

## PUNISHING DOMESTIC HOUSEBREAKING

### 1 Introduction

Housebreaking is pre-eminently a crime of violation. From the earliest times the interest of a person in the safe and private habitation of his home has been treated reverently and regarded as deserving of special protection by the law (Dressler *Understanding Criminal Law* (1987) 223). This is reflected in the original rationale for the crime, in its Common Law manifestation, as an offence against the habitation (Perkins and Boyce *Criminal Law* 3ed (1982) 246). Domestic housebreaking, consisting of the breaking and entry into a dwelling for the purposes of committing a crime within, is thus the classic form of the housebreaking crime, involving the violation of the dweller's sanctuary from external attack (for, as Coke has enquired, "where shall a man be safe if it be not in his house?" (Dressler 223)). The consequences of domestic housebreaking are not only (in the typical case) material loss, but a significant degree of psychological or emotional trauma. The victim has to contend with more than just the initial shock however. Research has indicated that feelings of fear and nervousness, along with changes in eating and sleeping patterns, may persist long after the housebreaking has taken place (Newburn "The Long-term Impact of Criminal Victimisation" 1993 33 *Home Office Research and Statistics Department Research Bulletin* 30 32, citing the work of Maguire and Bennett). Where the incident of housebreaking goes beyond simple transgression of property interests, with a concomitant infringement of the victim's territoriality (for a discussion of the notion of territoriality in the context of criminal law, see Hoctor "Human Territoriality and Criminality" 2002 *Obiter* 132), and results in a confrontation between housebreaker and victim, it follows that the resulting harm may be notably amplified.

It brooks no denial that housebreaking is a paradigmatic criminal act. This is reflected in its ubiquitous presence as a substantive offence in all jurisdictions based on English "Common Law", usually as "burglary" or "breaking and entering" (for a detailed analysis of the crime of housebreaking, see Hoctor *The Crime of Housebreaking in South African Law – A Comparative Approach* (1997) unpublished DJuris thesis Rijksuniversiteit Leiden). Moreover, the conduct associated with housebreaking is criminalized in civil law jurisdictions, usually as either an aggravated form of the crime of theft or a trespass offence (as is the case, for example, in the Netherlands – see discussion (Hoctor thesis) of art 311 and art 138 respectively of the *Wetboek van Strafrecht*). Given the consensus that the conduct associated with the housebreaking crime is deserving of

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criminalization, this leads as a matter of course to the issue of punishment – what factors ought to be taken into account in determining the sentence of the convicted housebreaker?

In Roman law, it appears that the punishment for housebreaking, which was regarded as a form of theft, varied greatly, depending on the circumstances of the taking and the status of the housebreaker (for a fuller discussion, see Robinson *The Criminal Law of Ancient Rome* (1995) 27-8; and Eardley-Wilmot *Digest of the Law of Burglary* (1851) 326-8). Nevertheless, it appears that the Romans did not favour the use of capital punishment, most commonly making use of forced labour (D 47.18.1.2, Ulpian 8 *de off. proconsulis*, cited in Robinson 27) or being sent to the mines, where aggravating circumstances were present (D 47.18.2, Paul *de off.p.v.*, cited in Robinson 27). (A member of the upper classes faced the prospect of banishment or relegation (Robinson 27-8).) The equivalent of the modern housebreaker was described by two differing terms in Roman law: the *effractor* (one who breaks into houses by force), and the *directarius* (one who climbs into a house) (see Hoctor “The Historical Antecedents of the Housebreaking Crime” 1999 5 *Fundamina* 97, particularly 105-106). Two significant aggravating features appear to be where the crime was committed nocturnally, and where the victim was assaulted by the housebreaker (Robinson 27-8, citing D 47.17.1, Ulpian 8 *de off. proconsulis*).

