

RECENT DEVELOPMENTS REGARDING THE CRIME OF HOUSEBREAKING WITH INTENT

1 Introduction

Housebreaking with intent to commit a crime consists of unlawfully and intentionally breaking into and entering a building or structure, with the intention of committing a crime inside (Snyman *Criminal Law* 4ed (2002) 540; Burchell *Principles of Criminal Law* 3ed (2005) 857; *S v Maseko* 2004 1 SACR 22 (T) 22E-F; and *S v Kesolofetse* 2004 2 SACR 166 (NC) 167J). The crime of housebreaking with intent was unknown in Roman-Dutch law and became part of South African criminal law through the strong influence of the English law crimes of burglary and housebreaking (Snyman 540; *R v Steyn* 1946 OPD 426 427-428; and *R v Makoelman* 1932 EDL 194 196). The legal interests protected by this crime are the undisturbed habitation of one's dwelling and undisturbed storage of one's property.

Interesting decisions were recently handed down on both (attempted) housebreaking *simpliciter* and the contentious crime of housebreaking with the intent to commit an offence unknown to the prosecutor. These recent decisions form the subject of this note.

2 Housebreaking *simpliciter*

In *S v Maseko* (*supra*) Grobler AJ (Bertelsmann J concurring) was afforded the opportunity of reviewing a judgment by the Magistrate's Court in terms of section 304(4) of the Criminal Procedure Act 51 of 1977. The accused were convicted in the court *a quo* of "attempted housebreaking" in that, on 24 January 2003, they attempted to break open and enter a shop in the district of Heidelberg, Gauteng.

Grobler AJ stated unequivocally (*S v Maseko supra* 22H-I) that there exists no crime, either at common law or in statute, which consists of mere "housebreaking" without a concomitant intent to commit a further crime. This intent must already exist at the time of the breaking and entering. This basic truth is also reflected in numerous other decisions (*R v Andries* 1958 2 SA 669 (E) 671B; *R v Melville* 1959 3 SA 544 (E) 546H; *R v Londi* 1985 2 SA 248 (E) 250C). In the absence of such an intent, the crime of housebreaking with intent cannot be committed. Grobler AJ (*S v Maseko supra* 22H) referred to the decision in *S v Hlongwane* 1992 2 SACR 484 (N) where Magid J stated the following (485A):

"In the light of the final result it is apparent that it was there held that there cannot be a conviction for attempted housebreaking *simpliciter*. In other words it is improper to convict an accused of an attempted housebreaking without proof that he had an intention to commit an offence."

The court in *Hlongwane* above was discussing a judgment of Hofmeyer J in *S v Molelle* (1971 (2) PH H 1 17 (O)).

The crime of housebreaking with intent comprises four main elements. These are the “breaking” of the premises or structure by displacing any object which bars entry to the structure; the entry into the structure by inserting any part of the body or another object into the structure in order to gain control over property inside the structure; the unlawfulness of such conduct and, finally, the intention to commit an offence (see Snyman 540; Burchell 859). The logical conclusion is, therefore, that there can be no conviction for housebreaking even if a “breaking” is proved but no entry is achieved. Similarly, an unlawful breaking of and entry into a structure without a concomitant intention to commit a common law or statutory crime inside the structure, does not constitute the crime of housebreaking with intent (see *S v Hlongwane supra* 485D and *S v Maunatlala* 1982 1 SA 877 (T) 879D).

The magistrate in *S v Maseko (supra)* in the court *a quo*, Mr S Buthelezi, convicted the accused of attempted housebreaking *simpliciter*. This is clearly wrong. If an accused cannot be convicted of housebreaking due to the fact that the intention to commit an offence inside the structure was lacking, there can be no conviction of an attempt to commit housebreaking without the intent. The magistrate in *S v Maseko (supra)* thus convicted the accused of a non-existent offence! In law there must be a punishable offence before there can be a punishable attempt to commit it. The conviction by the court *a quo* in *S v Maseko (supra)* in reality amounts to that of attempting a putative crime (see the judgment by Schreiner JA in *S v Davies* 1956 3 SA 52 (A) 64C).

Grobler AJ (*S v Maseko supra* 23F) finally considered the possibility of convicting the accused of malicious injury to property as a competent verdict since the evidence indicated that the accused had broken the glass of the front entrance of the premises. In this regard section 262(1) of the Criminal Procedure Act 51 of 1977 reads as follows:

“If the evidence on a charge of housebreaking with intent to commit an offence specified in the charge, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit the offence so specified but the offence of housebreaking with intent to commit an offence other than the offence so specified or the offence of housebreaking with intent to commit an offence unknown or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.”

It is clear that section 262 provides for such a competent verdict only where the accused is charged with the crime of housebreaking with a concomitant intention, that is, of the crime or crimes described in section 262. *In casu* the accused were not charged with any existing crime. Section 262 consequently finds no application and the conviction and sentence of both accused had to be set aside.

3 Housebreaking with intent to commit an offence unknown to the prosecutor

A charge of housebreaking with intent to commit an offence unknown to the prosecutor was not permitted at common law (Burchell 863; and *R v Mazula* 1943 OPD 224). The Criminal Procedure Act 51 of 1977 now sanctions a charge and conviction on this crime in sections 95(12) and 262 respectively.

In *S v Kesolofetse* (2004 2 SACR 166 (NC)) Olivier J reviewed a decision by the Magistrate's Court at Kathu. The accused were charged with housebreaking with the intent to commit a crime unknown to the prosecutor. Both accused pleaded guilty and, after the questioning in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977, the magistrate noted a finding of "guilty as charged".

