

CONSTRUCTIVE BREAKING – A CONSTRUCTIVE PART OF THE HOUSEBREAKING CRIME?

1 Introduction

Section 9 of the Theft Act of 1968 heralded a new formulation of the crime of burglary in English law, in that the unlawful conduct associated with the crime was changed from the previous elements of breaking and entering, to the requirement of a trespassory entry. Thus the element of breaking was dispensed with. Prior to the passing of the Theft Act, the English crime of burglary, along with other offences involving breaking and entering, was governed by sections 25-27 of the Larceny Act of 1916, which in turn fell to be interpreted and applied in terms of the abundance of common-law precedent. The common-law conception of the term “breaking” included both actual breaking and constructive breaking. The former notion involved the displacement of some obstacle in order to facilitate the unlawful entry into the premises: drawing a bolt, turning a key, lifting a latch, raising a cellar flap or window sash (Turner *Kenny’s Outlines of Criminal Law* 18ed (1962) 246). Constructive breaking may be defined as “obtaining an entrance into the [premises] by any threat or artifice used for that purpose, or by collusion with any person in the [premises]” (Stephen and Stephen *Stephen’s Digest of the Criminal Law* 5ed (1894) 283; see also Turner *Russell on Crime* 11ed (1958) Vol 2 919ff; Palmer and Palmer *Harris’s Criminal Law* 20ed (1960) 332; and Cross and Jones *An Introduction to Criminal Law* 5ed (1964) 256).

Whilst it is generally accepted that the crime of housebreaking with intent to commit a crime (hereinafter “the housebreaking crime”) in South African law has its roots in the English common law rather than the Roman-Dutch law (Snyman *Criminal Law* 4ed (2002) 540; and *R v Fourie*; *R v Louw* 1907 ORC 58 59), it has been doubted whether the common-law notion of constructive breaking has been received into South African law (Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 800). Moreover, Gardiner and Lansdown have stated that the “doctrine of constructive breaking ... would probably not be approved by South African courts if the matter came into question” (Lansdown, Hoal and Lansdown *Gardiner and Lansdown’s South African Criminal Law and Procedure Vol II: Specific Offences* 6ed (1957) 1720). It is proposed to examine whether constructive breaking has indeed been introduced into South African law, by examining the three aspects of constructive breaking set out in the above definition: entry by threat or duress, entry by artifice or fraud, and entry by collusion with another within the premises.

2 Threat, duress or intimidation

The question of whether entry obtained by means of duress or threats could be regarded as a breaking (see generally for the common-law position: Turner *Russell on Crime* 919; and Cross and Jones 256) has been canvassed in our law in *S v Cupido* (1975 1 SA 537 (C)). The four accused gained entry by dispossessing the doorkeeper of the keys to the lattice-work gate which barred entry to the structure. They rattled the gate, prompting the doorkeeper to approach them. He refused their demand that he should let them in, whereupon one of the accused caught hold of the doorkeeper's arm and held it fast. When the doorkeeper found that he could not break free of the accused's grasp, he was afraid, and consequently unlocked the gate, thus allowing the accused persons to storm onto the premises, taking the key away from the doorkeeper. The accused were convicted of housebreaking with intent to commit robbery and robbery in the court *a quo*, and the matter came before the Cape Provincial Division on review.

Although the court did not make a direct ruling on the matter, it took note of the arguments of accused's counsel, following Hunt and the authors of *Gardiner and Lansdown* (see above), that it was doubtful whether the doctrine of constructive breaking had been received into South African law (538A-B). Counsel were unable to find any Roman-Dutch authority directly in point, apart from an unreported decision of the Appellate Division in *S v Robyn* (2 October 1972), where the opening of a door to "a marauder who threatened to burn the house down if he did not do so" was apparently regarded as constituting a breaking, although the point does not appear to have been argued (538C). Ultimately the court sought to decide the matter on the basis of principle, rather than precedent, and applied the *qui facit per alium facit per se* rule. In terms of this rule, the perpetrator of the crime can commit the unlawful conduct through an innocent agent (such as an animal, a child, or someone who is unaware of the fact that a crime is being committed), and be held liable on this basis. Thus, as Burchell points out, the thrust of the maxim is that for the purposes of criminal liability, he who does an act through another, does it himself (573). The court illustrated its conclusion, which it regarded as "merely the application of a well-known principle of our law" (539A-B), as follows (538G-H):

"[I]f a burglar (sic) wished to gain entry to a house and, by the administration of threats to another, got the other person to do the breaking for him so that he could enter, it seems to me that the burglar would be guilty of housebreaking. If the threats were administered to the owner of the house, and the owner were to unlock the door so that the burglar could enter, the same considerations would logically apply, and it seems to me that it can make no difference whether the owner, at the time the threats are administered, is outside the house or, as in the present case, inside it. In each case the burglar would be using the owner as his tool to do the breaking for him."

