THE SINGULAR STATUTORY HOUSEBREAKING CRIME

S v Slabb 2007 1 SACR 77 (C)

1 Introduction

If the common-law crime of housebreaking with intent to commit a crime has been criticized for its form and function (see *S v Ngobeza* 1992 1 SACR 610 (T); and Snyman "Reforming the Law Relating to Housebreaking" 1993 6 *SACJ* 38), the statutory variation of the housebreaking crime, housebreaking with intent to commit a crime to the prosecutor unknown (for a discussion of the antecedents of this form of the housebreaking crime, see Hoctor "Some Constitutional and Evidential Aspects of the Offence of Housebreaking with Intent to Commit a Crime" 1996 *Obiter* 160 161-162), has been even more controversial, and has been subject to widespread academic criticism (De Wet *Strafreg* 4ed (2006) 369; Snyman *Strafreg* 5ed (2006) 549; and Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 806). The validity of this offence arose for discussion in *S v Slabb* (2007 1 SACR 77 (C)) (also briefly discussed by Hoctor "Recent Cases: Specific Crimes" 2007 *SACJ* 78 87).

2 Facts

Having gone to sleep in the bedroom of their dwelling, the complainant and her three minor children were woken in the early hours of the morning by the noise of a falling plate and spoon in the kitchen, which was only separated from the bedroom by a curtain (par [2]). When she went to the kitchen to investigate, the complainant saw the accused, who was known to the complainant and was resident in the area. The accused had obtained unlawful access to the premises by means of a screwdriver, with which he prised open the front door of the dwelling (par [2]). His movements whilst on the premises were limited to the kitchen area where items of value were kept. The accused fled the scene upon being discovered. It could not be established that the accused removed or attempted to steal any item from the kitchen (par [2]).

In the trial court, the Wynberg district court, the magistrate concluded that the only reasonable inference that could be drawn on the facts was that the accused entered the premises with intent to steal, and thus the accused was accordingly convicted on a charge of housebreaking with intent to steal (par [3]). Given the accused's voluminous list of previous convictions, the matter was referred to the Wynberg regional court for sentencing. However, the regional court magistrate seized of the matter was not satisfied that the proceedings in the trial court were in accordance with justice, despite requesting and obtaining further reasons from the district court magistrate for

the conviction. Since the regional court magistrate was of the view that there was insufficient evidence to conclude beyond reasonable doubt that the accused had the intention to commit theft or any other crime when found on the premises of the complainant, he referred the matter to the High Court on special review, in terms of section 116(3) of the Criminal Procedure Act 51 of 1977. The referring magistrate relied on *S v Woodrow* (1999 2 SACR 109 (C)) in holding that the proceedings in the trial court were not in accordance with justice. In the *Woodrow* case the curial and academic criticism of the validity of a charge of housebreaking with intent to commit a crime to the prosecutor unknown was noted, in the course of acquitting the accused on this charge (par [7]). According to the magistrate, as a result of the unease regarding this charge, courts confronted with such a charge usually sought to find some criminal intent on the part of the accused (par [7]). In the opinion of the referring magistrate, in the light of the *Woodrow* case, the accused in this matter did not commit any offence, and therefore the conviction in the trial court ought to be set aside (par [8]).

3 Judgment

The Cape High Court (per Le Grange AJ, Veldhuizen J concurring) accepted the correctness of the facts of the matter as set out by the trial court (par [2]). Le Grange AJ pointed out that the reliance placed on the *Woodrow* case by the regional magistrate was incorrect for a number of reasons. First, the facts *in casu* differed materially from those pertaining to the *Woodrow* case (par [9]; and see 110f-h of the *Woodrow* case). The context was entry into the premises with apparent theftuous intent by a person who was merely known to the complainant *in casu*, whereas in *Woodrow* the accused had been involved in an intimate relationship with the complainant which had broken down, and he had forced his way into the premises (by breaking a window, bending back the burglar bars, and climbing in through the window) when the complainant refused to allow him access to the premises to fetch his clothes and to speak to her (par [10]).

