

## ATTEMPTED HOUSEBREAKING WITH INTENT TO COMMIT A CRIME

### 1 Introduction

The Anglo-American crime of burglary is generally acknowledged as being the basis for the development of the South African crime of housebreaking with the intent to commit a crime. It has been widely accepted that the crime of burglary functions as “a rather unique type of attempt law” (La Fave and Scott *Criminal Law* 2ed (1986) 800). The context for the development of the crime was the traditional limitations on the law of attempt (Kadish and Schulhofer *Criminal Law and its Processes – Cases and Materials* 5ed (1989) 642). As noted in the commentary on the crime of burglary in the Model Penal Code (American Law Institute *Model Penal Code and Commentaries* (1980) § 221.1, 62-3), apart from the disparity in sentences for an attempt and a completed offence,

“[t]he common law of attempt ordinarily did not reach a person who embarked on a course of criminal behaviour unless he came very close to his goal. Sometimes it was stated that to be guilty of attempt one had to engage in the final act which would have accomplished his object but for the intervention of circumstances beyond his control. Under that view of the law of attempt, a person apprehended while breaking into a dwelling with intent to commit a felony therein would not have committed an attempt, for he would not have arrived at the scene of his projected theft, rape or murder.”

The South African version of the crime functions in a similar fashion as a sort of inchoate offence, in that it allows for the intervention of criminal liability upon the merest intrusion of a part of the body (or instrument) into premises (following a “breaking” which may be of a technical nature – see discussion in Hoctor “The ‘Breaking’ Requirement in the Crime of Housebreaking with Intent” 1998 *Obiter* 201ff), provided that such intentional intrusion is accompanied by a further intent to commit an offence within. Moreover, just as Common Law jurisdictions have typically sought to enable criminal intervention at an even earlier stage, through the use of the offence of possession of housebreaking implements, so too South African law has made use of such an offence in the earliest criminal legislation passed at the Cape and by the other South African colonies and states (see the discussion of the old statutory forms of housebreaking in Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 808ff), and still does so today (in terms of the new statutory offence of “failure to give a satisfactory account of the possession of an implement or object”, contained in s 82 of the General Law Third Amendment Act 129 of 1993, discussed in Hoctor “Statutory Housebreaking and Vehicle-breaking” 1999 *Obiter* 225ff). As Snyman notes, this offence fulfils a valuable function in that it in effect functions to create a form of attempt to break into premises (“Reforming the

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Law Relating to Housebreaking” 1993 *South African Journal of Criminal Justice* 38 49).

## 2 Can the housebreaking crime be attempted?

Since the housebreaking crime already constitutes a preparatory offence, the question arises whether it is appropriate to have a conviction for an attempt to commit this crime. This question appeared to have arisen in *S v Molelle* (1971 2 PH H117 (O)), where the Orange Free State Provincial Division altered a conviction of “poging tot huisbraak” in a magistrate’s court in the light of an admission by the magistrate that such a crime did not exist. That this was the tenor of the judgment seems to be the view of Milton, who notes this finding, before proceeding to suggest that it is incorrect, in that a verdict of attempted housebreaking with intent to commit an offence was possible (808). However, as there is no substantive crime of housebreaking as such in South African law, there can be no disputing the correctness of the decision in *S v Molelle*. Indeed, although this is not acknowledged in the report of the judgment, there is authority for this approach in *R v Abrahams* (1960 1 PH H95 (C)), where it was held on review that there is no such offence as attempted housebreaking. However, having stated the legal position, the court in *Abrahams* proceeded to ratify the conviction in the court *a quo* by altering the designation of the crime on review to a charge of “attempted housebreaking with intent to commit a crime to the public prosecutor unknown”. The conviction on the amended charge was confirmed. It should be noted that the court in *Molelle* adopted exactly the same approach, confirming the conviction on the basis of an amended charge, of attempted housebreaking with the intent to commit a crime to the prosecutor unknown. The decision in *Molelle* was discussed by Magid J in *S v Hlongwane* (1992 2 SACR 484 (N)), in the light of Milton’s interpretation, and it was concluded (485e) that:

“If, therefore, an accused person cannot be convicted of housebreaking if no intent to commit an offence is proved, there can be no conviction of an attempt to commit that offence without proof of the relevant intent. And, in my opinion, nothing more than that should be read into the *Molelle* judgment.”