Whilst the result of the case accords with one's sense of justice, it is perhaps debatable whether the court's recourse to the *qui facit per alium facit per se* rule is appropriate. Visser and Maré (*Visser & Vorster's General Principles of Criminal Law Through the Cases* 3ed (1990) 681) point out that Watermeyer J's statement regarding liability flowing from the acts of an innocent agent amount to a mere repetition of the English doctrine of

“innocent agency”, which has never been part of South African law. Moreover, the authors comment, the *qui facit* rule merely describes an indirect perpetrator or a situation of indirect perpetration (682). As Snyman states, an indirect perpetrator is someone who “commits a crime through the instrumentality of another” (257). Given that there is no material distinction between direct and indirect perpetrators for the purposes of liability, nothing turns on whether the instrument used to commit the crime happened to be an innocent agent (258).

Furthermore, surely if the court accepts that breaking can occur through the fear-motivated actions of another, then it is, to all intents and purposes, accepting that the notion of constructive breaking (or at least this form of constructive breaking) forms part of South African law? It seems that Milton falls into the same flawed thinking when he initially submits that an entry by force or “constructive breaking” is not part of South African law as there is no South African authority for such a “breaking”, but then proceeds to state, on the authority of *Cupido*, that where “on the other hand ... X by threats of force compels Y to ‘break’ premises” he can be convicted of housebreaking on the basis of *qui facit per alium facit per se* (800).

It is thus submitted that in preference to attempting to found liability on the *qui facit* rule, in a situation such as occurred in *Cupido*, where the accused obtains access by means of duress or threats, thus using the owner or householder as an “instrument” to gain entry, this should simply be regarded as a breaking (see Snyman 544; and Skeen “Criminal Law” in Joubert (ed) *LAWSA Vol 6 2ed* (2004) par 356). As De Wet states, in typical pithy fashion:

“As dit *breaking* is om ’n deur wat nie op slot is nie oop te maak, dan is toegang deur dwang verkry tog des te meer *breaking*” (*De Wet and Swanepoel Strafreg* 4ed (1985) 367 fn 433).

Crucially, by adopting this approach the primary focus of the enquiry relates to lack of consent on the part of the owner or occupant of the premises. Snyman states that consent obtained as a result of violence, fear or intimidation is not voluntary consent (126), and thus cannot be held to constitute a defence excluding the unlawfulness of the accused’s acts. As Schreiner ACJ (as he then was) noted in *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* (1959 1 SA 234 (A) 240D) in the context of robbery, the law may disregard the handing over of goods where the victim’s will has been vitiated by intimidation.

3 Fraud, trick or artifice

This form of constructive breaking (see generally, relating to entry by fraud: Turner *Russell on Crime* 919; Palmer and Palmer 332; and Cross and Jones 256) is exemplified by the English case of *R v Boyle* ([1954] 2 All ER 721 (CCA)), where the accused rang the doorbell of the complainant’s home, and falsely informed her when she opened the door that he was a representative of the British Broadcasting Corporation who had been sent to locate disturbances caused on the radio. The complainant admitted him on this basis. Upon entry, the accused asked for a glass of water, and when the

complainant went to get it, he stole her handbag. The accused's conviction for housebreaking with intent to steal was confirmed by the Court of Criminal Appeal, on the basis that the accused's conduct amounted to constructive breaking (721-2). The court specifically distinguished the situation which arose in this case from the situation where the accused is entitled to enter the premises in the ordinary course of his duty (eg, a man from the gas company, who comes for the purpose of reading the meter) and steals whilst on the premises – this latter situation would merely amount to theft (722). Whether breaking by fraud would give rise to liability for the housebreaking crime remains a moot point in South African law. The matter does not appear to have ever been argued. Nevertheless, there are some references to this issue in the case law.