In English law, the crime of burglary was a capital offence up to the early part of the nineteenth century (Turner *Kenny’s Outlines of Criminal Law* 18ed (1962) par 208). This led to the courts requiring strict compliance with all the technical distinctions in the crime of burglary, in order to avoid imposing, where possible, the obligatory death penalty upon conviction (Turner par 208). When capital punishment was removed from the crime in England, it appears that the colony at the Cape largely followed suit. Although there are reports of cases as early as 1832 where accused were sentenced to death (see Gardner “Housebreaking with Intent to Steal” 27 *SALJ* (1910) 414), it appears that these were exceptional cases.

However, section 277 of the Criminal Procedure Act 51 of 1977 provided that the death sentence could be passed if the accused was convicted of any form of the housebreaking crime (whether statutory, common law, or in the form of attempt) where “aggravating circumstances” were present. “Aggravating circumstances” (as defined in s 1 of the Act) meant “the possession of a dangerous weapon” or “the commission of an assault or a threat to commit an assault, by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence”. Where no aggravating circumstances were found to be present, the death sentence could not be imposed (see, *eg*, *S v S* 1981 3 SA 377 (A), where the death sentence on a conviction of housebreaking with intent to rape was set aside). Section 277 was replaced in

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its entirety by section 4 of Act 107 of 1990, which provided that the death sentence could only be passed where in the opinion of the court it was the proper sentence, and only with regard to murder, treason (in time of war), robbery or attempted robbery (if aggravating circumstances were found to have been present), kidnapping, child-stealing and rape. Whilst any of these crimes could be committed together with housebreaking with intent to commit that crime, the death sentence could only be imposed for one of the crimes *per se*, and not the housebreaking with intent. The landmark judgment of the Constitutional Court in *S v Makwanyane* (1995 3 SA 391 (CC)) struck down the death penalty as provided for in section 277 as unconstitutional, and consequently invalid, as it offended against the right to life (s 9), the right to dignity (s 10) and the right not to be subjected to cruel, inhuman and degrading punishment (s 11(2)) enshrined in the interim Constitution of the Republic of South Africa (Act 200 of 1993). Section 277 was subsequently repealed by section 35 of Act 105 of 1997.

Given that the crime of housebreaking is a crime which may vary in gravity, it raises difficult issues for the judicial officer in sentencing. Whilst it is generally acknowledged that the crime is a serious infringement of the rights of the victim, it is important not to allow the offender to be “sacrificed on the altar of deterrence, thus resulting in his receiving an unduly severe sentence” (*S v Sobandla* 1992 2 SACR 613 (A) 617g-h; and *S v Olivier* 1996 2 SACR 387 (NC) 391i). In order to consider the issues which serve before the courts in making such decisions, the English and South African position shall be adverted to.

## 2 English law

The Court of Appeal has recently handed down a set of sentencing guidelines relating to domestic burglaries where the trespass is accompanied by theft or an intention to steal, in the case of *R v McInerney; R v Keating* [2003] 1 All ER 1089 (CA) (hereafter *R v McInerney*). In doing so, the Court of Appeal took into account the advice of the Sentencing Advisory Panel (hereafter the “Panel”) in this regard. Both the submissions of the Panel and the views of the court shall be considered. (Unless otherwise indicated, all references in this section are to *R v McInerney supra*).

### 2.1 Sentencing advisory panel

Recognizing that burglary is an offence which gives rise to “particular public concern”, the Panel commissioned research into public attitudes to sentencing with regard to domestic burglary. This research was completed in September 2000, and was the source of the report *Sentencing of Domestic Burglary* (par [6]). The results of the research indicated, *inter alia*, a mismatch between the type of sentence which the respondents wanted to impose and the sentence they believed would be imposed by the courts, as

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well as an intolerance of repeat offending (par [11]). The Panel also took account of section 111 of the Power of Criminal Courts (Sentencing) Act 2000, which provides for a rebuttable presumption that an offender convicted of a third domestic burglary would receive a minimum sentence of imprisonment of three years.

The Panel took public attitudes into account in its description of a “standard domestic burglary”, which it defined as a burglary which has the following features:

“(i) [I]t is committed by a repeat offender; (ii) it involves the theft of electrical goods such as a television or video; (iii) the theft of personal items such as jewellery; (iv) damage is caused by the break-in itself; (v) some turmoil in the house, such as drawers upturned or damage to some items occurs; (vi) no injury or violence, but some trauma is caused to the victim ...” (par [11]).

Similarly, in drawing up lists of aggravating and mitigating factors (which were intended to be exemplary and not exhaustive), the Panel was guided by public response. It divided the aggravating factors into two categories, high-level and medium-level aggravating factors. High-level factors are listed (par [21]) as: force used or threatened against the victim; a victim injured (as a result of force used or threatened); the especially traumatic effect on the victim, in excess of the trauma generally associated with a standard burglary; professional planning, organisation or execution; vandalism of the premises, in excess of the damage generally associated with a standard burglary; the offence was racially aggravated; a vulnerable victim deliberately targeted (including cases of “deception” or “distraction” of the elderly). Medium-level aggravating features are listed (par [22]) as: a vulnerable victim, although not targeted as such; the victim was at home (whether day-time or night-time burglary); goods of high value were taken (economic or sentimental); the burglars worked in a group. The list of mitigating factors (par [25]) are: a first offence; nothing, or only property of very low value, is stolen; the offender played only a minor part in the burglary; there is no damage or disturbance to property; and that the crime is committed on impulse.

The Panel then, in relation to adult offenders in respect of a completed domestic burglary, not taking into account any aggravating or personal mitigating factors, set out their recommendations as to starting points in four categories:

- “(a) For a low level burglary committed by a first-time domestic burglar (and for some second-time domestic burglars) where there is no damage to property and no property (or only property of very low value) is stolen, the starting point should be a *community sentence* ...
- (b) For a domestic burglary displaying most of the features of the standard domestic burglary ... but committed by a first-time domestic burglar, the starting point should be a *custodial sentence of 9 months* ... The starting point for a second-time domestic burglar committing such an offence should be a *custodial sentence of 18 months*. When the offence is committed by an offender with two

or more previous qualifying convictions for domestic burglary, the starting point is a *custodial sentence of three years* ...

- (c) In the case of a standard domestic burglary which additionally displays any one of the ‘medium relevance’ factors ... but committed by a first-time domestic burglar, the starting point should be a *custodial sentence of 12 months*. The starting point for a second-time domestic burglar committing such an offence should be a *custodial sentence of two years*. When the offence is committed by an offender with two or more previous convictions for domestic burglary the starting point is a *custodial sentence of three and a half years (42 months)*.
- (d) In the case of a standard domestic burglary which additionally displays one of the ‘high relevance’ factors ... but committed by a first-time domestic burglar, the starting point should be a *custodial sentence of 18 months*. The starting point for a second-time domestic burglar committing such an offence should be a *custodial sentence of three years*. When the offence is committed by an offender with two or more previous convictions for domestic burglary the starting point is a *custodial sentence of 4 and a half years (54 months)*. The presence of more than one ‘high relevance’ factor could bring the sentence for an offence at this level significantly above the suggested starting points” (par [32]).

## 2.2 *The Court of Appeal*

In assessing the contribution of the Panel, the Court of Appeal (per Lord Woolf CJ) in *R v McInerney (supra)* sounded a cautionary note as to the extent to which public opinion could be relied upon in devising sentencing guidelines, particularly since the public could not be expected to be properly apprised of matters such as the pressure on prisons and the extent to which it is possible to address an offender’s criminal behaviour during a prison sentence (par [10]). The court was also careful to point out that section 111 should be interpreted as leaving a substantial degree of discretion to the sentencer (par [16]).

As regards the Panel’s proposals, the court firstly noted that it assumed that a “standard burglary” did not need to have all of the listed features (and that the theft of electrical goods or personal items was alternative) (par [18]). The court proceeded to approve the lists of aggravating factors identified by the Panel, whilst stressing that these were simply examples (the list of mitigating factors was similarly approved), and that it ought to be appreciated that there was no clear line between the categories of aggravation, and that they could overlap. The fact that the Panel did not seek to indicate the extent to which the presence of either the high-level or medium-level aggravating factors would increase the sentence was approved by the court, who agreed that it is appropriate for the sentencer “to reflect the degree of harm done, including the impact of the burglary upon the victim whether or not the offender foresaw that result or the extent of that impact” (par [24]). As regards mitigating factors, the court noted that whilst the report indicated that the public did not regard the time of the commission of the burglary as significant, nocturnal burglaries were likely to be into occupied premises, with the added risk of confrontation, and the greater fear induced by such an intrusion (par [26]). Other factors, such as a timely plea of guilty, the offender’s age or state of health (both physical and mental), evidence of

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genuine remorse, favourable response to previous sentences, and ready co-operation with the police were further approved by the court as providing grounds for mitigation (par [27] and [28]). With regard to the last two factors, the offender's criminal record assumes a particular significance as an indicator of the offender's efforts to rehabilitate himself. In *R v Brewster* ([1998] 1 Cr.App.R.(S). 181 (CA) 186), Lord Bingham CJ comments that

“[t]he record of the offender is of more significance in the case of domestic burglary than in the case of some other crimes. There are some professional burglars whose records show that from an early age they have behaved as predators preying on their fellow citizens, returning to their trade almost as soon as each prison sentence has been served. Such defendants must continue to receive substantial terms of imprisonment. There are, however, other domestic burglars whose activities are of a different character, and whose careers may lack any element of persistence or deliberation. They are entitled to more lenient treatment.”

The court's approach to the question of starting points differed from that of the Panel in important respects, although this is explained by Lord Woolf CJ as primarily a difference of emphasis rather than a completely different method (par [35]). Whilst endorsing the recommendations contained in (a) and (d), the court was concerned that the approach of the Panel in (b) and (c) would only reinforce the flaws in the present system, and would not address the issue of re-offending adequately (par [36]). Taking into account the costs of re-offending, along with the gross overcrowding of prisons (and inherent rehabilitative shortcomings associated with this situation), the court was concerned to maximise the deterrent effect of imprisonment. The court was of the view that a brief first period of incarceration, which would be the practical effect of the Panel guidelines, would not have such a deterrent effect (par [37]). Instead of the “stepped approach” suggested by the Panel in (b) and (c), the court proposed that

“[i]n cases in which courts would otherwise be looking to a starting point of up to 18 months imprisonment, the initial approach of the courts should be to impose a community sentence subject to conditions that ensure that the sentence is (a) an effective punishment and (b) one which offers action on the part of the Probation Service to tackle the offender's criminal behaviour and (c) when appropriate, will tackle the offender's underlying problems such as drug addiction. If, and only if, the court is satisfied the offender has demonstrated by his or her behaviour that punishment in the community is not practicable, should the court resort to a custodial sentence” (par [44]).

The court was of the view that this would benefit the public in reducing the demands placed on the Prison Service, in providing a saving on the expense of imprisonment, and in providing appropriate targeted action to tackle the offender's behaviour (par [45]). Where the offender does not comply with the terms of a community punishment, and especially where he commits further offences during the course of such punishment, there ought to be re-sentencing, in all likelihood resulting in a custodial sentence (par [47]). Whilst custodial sentences ought to be no longer than necessary, the court accepted that long sentences would still be applicable to repeat offenders and aggravated offences (par [48]).

### 3 South African law

Since the case of *S v Zinn* (1969 2 SA 537 (A)), the factors involved in sentencing have been settled as: the nature of the crime for which the accused is being sentenced, the interests of society, and the personal interests and circumstances of the accused. All these ought to be taken into account, without over-emphasising any one of these considerations (*S v Wayi* 1994 2 SACR 334 (E) 338a). Apart from these factors, an element of mercy or compassion must be considered in determining punishment (*S v Muggel* 1998 2 SACR 414 (C) 420g-h). It has been noted that more recent perspectives on punishment require that the specific interests of the victim, which may differ from those of society, should also be taken into account (*S v Isaacs* 2002 1 SACR 176 (C) 178c).

#### 3.1 *Interests of society*

Housebreaking has always been regarded as a serious offence (*S v Madlala* 1962 1 PH H9 (N); *S v Sagarias* 1991 1 SACR 231 (Nm) 233b-c; *S v Nkosi* 1992 1 SACR 607 (T) 610b; and *S v Coales* 1995 1 SACR 33 (A) 34i-j), as it is a crime which “constitutes a major invasion of private lives and dwellings of ordinary citizens” (*S v Congola* 2002 2 SACR 383 (T) 386j). The concerns raised by South African courts correspond to those identified by Lord Bingham CJ in *R v Brewster* (*supra* 185), where it is stressed that domestic housebreaking

“[m]ay involve considerable loss to the victim. Even when it does not, the victim may lose possessions of particular value to him or her. To those who are insured, the receipt of financial compensation does not replace what is lost. But many victims are uninsured: because they have fewer possessions, they are the more seriously injured by the loss of those they do have.

The loss of material possessions is, however, only part (and often a minor part) of the reason why domestic burglary is a serious offence. Most people, perfectly legitimately, attach importance to the privacy and security of their own homes. That an intruder should break in or enter, for his own dishonest purposes, leaves the victim with a sense of violation and insecurity. Even where the victim is unaware, at the time, that a burglar is in the house, it can be a frightening experience to learn that a burglary has taken place; and it is all the more frightening if the victim confronts or hears the burglar.”

Courts have stressed the prevalence of the offence as an important factor to be considered in sentencing (*S v Mbingo* 1984 1 SA 552 (A) 554H; and *S v Nkosi supra* 610b-c). Moreover, housebreakers frequently escape detection and capture (see *S v Mbingo supra* 554H). It has been noted that society expects the courts to impose proper penalties for a serious offence such as housebreaking (*S v Mbingo supra* 554H; and *S v Phulwane* 2003 1 SACR 631 (T) 634a). In short, in sentencing housebreakers the interests of society should be protected (*S v Mbingo supra*) – these concerns are reflected in Holmes JA’s comments in *S v Ivanisevic* (1967 4 SA 572 (A) 575-576):

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“As to that, persons who, with evil conception and careful planning, break into the home of a lonely elderly lady and plunder her of costly jewellery, must reasonably expect a robust sentence on conviction, lest others think the game is worth the candle, and rapacious violence flourish unrestrained ...”

However, notwithstanding the validity of these factors, it is important that the courts do not overemphasize them at the expense of the offender (*S v Winter* 1972 1 PH H64 (C)).

### 3 2 *The offender*

The offender's personal circumstances are required to be taken into account. Age may be regarded as a mitigating factor where the offender is youthful (*S v Mbingo supra* 554C; and *S v Jantjies* 1990 2 SACR 440 (C)), as well as where the offender is somewhat advanced in age but has no criminal record (*S v Madlala supra*; *S v Pietersen* 1990 2 SACR 440 (C); and *S v Pienaar* 1992 2 SACR 649 (C) 650f-g). In fact, where the offender is a first offender this is often regarded as a mitigating factor militating against direct imprisonment (see *S v Winter supra*; *S v Mbingo supra*; *S v Jantjies supra*; and *S v Phulwane supra*), although in appropriate circumstances imprisonment may be required (*S v Nkosi supra*). Even where the offender has had previous convictions, these might not be taken into account where the previous convictions are of a trivial nature (*S v Mkhize* 1972 1 PH H7 (D)), where they do not relate to crimes of dishonesty (*S v Pietersen supra*), or where they have occurred a substantial period of time prior to the present case (*S v Olivier supra*). Genuine remorse may serve as a mitigating factor (*S v Sobandla supra*; and *S v Coales supra*), just as lack of remorse may be considered as a factor negating a lesser punishment (*S v Nkosi supra*). The court will seek to distinguish a guilty plea motivated by true remorse from one which merely flows from the offender being caught red-handed (*S v Mbingo supra* 554E).

The courts are typically very careful to exclude financial pressure as a mitigating factor, although this factor will certainly be taken into account, particularly where the offender's desperation (resulting in the commission of the crime) stems from circumstances beyond his control, as opposed to innate criminality (*S v Sobandla supra* 617c-d; *S v Coales supra* 35h-i). Whilst dire financial need is one of the “human frailties and pressures of society which contribute to criminality”, it does not give the offender the right to steal (*S v Muggel supra*). As Grosskopf JA noted in *S v Coales (supra* 35i), there are many indigent people in our country who live in difficult conditions, but who nonetheless manage to remain law-abiding citizens. Economic considerations may also be taken into account where an offender is the family breadwinner (*S v Pienaar supra*), and where an offender who has stolen from his employer has apparently been exploited, by being paid insufficient wages (*S v Sagarias supra*).



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### 3.3 *The offence*

As has been noted above, the crime of housebreaking, and in particular its domestic variant, is *per se* a serious offence, as it constitutes an egregious violation of the rights of the individual. The fact that it is difficult for householders to protect their property against housebreakers (*S v Mbingo supra* 554H) has contributed to differing views as to whether housebreaking by day should be regarded as a mitigating factor (possibly indicative of a yielding to sudden temptation – see *S v Madlala supra*) as has historically been the case (South African law has been influenced by the English law distinction between diurnal and nocturnal burglary – see Gardner 1910 27 SALJ 414 417, where the writer comments that the daytime commission of the offence “materially lessens the seriousness of the charge”), whether it should be neutral (as it is the absence of the occupier, which makes the crime easier to commit, that is the key issue rather than time of day – see *S v Kumalo supra* 572E-F), or whether it might even be an aggravating factor (due to the “audacity” and “unfair advantage taken” of “absent working people” – this is the argument of counsel for the State in *S v Kumalo (supra* 567D).

The location of the crime has been a factor that the courts have considered in assessing mitigatory aspects of the offender’s conduct. Thus it has been suggested that the fact that the housebreaking took place in the country (during the day) could be regarded as a mitigating factor (*S v Madlala supra*); as could the fact that the crime was committed in respect of farm stores and cellars (and was aimed at stealing wine) (*S v Pietersen supra*); as could the fact that the premises in question were, to the offender’s knowledge, unoccupied at the time of the offence (*S v Olivier supra* 391b). It is noteworthy that the Appellate Division in *S v Coales (supra* 34j-35a) did not consider the distinction between breaking into a home and breaking into business premises to be significant for the purposes of evaluating the seriousness of the crime.

It seems that in refusing to give weight to the distinction between domestic and non-domestic housebreaking, the Appellate Division (per Grosskopf JA) was influenced by the fact that in breaking into a number of business premises, the offender in almost all instances brought about an actual breaking causing damage: “[E]ither a door or burglarproofing had to be forced open, or a window had to be cut or broken ... to gain entry” (*S v Coales supra* 35b). The nature of the breaking involved is indeed influential. Where the breaking is of a technical nature (such as pushing a window slightly wider open – *S v Winter supra*), or where it involves no force or violence (*S v Mkhize supra*), or where it involves the opening of a door offering little resistance (*S v Hendriks* 1955 2 SA 482 (C); and *S v Madlala supra*) this may be regarded as a mitigating factor. Breaking a padlock in order to gain entry would be regarded as intrinsically more serious than

these examples (*S v Kumalo supra* 572D-E). Similarly, where the offender exceeded the right of entry he had been granted as an employee, this could be regarded as a lesser form of the crime than the trespassory entry of a stranger (*S v Mkhize supra*).

The gravity of the housebreaking crime may be held to vary considerably, depending on the circumstances of its commission. Once again, the comments of Lord Bingham CJ in this regard (in *S v Brewster supra* 185-186) are equally applicable to the South African position:

“The seriousness of the offence can vary almost infinitely from case to case. It may involve an impulsive act involving an object of little value (reaching through a window to take a bottle of milk, or stealing a can of petrol from an outhouse). At the other end of the spectrum it may involve a professional, planned organisation, directed at objects of high value ... [o]r ... the elderly, the disabled or the sick ...”

On the one hand, housebreaking which targets vulnerable victims, such as the elderly, would be regarded as especially grave (*S v Nkosi supra*). Housebreaking which takes place using dangerous weapons or violent conduct against victims would also be aggravated in nature (see *S v Olivier supra* 391b-c). On the other hand, housebreaking which takes place in order to steal food (as occurred in *S v Sagarias supra* and *S v Pienaar supra*) may be regarded as petty crime involving minimal moral blameworthiness. Whilst the theft of articles of little value may be regarded as a mitigating factor (*S v Hendriks supra*; and *S v Madlala supra*), where the value of the goods stolen is high, this will not necessarily be regarded as an aggravating factor (see *S v Olivier supra* 391c, where the court remarks pithily that housebreakers typically remove as much of the content of the premises as possible). Where there is a charge of housebreaking with intent to commit a crime to the prosecutor unknown (in terms of s 95(12) of the Criminal Procedure Act 51 of 1977; for further discussion of this statutory extension of the common law crime of housebreaking see Hoctor “Some Constitutional and Evidential Aspects of the Offence of Housebreaking with Intent to Commit a Crime” 1996 *Obiter* 160), this crime is regarded as “very serious” (see *R v Boniface* 1968 2 PH H374 (R)) as it “in effect specifies in general terms each and every offence which it is physically possible for the accused to commit” (*S v Mkhize* 1976 2 SA 448 (N) 448H), and consequently it is important in assessing the issue of punishment to carefully consider all relevant factors (as in *S v Mkhize* 1972 *supra*).

#### **4 Some concluding remarks: the problem of reoffending**

With regard to housebreaking (as with other offences) it has been stressed that direct imprisonment is not always the appropriate sentence (*S v Phulwane supra* par [7]). This consideration is all the more pertinent in the case of a first offender (*S v Standaard* 1997 2 SACR 668 (C) 669g), and especially so when the effect of imprisonment on the lives of those who are

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incarcerated is considered. It is notorious that prisoners are exposed to numerous unsavoury elements in prisons, *inter alia* overcrowding (see *S v Isaacs supra* 178e-f for some recent statistics in this regard), poor discipline, and decrepit facilities (*S v Standaard supra* 670a). These factors in turn give rise to problems such as sodomy and the ready availability of dagga (*S v Standaard supra* 670a). As a result, prisons often become little more than “crime schools” (*S v Standaard supra* 669h-i), producing hardened personalities “bereft of the fear of prison” (*S v Phulwane supra* par [11]), who upon their release immediately pose a threat to the same society which sent them to prison through the instrumentality of the courts (*S v Phulwane supra* par [11]). The utility of a short period of imprisonment (other than in the most serious cases) may thus be questioned, as affording scant chance of rehabilitation (*S v Standaard supra* 669i).

These concerns, expressed in recent South African cases, are consonant with the authoritative English position set out in *R v McInerney (supra)*, where the court, whilst recognising the tension between the policy considerations of promoting public confidence in the criminal justice system and preventing re-offending, plumped for the latter. Noting the high rate of re-offending of those released from convictions for domestic burglary, the court pointed out that it could not be expected of the public to be aware of “the pressures on our prisons and the extent to which it is possible to address an offender’s criminal behaviour during a prison sentence” (*R v McInerney supra* par [10]). The “grossly overcrowded” nature of the prison system militated against rehabilitative possibilities during a short sentence of up to 12 months (*R v McInerney supra* par [37] and [41]). For this reason the Court of Appeal departed from the stepped approach adopted by the Panel, concluding that this *modus operandi* was unlikely to have a deterrent effect (*R v McInerney supra* par [36]).

There are clear resonances between the problems faced by the South African and English courts in framing sentences for domestic housebreakers. In the absence of proposals from a similar body to the Sentencing Advisory Panel, the South African law would certainly benefit from a closely reasoned judgment taking account of all the factors impacting upon the sentencing of housebreakers, along with appropriate sentencing guidelines. It is submitted that the judgment in *R v McInerney (supra)* may prove to be of valuable assistance in providing a framework for such a judgment for South African law.

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