Although in *R v Jaffa* (1924 2 PH H79 (C)), *R v Erasmus* (1952 4 SA 114 (C)) and *R v Selendani* (1956 1 PH H30 (T)), the reported judgments indicate that the respective accused were convicted of “attempted housebreaking”, it is submitted that these novel convictions can be ascribed to attenuated reporting or overly succinct judicial description, rather than the emergence of a previously unacknowledged basis for liability. It seems clear that

“it is improper to convict an accused person of an attempted housebreaking without proof that he had an intention to commit an offence” (*S v Hlongwane supra* 485a-b).

On the other hand, it is evident that a charge of attempted housebreaking with intent to commit an offence is acceptable in South African criminal law.

### 3 Attempted housebreaking with intent to commit a crime through the cases

The South African courts have acknowledged the validity of a conviction of attempted housebreaking, coupled with the requisite intent, in numerous decisions over a period of almost 125 years. The earliest reported decision to countenance an attempt conviction in respect of the housebreaking crime is *R v Oliphant* ((1884) 3 EDC 413), where the court quashed a conviction of “housebreaking with intent to commit a felony” on the basis that the term “felony” was not known to Roman-Dutch law, and the case was remitted for an alteration in the charge sheet to malicious injury to property or “attempting housebreaking with some criminal intent” (414). Since then, there have been a number of convictions for attempted housebreaking with intent to steal (*R v George* 1921 EDL 125; *R v Macamba* 1928 PH H23 (O); *R v Ncanca* 1954 4 SA 272 (E); *R v Motseme* 1960 3 SA 721 (GW); *S v Naidoo* 1967 1 PH H85 (N); and see also *R v Jafta supra*, where it is clear that this is the basis of the conviction, despite the unclear nature of the report), along with a number of convictions for attempted housebreaking with the intent to commit a crime to the prosecutor unknown (*R v Mtetwa* 1930 NPD 285 (which dealt with the statutory offence of housebreaking with intent); *R v Voster* 1933 1 PH H55 (T); *R v Behr* 1955 1 PH H25 (O); *R v Abrahams supra*; *R v Arries* 1960 1 PH H61 (GW); *S v Ndhlovu* 1963 1 SA 926 (T); *S v Molelle supra*; and see also the cases of *R v Crawford* 1924 PH H55 (GW), *R v Erasmus supra*, and *R v Selendani supra*; where despite the lack of clarity in the relevant dicta it is clear that this was the basis of the respective convictions).

It seems that all the case law relating to attempted housebreaking with intent has dealt with a factual situation where there has been a breaking, but for some reason the accused has been unable to effect an entry (Milton 808 further suggests that an attempt conviction may follow in these circumstances). Thus liability for attempted housebreaking with the requisite intent may be founded upon such conduct as: opening or breaking or breaking open a window (*R v Jafta supra*; *R v Crawford supra*; *R v Macamba supra*; *R v Voster supra*; *R v Erasmus*; *R v Ncanca*; *R v Behr supra*; *R v Selendani supra*; *R v Arries supra*; *S v Naidoo supra*; and *S v Molelle supra*), breaking a lock on a door (*R v George supra*; and *R v Erasmus supra*), inserting a key in a lock (*R v Mtetwa supra*), breaking an immovable display cabinet (*S v Ndhlovu supra*), making a hole in a door (*S v Chinyerere* 1980 2 SA 576 (RA)), and removing portion of the roof of a dwelling (*R v Teleko and Matlala* 1958 2 PH H209 (O)).

It is not necessary that there be a completed breaking before there can be an attempt conviction. This is evident from such decisions as *R v George (supra)* (where the accused was arrested having removed some but not all of the locks on a door with a pickaxe), *R v Mtetwa (supra)* (where the accused was held liable for attempted statutory housebreaking after having inserted a key in a door, at which point he was disturbed and fled before

opening the door), *R v Arries (supra)* (where the accused had broken a window, but still had to remove iron bars in the window opening to gain access to the premises), and *S v Ndhlovu (supra)* (where the accused's throwing arm was seized in the act of throwing a stone through a display case). Further, Magid J stated in *S v Hlongwane (supra 485h-i)* that

“if a person were found with a crowbar in his hands trying to lever open a door or window of premises in order to gain access thereto in order to steal, I have no doubt that his conduct would constitute an attempted housebreaking with intent to steal even though he had not yet achieved the necessary breaking or entry”.