In *R v Mososa* (1931 CPD 348), the court engaged in a review of a conviction of housebreaking with intent to steal, where the court was required to adjudicate whether pushing up a partially open sash window and subsequent entry into the premises constituted the *actus reus* of the crime (ie, as to whether *actual* breaking had occurred). In the course of a judgment confirming the conviction on these grounds, Gardiner JP commented that a statement from Barel's *Crimineele Advysen* (No. 33), that "de dieven ... de tuinhuisjes met geweld of *kwade practyk* komen open te breeken ..." (our emphasis) would be punished, indicated that an entry effected by fraud would give rise to the housebreaking crime (351). It should however be noted that the point of departure of the court – that in Roman-Dutch law housebreaking with intent to steal was in itself a substantive crime (350), with the attendant consequence that Roman-Dutch sources would be authoritative – is a contested one (see Hoctor *The Crime of Housebreaking in South African Law – A Comparative Perspective* (1997) *DJuris* thesis (Rijksuniversiteit Leiden) 19 fn 90). In particular, in *R v Fourie*; *R v Louw* (*supra*), Maasdorp CJ stated that given the conflicting Roman-Dutch authority, "we cannot do better than accept the English definition of the term 'housebreaking' given in Stephen's *Digest of the Criminal Law ...*" (59). This definition received further support in the Transvaal case of *R v Coetzee* (1958 2 SA 8 (T) 10C-E), where Williamson J acknowledged that the definition in question (found in Stephen and Stephen 282) was "a proper definition of breaking for the purposes of the South African common law offence of housebreaking with intent to commit a crime ..." It is notable that the definition in question includes constructive breaking, as cited above (in the Introduction).

In *S v Maisa* (1968 1 SA 271 (T)), the court was, as in *Mososa*, required to deal in a magistrate's court with a review of a conviction of housebreaking with intent to steal and theft. The court, per Hiemstra J, confirmed the conviction, setting aside part of the sentence. From the judgment it appears that the accused obtained a key to the premises through fraud, achieving ingress into the premises in this way, and it is notable that the court on review saw no difficulty in sustaining the conviction. Unfortunately, this conclusion is not discussed or elaborated upon by the court.

The question of whether entry obtained by fraud could be regarded as a breaking was mentioned in *S v Cupido* (1975 1 SA 537 (C)), the court's attention being drawn to the passage from Barel's cited in *Mososa* in this

regard. It is remarkable that both Snyman (544) and Skeen (par 356) state baldly, citing *Cupido* as authority, that entry obtained by fraud is not sufficient to constitute housebreaking. However, the court in *Cupido* said no such thing. Instead the court expressly declined to comment on whether the Barel's passage was indeed authority for the proposition (538E), or what the legal position would be where entry to premises was obtained by fraud or trick (539B), regarding it as unnecessary for the purposes of the case in question to do so. Milton is more cautious, merely submitting that entry by fraud is not part of South African law (800), although he states that:

"[O]ur law almost certainly rejects the quaint idea that there is a breaking (despite lack of displacement) where X comes down the chimney or obtains entry by fraud" (795).

As regards the first-mentioned mode of entry – through a chimney (as De Wet 367 fn 432 inimitably puts it, we have not yet had a case involving a "skoorsteenduiker"! – it is perhaps interesting to note that whilst Turner (*Kenny's Outlines of Criminal Law* 246) regards the common law rule, that such entry amounted to a breaking (see *R v Brice* (1821) R&R 450), as falling under the head of "constructive breaking", writers such as Stephen and Stephen (283), and Cross and Jones (256), categorise this as a form of actual breaking (as it is impossible to close the chimney). Whilst the sixth and final edition of *Gardiner and Lansdown* (Lansdown, Hoal and Lansdown 1720) discounted the possibility of constructive breaking being a part of South African law, it bears noting that the authors state that the meaning of "breaking" has been extended to cover entrance by means of a chimney, citing English case authority (*R v Brice supra*; and *R v Spriggs & Hancock* 1 M&R 357) in this regard. Thus it appears that this exceptional form of breaking was accepted by the authors as part of South African law, notwithstanding their rejection of the "constructive breaking" doctrine per se.

