9-3-70

200/69

200/69

G.P.-S. J. 465

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

REGINALD HARRISON
Appellant.

versus/teen

THE STATE
Respondent.

Appellant's Attorney Prokureur van Appellant — *Respondent's Attorney* A-G (Pretoria) Prokureur van Respondent

Appellant's Advocate T.M Kuhn — *Respondent's Advocate* D.J. Uys
Advokaat van Appellant — *Advokaat van Respondent*

Set down for hearing on 26-5-70
Op die rol geplaas vir verhoor op 2.5.8.

(T.P.D.)

Coram: Van Blerk, Holmes AJA et de Villiers AJA
Tgl: 9.45 a.m. — 10.15 a.m.
Uitspraak: C.A.V.

Postea on 27-5-70 per Holmes, JA:—
~~Application~~ appeal allowed. Conv.
& sent. as per written judgment handed
down.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

Between:

REGINALD HARRISON ..... Appellant

AND

THE STATE ..... Respondent

Coram: Van Blerk, Holmes, JJ.A., et De Villiers A.J.A.

Heard: 26 May 1970 Delivered: 27/11/1970

J U D G M E N T

HOLMES, J.A.:

This is a poignantly sombre case about a European man, aged 55 years, who appears to be something of a ne'er-do-well, having fallen lowly in life's estate through his addiction to alcohol. He was convicted of housebreaking with intent to steal and theft of two packets of biscuits and, in view of his record, was declared an habitual criminal. This is regarded as the equivalent of imprisonment for nine years; see section 4 (f) of the fifth schedule to Act 56 of 1955.

2/... He

He appealed to the Transvaal Provincial Division in person, having been granted permission to do this. The appeal was dismissed, save that the conviction was altered to one of housebreaking with intent to commit a trespass, and trespass. He now appeals to this Court with leave. Mr. Kühn kindly undertook to appear for him Pro Deo, and we are grateful for his assistance.

The complainant, who lives in Boksburg, has a house in Benoni which is unoccupied. He took the appellant in from the cold and let him sleep in this house, provided he stayed in employment. The appellant responded by selling the complainant's electric toaster; and it does not need much perception to realise that he did this to obtain money for alcohol. The complainant thereupon turned him out of the house and forbade him to come back. A couple of months later the appellant, somewhat under the influence of intoxicating liquor, needed a place to sleep; so at eventide he broke the kitchen window of this empty house of his erstwhile benefactor, and laid him down to sleep.

3/... The

The regional magistrate, having convicted the appellant of housebreaking with intend to steal and theft, was obliged by section 335 (2) of Act 56 of 1955 to declare him an habitual criminal, because that offence falls within group III of part I of the third schedule to that Act, and he had previously been sentenced to imprisonment for the prevention of crime in respect of theft, which also falls within that group. At that time, namely 28 November 1967, section 335 A had not been passed. It was inserted by section 20 of Act 9 of 1968. In a case of this sort it empowers the Court, if it is of opinion that there are circumstances which justify the imposition of a lighter sentence than such prescribed punishment, to impose, in lieu thereof, a sentence of imprisonment for a period not exceeding nine years.

In my view the alleged theft of biscuits was not proved. This was also the opinion of the Court a quo. But I do not think that there is any doubt but that the appellant is guilty of the crime of housebreaking with intent to commit the offence of being in the house without the permission of the

4/... owner.

owner. The latter offence was created by section 1 (1) of the Trespass Act, No. 6 of 1959; and it was explained by this Court in R. v. Badenhorst, 1960 (3) S.A. 563. No prejudice arises from the amendment of the charge. The verdict is altered accordingly.

The verdict having now been altered, sentence must be considered and imposed anew. If we send the case back to the magistrate to pass sentence afresh, the provisions of section 335 A will be applicable. This was common cause; see Steyn, Uitleg van Wette, 2nd. edition, page 96. It was also common cause that, instead of remitting the case, the more appropriate and convenient course would be for this Court to impose the sentence. As to that, the amended conviction still falls within group III aforesaid. Hence the appellant must be declared an habitual criminal unless we are of opinion that there are circumstances justifying a lighter sentence. Now section 335 A refers only to circumstances. It does not require exceptional or special circumstances, and it must not be judicially curtailed as if it did. In this regard I agree with

the view of Fannin, J. in S. v. Van der Berg, 1969 (2) S.A. 235 (N). It was followed in S. v. Joseph, 1969 (4) S.A. 27 (N), and S. v. Foko, 1970 (1) S.A. 6 (E.C.D.). In my opinion the contrary view, expressed in S. v. Pholo, 1968 (3) S.A. 466 (O.P.D.), cannot be regarded as stating the position correctly.

In the present case the following circumstances seem to us relevant. The offence was not of a vicious or heinous character. The house was unoccupied. The appellant had previously been permitted to sleep there, although this was later revoked. He was homeless, somewhat under the influence of intoxicating liquor, and in need of a place to sleep. As regards the element of trespass, the maximum sentence for that crime, standing alone, is a fine of R50 or imprisonment for three months. The appellant neither intended to, nor did he, steal anything or do any damage to the house, apart from breaking the window of the kitchen. As far as is known, he only wanted to spend the night there.

On the other hand the element of housebreaking in

6/... the

the crime is serious, as every householder would agree. And the appellant has a bad record - a dreary catalogue of offences, fairly petty for the most part, but rendered serious by their sustained persistence over a period of thirty years. It would seem that drink has long been his besetting problem. Detention in a work colony might be appropriate, save that that has already been tried, and in any event he has already been in goal for nearly 2½ years since his conviction in the present case.

Reviewing the foregoing circumstances we are unanimously of the opinion that they justify a sentence lighter than that of being declared an habitual criminal, which, as already mentioned, is regarded as the equivalent of imprisonment for nine years. Justice must be done; but mercy, not a ~~sledge~~ Sledge - hammer, is its concomitant.

Weighing all the factors, including the appellant's bad record of previous convictions, and bearing in mind the aspects of deterrence (to himself and others) and retribution and hoped-for reformation, we consider that an appropriate sentence would be imprisonment for two-and-a-half years. As the appellant

7/... has

has already served all but a day or two of that, it seems that by the time he hears of this judgment he will be bidding his gaolers adieu.

To sum up -

1. The appeal is allowed.

2. The verdict is altered to guilty of housebreaking with intent to be in the house in contravention of sec. 1 (1) of the Trespass Act, No. 6 of 1959.

3. The sentence declaring the appellant an habitual criminal is set aside.

4. There is substituted a sentence of imprisonment for 2½ years.

G.N. HOLMES

JUDGE OF APPEAL

Van Blerk, J.A.)
De Villiers, A.J.A.) Concur.