(By way of comparison, in relation to the Dutch offence of aggravated theft contained in s 311(5) of the *Wetboek van Strafrecht* – where theft occurs by means of breaking or climbing into premises, or entry by means of false keys, a false order or a false costume or disguise – attempted theft with breaking is already present once the offender has begun with the breaking (Van den Hout “Diefstal en stroperij” in Cleiren and Nijboer (eds) *Strafrecht: Tekst & Commentaar* 5ed (2004) 1071, citing HR 22 juni 1999, NJ 1999, 636)). Nevertheless, the actions of the accused must have gone beyond the stage of mere preparation in order to incur criminal liability. In *R v Mtetwa (supra)* it was held that the accused, in inserting a key in a door, had gone beyond an act of preparation, and that what he did amounted to “an act, or one of a series of acts, which, had he not been interrupted, would have constituted the actual consummation of the crime” (288). Similarly, in *R v Voster (supra)*, the accused were held to have passed the stage of preparation in that they “were actually trying to force an entrance by ‘working at the fanlight’”. The court in this case distinguished the case of *R v Magatlate* (1928 TPD 615), where, on a statutory unlawful entry charge, the mere fact that the accused was found in front of the complainant’s house at night failed to disclose that “any overt act which in law amounts to an attempt” had been committed. Tindall J stated that the evidence was “quite consistent with the view that he was merely looking to see what the situation was before he proceeded further” (617). In *R v Muteweye* (1963 2 PH H256 (SR)), the accused was arrested whilst attempting to squeeze through the sun louvres in front of a bank’s locked doors. The court held that the accused’s actions failed to amount to an attempt to break into the bank, and that his subsequent running away and giving of palpably false explanations could not be used to convert the nature of his acts from “preparation” to “attempt”. In a comparable factual scenario, the accused in *S v Hlongwane (supra)* was held to be, at most, trying to ascertain whether a breaking-in was feasible when he moved some curtains, and therefore could not be held liable for an attempt. (By way of comparison, in the Canadian case of *R v Blencoe* [1992] BCWLD 1627 (BCCA) the accused’s conviction for attempted breaking and entering was overturned, after he was found wearing a sock and a mitt on his hands; whereas in the US case of *State v Kleier* 69 Idaho 491, 210 P.2d 388 (1949) the defendant was convicted of attempted burglary after being apprehended in the early morning hours climbing the stairs to a second-floor store, carrying a bolt cutter.)

It is submitted that the remaining inchoate offences, conspiracy and incitement, can equally be combined with a charge of housebreaking with intent to commit a crime in appropriate circumstances. In *R v Motseme* (*supra*) the accused had been convicted of inciting to housebreaking with intent to steal and theft in the magistrate's court, having been charged with housebreaking with intent to steal and theft. The court held that the accused should have been convicted as charged, as the inciting had succeeded, and consequently he was liable as a *socius criminis*. Thus a conviction of inciting to housebreaking with intent would be appropriate where the crime had not (yet) been committed (see *R v Milne and Erleigh* (7) 1951 1 SA 791 (A) 823; and Snyman *Criminal Law* 4ed (2002) 295). Similarly, conspiring to commit housebreaking with intent could incur criminal liability where the actual crime has not yet been perpetrated (see *R v Milne and Erleigh* (7) *supra* 823; and Snyman 292).