Secondly, it was held that the reasoning in the *Woodrow* case does not constitute good authority not to convict an accused person of housebreaking with the intent to commit an offence to the prosecutor unknown, as provided for in section 262 of the Criminal Procedure Act (51 of 1977), and therefore the regional magistrate's reliance on it in this regard was consequently misguided (par [9]). The acts of the accused in the *Woodrow* case mentioned above gave rise to a conviction of housebreaking with intent to commit a crime to the prosecutor unknown. (The accused was also convicted of malicious damage to property for breaking the window and the complainant's telephone, which was confirmed on appeal, and of assault with intent to do grievous bodily harm flowing from his assault of the complainant, which was altered on appeal to common assault.)

In *Woodrow* the court set aside the conviction of housebreaking with intent to commit a crime to the prosecutor unknown because the accused's intention – to speak to the complainant – was indeed known, and was moreover not in itself unlawful (see *S v Woodrow supra* 113b-c). The remarks expressed in

Woodrow regarding the difficulties associated with housebreaking with intent to commit a crime to the prosecutor unknown, which were cited by the regional magistrate, were not supported in the judgment of Le Grange AJ (par [11]-[13]).

Thirdly, it was held that in order for a conviction of housebreaking with intent to trespass (in terms of s 1(1) of the Trespass Act 6 of 1959) to be sustained, it needs to be established by the prosecution both that

> "the perpetrator(s) unlawfully entered the premises with the intention 'to remain' on the property but also that the perpetrator 'was' on the property and intended 'to *be*' on the property" (par [9]).

In conclusion, the court held that, based on the trial court record, the "inescapable conclusion" to be drawn was that the accused "gained unlawful entry to the premises of the complainant to commit a crime", and further that the "only inference" which could be drawn from such facts was that the accused was correctly convicted of housebreaking with intent to steal (par [14]). The conviction in the trial court was thus confirmed, and the record was returned to the regional court magistrate for sentencing (par [15]).

4 Discussion

The first point of interest regarding the case at hand is that virtually all the significant discussion of the law, and more specifically the crime of housebreaking with intent to commit a crime to the prosecutor unknown, is *obiter*. The regional court magistrate doubted the validity of the trial court's conviction of housebreaking with intent to steal based on "insufficient evidence" (par [6]), and the Cape High Court on review found that there was sufficient evidence to sustain the conviction. It appears that the interesting discussion of the law of housebreaking which followed flows from the regional magistrate proposing that if the original conviction was invalid, there could be no resort to the crime of housebreaking with intent to commit a crime to the prosecutor unknown, given its controversial nature, and thus that the accused's actions could not found criminal liability for any form of the housebreaking crime.

Before addressing the matters raised in the judgment in more detail, two brief points fall to be made regarding the regional court magistrate's findings. First, the statement (par [6]) that the accused lacked intention to commit theft or any other crime when "found on the premises" of the complainant, given the *Woodrow* judgment, is curious. The crucial moment for the assessment of intention for all manifestations of the housebreaking crime is at the point of entry of the accused into the premises, and not "when found" (Milton 806; Snyman 549). Secondly, the magistrate's view that the accused "did not commit any offence" (par [8]) is questionable – even if housebreaking with the intent to commit a crime could not be established, surely the accused's acts amount to the crime of trespass (s 1(1) of the Trespass Act 6 of 1959)?

(i) The curious offence of housebreaking with intent to commit a crime to the prosecutor unknown

Whereas at common law if an accused was charged with housebreaking with intent to commit one offence, and the evidence established intent to commit another offence, an acquittal had to follow, since 1917 it has been a competent verdict (and is currently so in terms of s 262 of the Criminal Procedure Act of 1977) to convict the accused of housebreaking with intent to commit that other offence, or even "some offence unknown" (Milton 806). (The formulation used in s 262(2) and (3), and in s 95(12) of the Criminal Procedure Act (which provides for a charge in these terms) – "an offence to the prosecutor unknown" is clearly preferable to that used in s 262(1) – "an offence unknown" – since the issue is whether the offence intended can be proven rather than whether it exists.) The notion of housebreaking with the intent to commit a crime to the prosecutor unknown has been subjected to stringent criticism by commentators. De Wet regards this notion as an "onding" (370), Snyman (549) states that it has "geen bestaansreg" in our law, and Milton (807) opines that any such charge is potentially prejudicial to the accused and smacks very much of a fishing expedition. The nub of the criticism of the offence by these writers may be briefly set out as follows.