A crucial oversight by the magistrate in the court *a quo* is that the answers of both accused in terms of section 112(1)(b) of the Criminal Procedure Act indicated clearly that they had broken into the premises with intent to steal. (Answers in terms of s 112(1)(b) form part of the evidence. See Kannemeyer J in *S v Andrews* 1984 3 SA 306 (E) 308A). The magistrate in *S v Kesolofetse* (*supra*) was thus clearly wrong in convicting the accused of the crime of housebreaking with intent to commit a crime unknown to the prosecutor, as the evidence quite simply did not prove that offence. The latter is an independent and separate crime. An essential element of this crime is a concomitant intention to commit a crime, but one which is not known by the prosecutor (per Olivier J 168A). Although the intended crime could be unknown to the prosecutor, the evidence must show that the accused intended to commit some offence known to the South African criminal law (see Graham JP in *R v Grobler* 1918 EDL 124 127b; and Van der Heever R in *S v Buffel* 1971 (2) PH H 128 (NC) 261).

Where, at the end of proceedings, it is known to the prosecutor and indeed the court what the intended crime was, it is senseless and misleading to convict an accused on the basis of his having had the intention to commit a crime unknown to the prosecutor (*cf* also *S v Siziba* 1976 1 SA 817 (R) 817A; *S v Lebeku* 1971 3 SA 427 (NC) 427B; and *S v Wilson* 1968 4 SA 477 (A) 481F).

Section 262(2) of the Criminal Procedure Act 51 of 1977 provides for housebreaking with intent to commit a specific offence in instances where the evidence did not prove the offence of housebreaking with intent to commit a crime unknown to the prosecutor:

"If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specific offence, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved."

In casu the competent and correct verdict is thus clearly housebreaking with intent to steal. Being unrepresented, the accused ought to have been informed by the magistrate of the possibility of such a competent verdict (see Friedman JP in *S v Kester* 1996 1 SACR 461 (B) 469A). Olivier J (Majiedt J concurring) consequently set aside the convictions of both accused and substituted it with convictions of housebreaking with intent to steal. The imposed sentences of nine months' imprisonment each were confirmed.

The crime of housebreaking with the intent to commit a crime unknown to the prosecutor has been widely criticised (Olivier J in *S v Kesolofetse supra* 167; Smit R in *S v Ngobeza* 1992 1 SACR 610 (T) 614E-H; Van den Heever R in *S v Abrahams* 1998 2 SACR 655 (C) 656C; Innes CJ in *R v Cumoya* 1905 TS 402 404-405; Snyman 546; and Burchell 863). Snyman (546)

opines that the crime has no right of existence as it contains a contradiction: how can a court find that an accused intended to commit a crime if it is impossible for the court to determine *what* this intended crime was? The makeshift solution of convicting the accused of housebreaking with the intent to trespass indicates, according to Snyman, the artificiality of this crime. This illogical aspect of the crime was also emphasized by Cleaver J in *S v Woodrow* 1999 (2) SACR 109 (C) 111-112. Cleaver J referred to the following comments about the crime by De Wet and Swanepoel (*Strafreg* (1984) 369):

“Daarmee het die Wetgewer hom op wonderbaarlike wyse 'n voorstelling gemaak van iets wat begripmatig onbestaanbaar is ... net so min kan mens praat van die bestaan van 'n bedoeling by iemand om 'n misdaad te pleeg, sonder om te bewys ... dat hy die bedoeling gehad het om hom te gedra op 'n wyse wat binne die ... misdaadoms krywing val. Is dit bewys, dan is die misdaad nie meer onbekend nie. Is dit nie bewys nie, dan is nie bewys dat die persoon die bedoeling gehad het om 'n misdaad te pleeg nie. Huisbraak met die bedoeling om 'n onbekende misdaad te pleeg kan dus net so min 'n misdaad wees ...”

4 Conclusion

The crime of housebreaking with intent is one of the most commonly committed crimes in practice and requires, in a certain sense, a “dual intention”. There is no such crime as “housebreaking *simpliciter*”. Not only must the perpetrator intentionally (and unlawfully) break open and enter into a premises, but this conduct must be accompanied by a further intention to commit another crime inside. This intention is threatening to become a mere fiction as an accused can be charged and convicted of the crime “housebreaking with intent to commit a crime to the prosecutor unknown” (Snyman 540). “Breaking” and “entering” are, moreover, technical concepts and the application and interpretation of the elements of the crime has caused much confusion and many problems (as pointed out by Smit R in *S v Ngobeza supra* 614E). Technical and artificial interpretation of the elements of the crime often obfuscates the definition of the crime. Milton (*South African Criminal Law and Procedure Vol II Common Law Crimes* (1996) 793) also states that some of the law relating to housebreaking is illogical and difficult to justify on policy grounds. The development of crimes of housebreaking with the intent to commit various crimes (albeit possibly unknown to the prosecutor) has been regarded as a social necessity.

Finally, an interesting question which remains is whether the crime of housebreaking with intent to commit a crime unknown to the prosecutor would stand constitutional scrutiny (compare Snyman 546). In particular, the decision whether this crime unjustly infringes upon the right not to be deprived of freedom arbitrarily or without “just cause” (as entrenched in s 12(1) of the Constitution of the Republic of South Africa Act 108 of 1996) would make for interesting jurisprudence on the topic.

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