for the (break-in) removal of the iron sheet through which they had entered the residence" (par 16). However, in order for the crime of housebreaking to be completed, there would have to be a breaking on the part of the accused. The "breaking" consists of the removal or displacement of any obstacle that bars entry into the structure, and which forms part of the structure itself. (See *R v Mososa* 1931 CPD 348 351−352; and generally on this requirement, Hoctor "The 'Breaking' Requirement in the Crime of Housebreaking with Intent" 1998 *Obiter* 201). Even as a co-perpetrator, the appellant would be required to fulfil all of the elements of the crime; this would only not be required if the common purpose doctrine was applicable. Hence, if a second intruder simply enters premises, without any displacement of any obstacle, after the first intruder created an opening, the second intruder does not fulfil the breaking requirement, and can only be liable for the housebreaking crime on the basis of the common purpose doctrine. Mere entry through an open space does not suffice for the crime.

Thus, in the absence of the operation of the common purpose doctrine, it is not entirely clear that the appellant was indeed a "co-perpetrator", nor that "the element of housebreaking" (par 16) ought to have been regarded as having been proved beyond reasonable doubt.. The apparent lack of clarity regarding the fulfilment of the breaking requirement poses certain difficulties, although, if the court had applied the common purpose doctrine, these difficulties could have been readily answered. There appears to be no doubt whatsoever that the intruders were acting together for a nefarious purpose: as the court rightly states, the "only reasonable inference that can be drawn from … [the circumstances of the case] … is that their intention was to commit a crime" (par 17). Moreover, it may be added, it is clear that the intruders intended to act together. Proof of the housebreaking crime by means of the common purpose doctrine presents no difficulties on the facts, it is submitted. Justice is thus served by convicting the appellant of the housebreaking crime. What is rather less clear is whether the appellant

himself lifted the corrugated iron sheet so as to fulfil the requirement of breaking into the premises, and committing the crime. This raises difficulties in so far as the appellant is to be regarded as a co-perpetrator (which approach the court iterates in par 18−19), albeit that all the other elements of the housebreaking crime are fulfilled. In this regard, it is clear that the appellant was part of the criminal activity, rather than merely being present, as was argued on his behalf by counsel. Having said this, if there was indeed common purpose in the form of a prior agreement unlawfully to break and enter the premises, there would be no presence requirement as such.

The court's wrestling with the common purpose doctrine extends to the convictions for unlawful possession of a weapon and ammunition. The court ultimately applies the "joint possession" doctrine to confirm the appellant's liability regarding these charges (applying *S v Kwanda* 2013 (1) SACR 137 (SCA) and *S v Motsema* 2012 (2) SACR 96 (GSJ)). Once again, the result seems entirely correct. The *Motsema* case (par 29, cited at par 22) makes it clear that common purpose in itself does not establish joint possession. What is required is that there was an intention on the part of any participant who had control of the weapon to use it and possess it for himself and on behalf of the other participants, and that each participant who did not have physical control of a weapon intended that such weapon should be used and possessed by another participant on his behalf. As stated earlier, the court held that the test for joint possession was satisfied on both scores, and thus liability was correctly attributed (par 23). The court criticizes the court a quo for making use of the common purpose doctrine to found liability in these terms (par 21):

> "I disagree with the proposition that Appellant's conviction on this charge could be based solely on common purpose since the doctrine is irrelevant where an agreement has been proved by means of evidence that is direct or circumstantial or both. It only applied where such a prior agreement could not be proved."

This statement of the court is puzzling. The common purpose doctrine applies in two contexts: where there has been a prior agreement between the parties to engage in criminal conduct, or, in the absence of such prior agreement, where there has been active association with the common purpose (Kemp *et al Criminal Law in South Africa* 262). The court's statement that the common purpose doctrine only applies where there is no prior agreement cannot be reconciled with this position.

5 Conclusion

Might the court in *Leshilo* have engaged in more detail with the controversial nature of the statutory form of the housebreaking crime, particularly in the light of the swingeing penalty imposed by the court, despite the actual harm inflicted being limited, and the further criminal harm intended being obscure? It seems that having cited the *Slabb* case, which defended the existence of this crime, the court did not see fit to take this matter any further. Ironically, on the facts of the case, the issue was not so much whether there was conclusive proof that the appellant had a criminal intent (the particular difficulty which this form of the crime helps to resolve), but whether the

appellant had complied with another element of the crime – that is, whether there had indeed been a breaking on the part of the appellant. The evidence in this regard does not appear conclusive. This difficulty could easily be resolved by the application of the common purpose doctrine, but the court chose not to do this, seeming to view it as unnecessary. Whether this view is indeed correct is debatable. What can safely be concluded is that both the statutory form of the housebreaking crime and the common purpose doctrine will remain controversial. In this regard, it is hardly surprising that a case containing both elements gives rise to some debatable issues.

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