Snyman asks: how can a court find as a fact that the perpetrator intended to commit *an* offence if it is impossible for that court to determine *what* this intended offence was (Snyman 1993 6 *SACJ* 43; and Snyman 549)? Moreover Snyman points out that housebreaking *per se* is not a crime, and neither is the mere intention to commit a crime; thus "to charge somebody with such an offence is therefore tantamount to charging him with something which conceptually cannot constitute a crime" (Snyman 1993 6 *SACJ* 43; and Snyman 549). In other words, two non-wrongs don't make a right (and proper) conviction.

De Wet, typically acerbic, notes (369) that

> "[d]aarmee het die Wetgewer hom op wonderbaarlike wyse 'n voorstelling gemaak van iets wat begripmatig onbestaanbaar is. 'n Misdaad is nie 'n simboliese voorstelling nie, maar 'n strafbare doen of late met sekere eienskappe. Net so min as wat mens kan sê dat iemand hom aan 'n misdaad skuldig gemaak het sonder om te bewys of te aanvaar dat hy hom op 'n bepaalde manier gedra het, net so min kan mens praat van die bestaan van 'n bedoeling by iemand om 'n misdaad te pleeg, sonder om te bewys of te aanvaar dat hy die bedoeling gehad het om hom te gedra op 'n wyse wat binne die een of ander misdaadomskrywing val".

Milton is equally scathing in his dismissal of the notion of being convicted with the intent to commit an unknown crime (806):

> "It would seem that if X is charged with housebreaking with intent to commit an offence to the prosecutor unknown, he cannot be convicted unless the evidence shows that he intended to commit some offence known to our law. But if the evidence does reveal such an intent, then it is logically contradictory and farcical to convict of housebreaking with intent to commit an offence unknown, because the offence is known."

However, this form of the housebreaking crime has been defended by Nanoo, who argues that a distinction must be drawn between *no* intent and an

unknown intent, and that such a charge will be valid "if an inference of criminal intent is the only reasonable explanation of suspicious behaviour" (Nanoo "In Defence of Housebreaking with Intent to Commit a Crime Unknown" 1997 10 *SACJ* 254 255-256). Nanoo contends that this charge is indeed appropriate where the breaking and entering occurs in circumstances which indicate an intention to commit an offence beyond trespassing, but "where the evidence is insufficient to establish with certainty what that intended offence was" (Nanoo 1997 10 *SACJ* 256).

Further, as has been argued in more detail elsewhere (Hoctor 1996 *Obiter* 160 162ff), it seems that this provision does not unjustifiably limit either the accused's right to be presumed innocent or the accused's right to be informed of the details of a charge with sufficient details to answer it (s 35(3)(h) and (a) of the 1996 Constitution respectively). This view has been accepted by the South African Law Commission (now the South African Law Reform Commission) 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, which has therefore recommended that sections 95(12) and 262 of the Criminal Procedure Act be retained in their present form.

(ii) The need for this offence

In response to the challenge of the referring magistrate to the validity of housebreaking with intent to commit a crime to the prosecutor unknown, the Court in *S v Slabb* mounted a stout defence of this offence. Whilst apparently conceding the difficulties of definition associated with the offence, the Court emphasized the significance of the housebreaking crime in protecting life and property (par [12]).

The role of the housebreaking crime in this regard should not be underestimated. It is well-recognized that the housebreaking crime is a serious offence, involving the invasion of the personal right of security and safety of the individual in his or her home or property (*S v Madlala* 1962 1 PH H9 (N)). As Le Grange AJ notes, the crime "constitutes a major invasion of the private lives and dwellings of ordinary citizens" (par [12]). This is particularly the case where the invasion takes place in the home, in the "place of security for [the complainant's] family, as well as his most cherished possessions" (American Law Institute *Model Penal Code and Commentaries* (1980) art 221.1 67 (hereinafter "*MPC*")), with the inevitable consequence of terror or fear being inflicted on the victim (Haddan "Burglary: The Law" in Wright and Miller (eds) *Encyclopedia of Criminology* (2005) 129 130). It follows that burglary (the Common Law version of the housebreaking crime) has been described as one of the "most damaging crimes to society" (House Report No. 98-1073 (1984) 3 cited in *Taylor v United States* (1990) 495 US 575 581), and that in the British Crime Survey burglary was found to be the most feared crime among all respondents (cited in McSherry and Naylor *Australian Criminal Laws* (2004) 319). Accordingly, the existence of this crime "reflects a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to terrorize occupants" (*MPC* 59).