Fraud excludes real consent. Real consent is defined as consent which is "not induced by force, threats or fraud and given by a person fully aware of what he or she is consenting to" (Skeen par 62; see also Snyman 126ff; and Burchell 341). Thus whether the fraud (or force) induces the victim to act either passively or positively, consent would be nullified as a result of the misrepresentation or fraudulent non-disclosure, and the accused's act would therefore be regarded as unlawful (Skeen par 62). Authority for this approach may be found in *Minister of Justice: in re Gesa*; *R v de Jongh* (*supra* 240D), where it was held that the law may treat the vitiated will as non-existent in the case of fraud.

It is submitted that a better approach is to enquire whether there is consent to the specific conduct or not, requiring for the purposes of liability that there be a causal link between deception and harm, such that the deceit deprived the complainant of the ability to exercise her will in relation to her physical integrity with respect to the activity in question (Hoctor "Kidnapping by Deceit – *R v Cort* [2003] 3 WLR 1300; [2004] 4 All ER 137 (CA)" 2005 *Obiter* 159 165; and *R v Cuerrier* (1998) 127 CCC (3d) 1 (SCC) par [16]). This approach is advantageous in three respects: it focuses on the liability of the accused (Ashworth *Principles of Criminal Law* 3ed (1999) 344); it applies the principles relating to deception equally to the crime of housebreaking as

they apply to property crimes such as theft (*cf* Hogan “On Modernising the Law of Sexual Offences” in Glazebrook (ed) *Reshaping the Criminal Law* (1978) 174 183-184) – there being no good reason to protect a property interest more rigorously than the psychological trauma and sense of violation invariably accompanying a housebreaking; and it accords with autonomy – in order to maximise the protection of physical integrity and personal autonomy, only consent obtained without negating the voluntary agency of the complainant is legally valid (Hoctor 2005 *Obiter* 166).

4 Collusion with collaborator within premises

The common law conception of constructive breaking included the situation where one person had a conspiracy with someone lawfully on the premises, where the latter opened the door for the former. Both would be liable for burglary (Turner *Russell on Crime* 920; and Palmer and Palmer 332). It was held that if a servant acting under the instructions of the police or his master opened the door there could be no breaking, as the door was lawfully open (*R v Johnson* 1841 C&M 218), whilst where a servant, with the knowledge of the master, gave a key to the accused in order to set a trap for him, and the accused made a duplicate set of keys with which he opened the door, there was held to be a breaking (*R v Chandler* [1913] 1 K.B. 125).

There have been two reported cases which have dealt with this scenario in South Africa. In the first of these, *R v Tusi* (1957 4 SA 553 (N)) the accused obtained entry through a confederate (who was an employee of the targeted company) who had hidden within the premises, and opened the door to permit them to enter. In response to argument from defence counsel that these facts did not give rise to the crime of housebreaking, since no breaking took place, the court held that there had been a breaking. The court distinguished the case in question from those cases where a person who had a lawful right to enter premises was held not to be guilty of housebreaking when he exercised such right, holding that in the present case the person inside the premises had no lawful right to be there (555H). However, the court went on to found liability on the basis of a common purpose between the accused and the person inside the premises, and to hold that the persons acting under common purpose had effected a breaking (556B-C).

The decision in *Tusi* was approved, on similar facts, in *S v Maelangwe* (1999 1 SACR 133 (NC)146i-j). In this case, the door was opened by another person to admit the accused. It was argued on behalf of the accused that in the absence of evidence of arrangement between the accused and the person who opened the door, there was no breaking, and consequently the crime of housebreaking had not been committed. It was argued that the persons within the premises had entered when the store was open and there was thus a right of entry (145i-j). The court rejected these arguments however, holding that there was a common purpose between the accused and his associates, and those who entered the premises, to commit theft within the premises, and that, as in *Tusi*, there was thus a breaking, and the crime of housebreaking was committed (147d-e).

On the basis of the authority in *Tusi* and *Maelangwe*, it is generally accepted that there is a breaking where a person has remained in the premises when he or she was supposed to leave them and later opened the door to the wrongdoer (Skeen par 355; and Snyman 544). It is however worthy of noting that, as indicated, in both cases the court founded liability on common purpose, rather than holding that the accused had individually fulfilled the elements of the crime. Whilst common purpose flowing from prior agreement is the most justifiable form of liability flowing from this principle, common purpose liability nevertheless constitutes an infringement of the presumption of innocence (Burchell 581), and (the constitutional clean bill of health in *S v Thebus* 2003 2 SACR 319 (CC) notwithstanding) ought to be avoided wherever possible. It is submitted that a better approach would be to regard collusion with a collaborator within the premises as a form of breaking. If this were to be accepted, then as Buys J stated in *Maelangwe* (147b), it matters not *how* the person opening the door acquired access to the premises. The fact of the opening of the door fulfils the breaking requirement, and therefore founds liability for housebreaking.