#### 4 Concluding remarks

It is evident that the crime of housebreaking with intent fulfils a very useful role in acting as a form of inchoate offence, allowing for the crime to be completed at the moment of unlawful intentional intrusion by means of a "breaking" into premises, coupled with the intent to commit a crime within. The crime intended may be common-law or statutory. It is usually theft, but it may be rape (*R v Williams* 1956 2 PH H192 (GW)); assault (*R v Grobler* 1918 EDL 124); indecent assault (*R v Solomon* (1883) 2 HCG 193); robbery (*S v Cupido* 1975 1 SA 537 (C)); murder (*R v Cumoya* 1905 TS 402); malicious injury to property (*R v Badenhorst* 1960 3 SA 563 (A)); trespass (*R v Badenhorst*, *R v Maduma* 1959 4 SA 204 (N), *R v Nyaka* 1959 2 PH H320 (N)); or any other offence (*R v Schonken* 1929 AD 36), including (in terms of s 262 of the Criminal Procedure Act 51 of 1977) housebreaking with intent to commit an offence to the prosecutor unknown. The English crime of burglary functions similarly, in providing that the crime is complete upon entry into a building as a trespasser with intent to commit theft, grievous bodily harm, rape or unlawful damage; or having entered as a trespasser, the commission of theft or infliction of grievous bodily harm (in terms of s 9(1)(a) and s 9(1)(b) respectively of the Theft Act of 1968).

Punishing attempt to commit the housebreaking crime allows criminal liability to intervene at the earliest possible moment in the actual conduct of breaking and entering a premises. This accords with the rationale for punishing incomplete attempts: the social importance of authorizing official intervention before harm is done (Ashworth *Principles of Criminal Law* 5ed (2006) 447; and see also Burchell *Principles of Criminal Law* 3ed (2005) 622). As indicated earlier, the statutory offence of possession of housebreaking implements (as set out in s 82 of the General Law Third Amendment Act 129 of 1993) sanctions criminal liability even earlier in the process. However, the punishment for this offence is either a fine or imprisonment for a period of three years. In contrast, although a lesser punishment is usually imposed for an attempt conviction, in principle an

attempt can be punished in the same measure as the completed crime. It is thus clear that it would be preferable, in appropriate circumstances, to frame a charge in terms of an attempt to commit the housebreaking crime, rather than the statutory offence contained in section 82, in order to authorise “penalties more nearly in accord with the seriousness of the actor’s conduct” (in the words of the *Model Penal Code and Commentaries* §221.1, 63).

The utility of a charge of attempted housebreaking with intent for the State is further enhanced by the statutory extension of the common-law crime to allow a charge and conviction of housebreaking with intent to commit a crime to the prosecutor unknown (in terms of s 95(12) and s 262 of the Criminal Procedure Act 51 of 1977 respectively). Through this extension, the difficult burden resting on the prosecution of establishing the further intent with which the accused broke into and entered the premises was considerably alleviated. Although this development has been subjected to severe criticism (De Wet *Strafreg* 4ed (1985) 369; and Snyman 546; Milton 806), it appears that the statutory variation of the housebreaking crime does not unjustifiably limit the rights of the accused to be informed of the charge with sufficient details to answer it and to be presumed innocent (ss 35(3)(a) and 35(3)(h) of the Constitution of the Republic of South Africa, 1996, respectively – this was concluded in Hoctor “Some Constitutional and Evidential Aspects of the Offence of Housebreaking with Intent to Commit a Crime” 1996 *Obiter* 160, and approved by the South African Law Commission *The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing* (Report: Project 101, May 2001) 87-91). Whilst the academic criticism of this form of the housebreaking crime has been reflected in the courts (see *S v Woodrow* 1999 2 SACR 109 (C) 111h-112c), the basis for the existence of the crime has recently been defended in *S v Slabb* (2007 1 SACR 77 (C) par [12]-[13]) in the following terms (original emphasis):

“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 ... 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 ... the proper one.”

Clearly, the ambit of the crime of attempted housebreaking with intent to commit a crime to the prosecutor unknown provides for a conviction on the basis of little more than an incomplete breaking. Nevertheless, it bears repeating that the accused could not be found criminally liable on such a charge unless his or her actions had gone beyond the stage of preparation, and could be classified as being in the stage of execution of the crime (see, eg, *R v Magatlale supra*; *R v Muteweye supra*; and *S v Hlongwane supra*). Given the gravity of the housebreaking crime it is evident that, in this form of the crime, prosecutors possess a tool which could function very effectively

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indeed in combating crime within premises. Further, there is no reason in principle why there could not be a conviction of attempt to incite the crime of housebreaking with intent, or attempt to conspire to commit the crime of housebreaking with intent (or other variants involving conspiracy and incitement – see Snyman 298), thus pushing back the line separating innocence from criminality in the steps leading up to the commission of a substantive offence even further.

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