Burglary inflicts significant costs upon its victims and society in general. Research indicates that victims of residential burglary suffer considerable psychological and emotional consequences (Newburn "The Long-term Impact of Criminal Victimisation" 1993 33 *Home Office Research and Statistics Department Research Bulletin* 32). (For argument that the protection of the owner or occupant against the psychological trauma and sense of violation associated with a housebreaking ought to be regarded as the overarching rationale for the housebreaking crime, see Hoctor "The underlying rationale of the crime of housebreaking" 1998 *Obiter* 96.) Apart from loss of property, victims may potentially struggle with physical trauma, post-traumatic stress disorder, immobility, and stages or phases of grief, anger, shock, disbelief, fear and sadness (Robinson "Burglary: Extent and Correlates" in Wright and Miller (eds) *Encyclopedia of Criminology* (2005) 126). Where the perpetrator is not apprehended, this can result in additional trauma for the victim, who may fear a further intrusion (Haddan 131). Furthermore, fear of being a victim of burglary is a pervasive concern amongst even those who have not experienced such trauma first-hand (Robinson 126). As Haddan points out, "[s]ince burglary is frequent, costly, upsetting, and difficult to control, it makes great demands on the criminal justice system" (131).

Moreover, the gravity of the crime of housebreaking is invariably considerably enhanced by the possibility of violent confrontation:

> "[A]n intrusion for any criminal purpose creates elements of alarm and danger to persons who may be present in a place where they should be entitled to freedom from intrusion. Their perception of alarm and danger, moreover, will not depend on the particular purpose of the intruder. The fact that he may be contemplating a minor offence will be no solace to those who may reasonably fear the worst and who may react with measures that may well escalate the criminal purposes of the intruder" (*MPC* 75).

Whilst sometimes viewed as a non-violent crime, the character of the crime can change rapidly, "'depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises" (*Taylor v United States supra* 581). The offender's own awareness of the possibility of violent confrontation may mean that he is prepared to use violence if necessary to carry out his plans or to escape (*Taylor v United States supra* 588).

Given that the statutory variant of the housebreaking crime functions as an adjunct to the common-law crime, these policy considerations apply equally to it. Although the criticisms levelled at the statutory version of the crime are indubitably theoretically sound, for all that it seems to have a useful and even important role in practice (see, *eg*, *S v Keenan* 1973 1 PH H17 (T), where the accused broke and entered the premises only to emerge empty-handed, probably because he realized he had been seen, and where the court duly handed down a conviction of housebreaking with intent to commit a crime to the prosecutor unknown). There have been several convictions on this basis, although it seems that where possible (quite properly, it is submitted) the court attempts to substitute a conviction of housebreaking with intent to commit some known crime for a charge under s 95(12) of the Criminal Procedure Act 51 of 1977 (see, *eg*, *R v Coetzee* 1958 2 SA 8 (T); and *S v Wilson* 1968 4 SA

477 (A)). If we are to reject this version of the crime, and scrap the legislative provisions which underlie it, we need to ask whether this will leave a *lacuna*, and whether other, more ideologically acceptable, methods can be employed to remedy whatever defect exists. The fact remains that the notion of being convicted with intent to commit a crime to the prosecutor unknown remains a valuable source of assistance to prosecutors who may be called upon to convince the court of the criminal intent of the accused, armed only with the flimsiest evidence of the real state of mind of the accused.

(iii) Intention to commit a crime

Calling for a "common-sense approach" to determining the intention of the intruder and the application of the "ordinary principles of law" (par [12]), the Court concluded (par [13]) that

> "[w]here … 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 … the proper one".