5 Conclusion

Whilst not all of the common-law technicalities were received into South African law, it is clear that the notion of breaking has been primarily shaped by English law precedent. A further example of this heritage may briefly be mentioned. It has been held in South African law that where, although no external breaking takes place, the accused breaks into some interior portion of the premises (such as an inner office or safe built into the wall of an office) then this will suffice for the purposes of housebreaking liability (Burchell 860). Though the first case holding that this was so, *R v Xabela* (1945 2 PH H282 (W)), cited no authorities and gave no reasons for this decision, the next case dealing with this issue, *R v Shela* (1950 2 PH H193 (W)), explicitly relied on English authority in finding that such conduct constituted a breaking, concluding that “[t]here appears to be no reason why the English Law should not be accepted on the question”. This approach was confirmed in *R v Heyns* (1956 2 PH H247 (C)) and in *R v Coetzee* (*supra*). Although the South African writers have been reluctant to accept the doctrine of constructive breaking per se, it is clear that the South African legal position in relation to entry by threats or duress, as well as entry through the means of a collaborator on the premises, accords with the principles of constructive breaking. More doubt exists in relation to entry by means of fraud or trick, but it is submitted that the South African law should also follow the principles of constructive breaking in this regard.

Why the reluctance to accept the doctrine of constructive breaking? This question becomes even more pointed in the light of the argument advanced by Turner (*Kenny's Outlines of Criminal Law* 247) that the term “constructive breaking” has, by a false analogy, been traditionally employed to indicate “an *actual* breaking, yet one effected not by the burglar himself but by some innocent person at his instigation”. Turner proceeds to argue that such cases fall within the maxim “*qui facit per alium facit per se*”, and thus that it is “inaccurate and may be misleading” to refer to such situation as a “constructive breaking” (*Kenny's Outlines of Criminal Law* 247).

A possible objection to the acceptance of this doctrine may relate to the nature of the "breaking" element. Undeniably a term of art (see *R v Faison* 1952 2 SA 671 (SR) 673C), replete with numerous technicalities, the breaking requirement, the primary focus and historic rationale of the housebreaking crime, fulfils a vital role in restricting the scope of housebreaking and guarding against the over-subjectivization of the crime (Hoctor "The 'Breaking' Requirement in the Crime of Housebreaking with Intent" 1998 *Obiter* 201 218ff). Jurisdictions which have dispensed with the breaking requirement in the legislative formulation of the crime of burglary face a greater challenge in respect of these two aspects (Hoctor 1998 *Obiter* 218ff). The possible subjectivization of the elements of housebreaking therefore constitutes a legitimate concern but, as discussed above, South African courts have not regarded this to be a problem in extending the breaking requirement to encompass entry by means of threats, or by means of collusion with a collaborator within the premises. It is submitted that there is no reason not to extend a similar approach to entry by means of fraud. The actions of shoplifters, who enter premises with intent to steal, subvert the general permission to enter granted by shopkeepers. Although no shopkeeper would allow a shoplifter onto her premises with knowledge of her intent, and thus real consent to the entry of a shoplifter would invariably be absent, it is submitted that to regard the act of shoplifting as one of housebreaking, given the trespassory entry without real consent (as occurs in jurisdictions which have done away with the breaking requirement), would undermine the gravity and purpose of the housebreaking crime. When assessing consent it is necessary to examine the legal convictions of the community (De Wet 95), and it is submitted that just as the "consent" of the householder is excluded in the case of entry by means of duress, so too entry by means of a deliberate fraudulent misrepresentation ought to be regarded as a breaking. This is consistent with a recognition of the fact that consent is founded on the autonomy of the other person to agree to the conduct involved (Ashworth 331). Where such consent is absent there is no such autonomous choice to bear the consequences of the conduct, and thus any entry by means of fraud ought to be regarded as a breaking.

Suhayfa Bhamjee
and

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg