

REX v. DOW.

1909. December 1. MAASDORP, C.J.

Criminal procedure.—Splitting of charges.—House-breaking with intent to steal and theft.

A person who breaks into a house with the object of stealing, and there commits a theft, cannot be separately convicted of house-breaking with intent to steal and theft.

The accused had been convicted by the Assistant Resident Magistrate of Bloemfontein, (1) of house-breaking with intent to steal, and (2) of theft of clothes and papers valued at £2, 10s., on remittal by the Attorney-General under sec. 85 of Ordinance 7 of 1902, and sentenced to six months' imprisonment on the first count and three months on the second. It appeared from the record that the two offences arose out of the same act.

Streeten, at the request of the Court, for the accused. This is a case of splitting of charges. The sentence on the first count should be struck out. See *R. v. Sabuyi* ([1905] T.S. 170). This case is on all fours with the case before the Court, and it was decided that the sentence on the count charging house-breaking should be struck out. Only one crime was committed—that of theft. The house-breaking is mere matter of aggravation; see *R. v. Vail* (19 E.D.C. p. 279).

Lloyd, for the Crown: House-breaking under the Roman-Dutch law is a substantive crime; and see Rule of High Court 129, which provides that "it is competent to indict a defendant in the same indictment for two or more offences arising out of the same act or a continued series of acts committed by him, in which case each offence should be charged in a separate count."

MAASDORP, C.J.: The cases quoted by Mr. *Streeten* seem to me to be in point. The magistrate sentenced the accused on

two counts arising out of the same act, and this he has no right to do. It will not be necessary for me to decide the question as to which of the two sentences should be struck out in such cases; but in this case, as the sentence was excessive considering the nature of the offence, the sentence of six months on the first count will be struck out.