This is consistent with the approach adopted in the US Model Penal Code, where it is required only that it be established that the intrusion be made as a "conscious step towards the accomplishment of one of a number of possible criminal objectives" (*MPC* 68; see also the Canadian cases of *R v Delory* (1932) 4 MPR 524 (NBCA); and *R v Kaehler* (1945) 83 CCC 353, where it was held that the intended offence need not be specified in the indictment). The criminal purpose required for burglary liability on the part of the intruder is broadly defined, consisting simply of a "purpose to commit a crime therein" in the recognition that apprehension of the burglar at the point of entry considerably complicates the process of determining his or her intent, and that a more broadly defined intent requirement "reflects the realities of law enforcement more accurately than would a narrower formulation" (*MPC* 75). As a result, it has been held in a number of US cases that the specific criminal purpose "need not be pleaded and proved with the same particularity in prosecuting burglary as in prosecuting the crime which the burglar had in mind or an attempt to commit that crime" (*MPC* 76, citing the following cases: *State v Norwood* 289 NC 424, 222 SE.2d 253 (1976); *State v O'Clair* 292 A.2d 186 (Me 1972); *People v Daniels* 145 Cal.App.2d 615, 302 P.2d 831 (1956); *Commonwealth v Ronchetti* 333 Mass 78, 128 NE.2d 334 (1955); *Ex parte Seyfried* 74 Idaho 467, 264 P.2d 685 (1953); and *State v Woodruff* 208 Iowa 236, NW 254 (1929)).

As Hugo has pointed out, where there is no proof at all concerning the nature of the intended offence, it may simply be that the accused did not intend to commit an offence (but intruded, for example, in order to sleep or escape the weather), and so must be acquitted (Hugo "Housebreaking with Intent to Commit an Unknown Offence" 1969 86 *SALJ* 22 23). However, the court may draw inferences from the facts in order to establish which offence the accused intended to commit (Hugo 1969 86 *SALJ* 23), including the circumstances of the entry (*MPC* 76) and the accused's acts after entry

(presumably the court's statement in *S v Woodrow supra* 112h-i, that drawing the inference of intent "will not in all cases be sound" is not so much a comment on the appropriateness of using inferential reasoning as a warning to be cautious in doing so).

5 Conclusion

Housebreaking with intent to commit a crime is a serious crime, which impacts not only on property rights, but also on the psychological well-being of its victims. As the court in *Slabb* stressed, the purpose of the legislation on housebreaking crime is "to protect and preserve the sanctity of people's homes and property", as well as to punish intruders "who unlawfully gain entry into a home or other premises with the intention of committing a crime on the premises" (par [12]). Thus the delineation of the crime in legislation crime protects the rights to property and security of the person (see Haddan 133), and does so for all members of society, not just the wealthy (see Kgomo J's comments in *S v Madini* [2000] 4 All SA 20 (NC) 25c, where the need for the crime to protect even shanties in informal settlements is stressed). Moreover the crime functions, in the words of Justice Holmes (*The Common Law* (1881) 74), as "an index to the probability of certain future acts which the law seeks to prevent". Thus there are compelling policy arguments for not merely charging an intruder apprehended shortly after entry with trespass, but with the housebreaking crime, recognizing that the breaking and entry often constitutes the first steps towards "wrongs of a greater magnitude" (Holmes 74). These considerations form the foundation of the statutory housebreaking crime, a point which was pertinently recognized by the court in *Slabb*.

One final point. There is no reason why an accused should not be charged with the crime of housebreaking with intent to trespass, and convicted accordingly, where this intention can be established on the part of the accused. Although some writers have criticized this charge as artificial, operating as a sort of *deus ex machina* to cover those cases where the "real" intention of the accused cannot be established (see De Wet 370; Snyman 550; and Chaskalson "Criminal Law (Legislation and Specific Crimes)" 1992 *Annual Survey* 491 527), it is submitted that in the light of the weighty policy considerations underlying the dangerous and distressing house-breaking crime that it is indeed appropriate to utilize this charge. It is recognized by the courts that housebreaking with intent to trespass is a less serious offence in South African law (*S v Le Fleur* 1969 2 PH H200 (N)), so the familiar charge that the accused is being prejudiced as a result of such a conviction carries less weight, and thus the social evil which this conduct constitutes, and from which the community desires, and deserves, adequate protection should be penalized accordingly.

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