REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

..... 10/5/2013

CASE NO 2012/A447

RTS/B1/67

IN THE MATTER BETWEEN:

DOMA, TSHEPO SHEPERD **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

SUTHERLAND J:

Introduction

1. The appellant was convicted of a contravention of Section 36 of the General law Amendment Act 62 of 1955 (Section 36) (ie, being found in possession of suspected stolen property without a satisfactory explanation for such possession) and sentenced to seven years imprisonment of which three years were suspended. The appeal is against both conviction and sentence.

2. The appellant, and another Accused, Richard Phadu, were charged with theft of a particular car, a Fiat Grande Punto ND645577 on 15 September 2010 from its owner, First Car Rental. Theft by the appellant was unproven and he was convicted of the competent alternative offence of Section 36, as provided for in Section 264 of the Criminal Procedure act 51of 1977 (CPA)

The relevant evidence

3. At great deal of inadmissible or irrelevant evidence was adduced. This judgment ignores all of it.

4. The case against the appellant rests on the evidence of Lerato Sello and on his own evidence, and on those admissions which were made from the bar by his legal representative.

<u>The stolen car</u>

5. On 1 March 2011, the police came to Ms Lerato Sello and confiscated the car she possessed on the premise that it was stolen.

6. Its stolen status was addressed by W/O Simon Ntuli, a veteran Policeman of 39 years service. This aspect of the case was dealt with in a perfunctory and unmethodical manner which inspired counsel for the appellant to contend that there was no proper proof that the vehicle the appellant allegedly involved himself with was, indeed, a stolen vehicle.

7. W/O Ntuli testified that the vehicle seized from Sello had a different registration plate from the allegedly stolen car. However, the VIN number of the car seized from Sello was that of the stolen vehicle, the number having not been obscured or filed off. It was on this basis that the vehicle seized from Sello was identified as the car stolen from First Car Rental and returned to the owner. A false tag had also been put on the door of the stolen car which was ostensibly used as a source of reference to fraudulently re-register the vehicle. This explained the false data on the registration papers possessed by Lerato Sello relating to the car which was seized from her, that bore the VIN numbers of the stolen car.

8. None of this evidence was challenged in any way. However, it was contended that proof of the stolen status of the car seized from Sello was not proven because of an omission to procure evidence from the purported owner that the vehicle it initially possessed was indeed a vehicle with that VIN number. In my view, although appropriate to adduce such evidence when it is available, its omission cannot be fatal. In this case, the other evidence demonstrates, on a holistic appreciation, that there was no real risk of misidentification. Few true owners can tender the sort of evidence contemplate by the contention, but if the probabilities lean towards an identification such evidence is sufficient.

9. Nevertheless, it is inappropriate that the prosecution present a case in such a casual manner and it is rightly criticised in that respect. Notwithstanding that observation, there

is the unrebutted evidence that a vehicle with the same VIN numbers as the stolen car was located in Sello's possession and returned, and by implication, accepted by First Car Rental as its own property. In my view the connection between the stolen car and Sello's car was proven.

Sello's acquisition of the car from the appellant

10. According to Sello she bought the car. She said she was referred to 'Shane' who allegedly sold cars. She never met Shane and only ever spoke to a voice over the phone who said he was Shane. Regrettably, her evidence about the transaction of sale itself was lean. Apparently she was required to deposit money into an account. Once that was done she was contacted by phone and a delivery was arranged.

11. She said she paid a sum of R28,000 into a bank account called Doma Logistics CC. She was told to go to a Mcdonalds' drive-in restaurant in Centurion. She apparently still owed some money for the car.

12. She arrived. Then, the car she had bought arrived with two persons in it, the appellant and one other, whose name she never knew. The appellant drove the car. When appellant arrived he called her. She had never met them before. She understood that the appellant was Shane's brother, but the evidence does not indicate how or when she was brought under that impression.

13. Appellant and Sello spoke. The balance of payment outstanding was discussed. She said to appellant that she had yet to deposit it and told appellant that she had spoken to appellant's brother, ie Shane, about such a later deposit and he had agreed. Appellant said his brother would not like that. Nevertheless, she took the car from the appellant without

any further payment at that time and at a later stage she paid a further R5000 into the same account. She said she paid a total of R40,000 but the figures on her own account do not add up. A few weeks after delivery the appellant came to her workplace to hand over the registration papers.

14. The appellant's version is slightly, but importantly, different.

15. Appellant says Shane sent him to meet Sello for the sole purpose of collecting money. Initially they were to meet at appellant's place but Sello was lost and so Mcdonalds was agreed as the spot. This evidence about an initial plan to met elsewhere was never put to Sello in cross-examination.

16. He says he came in his own car and did not drive the car which was the subject of the sale. The car was brought by another person who identity he does not know. This was denied by Sello who insisted it was he who drove the car which was being delivered to her.

17. When the handing over of the money was discussed, the appellant says both Sello and he called Shane and both he and Sello spoke over the phone to him in each others' presence to arrange a deferment of payment. This important variance from Sello's version was not put to Sello in cross examination.

18. Sello's evidence that he delivered her registration papers to her was unchallenged.

19. As to the Doma Logistics CC account, it is common cause that it is an account of the appellant. Appellant says he uses it jointly with Shane in a clothes selling business. He

also says that Shane and another unidentified person also cars. This other person remained unidentified. The appellant did not explicitly say that car selling business run by Shane and another person used the Doma Logistics CC Account, but this fact can be inferred from the common cause payment into the account by Sello. Other evidence established objectively that Sello deposited a sum of sum R15 500 into the account.

20. Thus, according to the appellant, the people in the car selling business are Shane, himself and Mr 'X". The appellant made a remark to W/O Ntuli about his own role in selling the cars, which is pertinent to this aspect. W/O Ntuli says when he asked the appellant about this particular car he said he deals with so many cars he cannot recall if this was one he dealt with. This evidence was not challenged.

21. The illusive Shane was the subject of much enquiry. It appears that no one other than the appellant and his mother, who was called to testify, can vouch for the existence of 'Shane'. W/O Ntuli opined that Shane does not exist. He advanced this view on the basis that he was investigating several other car transactions which had been arranged over the phone with a person who called himself Shane, but Shane had never been seen by Sello, or himself or any of the other buyers of these other cars.

22. This was the sum of the evidence relevant to the culpability of the appellant.

Is appellant's version reasonably possibly true?

23. The first enquiry is to determine which version must be accepted.

24. Perhaps predictably, the court was told that Shane was out of reach. It was said that he had gone to England to cook. The police cannot reach him. Stung by the allegation that Shane was fictitious, Sibongile Leah Nkosi, the alleged mother of the appellant and of Shane was called to confirm his existence. Other than her say so, no proof that she is the mother of anyone was produced, even of the appellant. Indeed the absence of the obvious evidence to prove the existence of a person such as an Identity book, or at least an identity number, a photograph, a copy of the CIPRO data sheet showing such a person to be a member of Doma Logistics CC, a document from the bank showing him to be a signatory of the relevant bank account, or even a cell phone account or any other account with such a name, gives rise to an inference that "Shane" is indeed a chimera.

25. The failure to challenge critical aspects of Sello's evidence, as alluded to above, warrants examination. The embellishments given in the appellant's own testimony later on seem to be improvisations intended to adapt his version to that of Sello's evidence. It is so that Sello's evidence not unblemished in relation to the sums paid which is incongruent both with the bank statement produced and her own explanation; however, this discrepancy is tangential to the real material issues of appellant's possession and control over the stolen car.

26. Axiomatically, an Accused person need not put up a version that is more than reasonably possibly true and the version need not even be believed. Can the appellant version's satisfy this test?

27. The appellant's version requires of the trier of fact to believe that Sello was, initially, supposed to come to his "place" to hand over money for the car Shane sold her. Was she to take delivery of the Car there? Logically that must have been so. Thus when she could

not locate his "place", which was never identified, the car and its anonymous delivery man, and the appellant in a separate car, went to Mcdonalds'. Rather than travel together, as alleged by Sello, they came in separate cars. That *per se* is not implausible, for how was whoever drove her car for delivery to return to whence he had come? Nevertheless, it is a curiosity that she should dispute such a matter if it was otherwise, because whether the appellant physically drove the car or travelled separately, he was on both their versions in control of the car and in a position of authority to release it to her.

28. Furthermore, the change of venue must have been communicated to the deliveryman by the appellant, yet this deliveryman who is entrusted to convey a valuable asset is yet another nameless person to the appellant. Alternatively, it might be asked if it had it always been arranged that the vehicle would be collected at McDonalds and the money delivered elsewhere? Why do that, ie pay in private and choose a public, neutral, place for delivery?

29. Moreover, it would be prudent to withhold the registration papers until full payment had been made. Thus, the money collector would also be deputed to deliver the registration papers. Of importance in this regard, as alluded to earlier, is the appellant's statement to W/O Ntuli that he deals with so many cars that he was, initially, uncertain if he dealt with this one, which implies this transaction was not an isolated 'favour' for Shane but an event in a pattern of conduct.

30. In my view, the appellant's version is contrived to try to disassociate himself from being in physical possession of the car, a misconception about the true gravamen of his implication in a course of criminal conduct. Shane, as I have indicated above, is in my

view, an invention, but even if there is a real person who does the telephone chats to buyers, the actions which implicate the appellant are no less established.

31. In the result I find that Sello's version is to be believed where her evidence contradicts that of the appellant.

What is the appellant guilty of?

32. Plainly, there is no basis at all to suppose that the appellant was complicit in the theft of the car. However, where a court has to contemplate whether or not there is guilt on a competent alternative verdict, it must nevertheless examine whether or not the evidence adduced establishes all the elements of that alternative offence. It seems that this point was not appreciated in this case.

33. Section 36 Provides as follows:

> " any person found in possession of any goods.....in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence ...."

34. The elements of this offence are therefore:

34.1. To be found in possession of goods,

34.2. The existence of a reasonable suspicion that the goods are stolen,

34.3. The absence of a reasonable explanation, given at least at trial.

35. The only evidence of possession by the appellant of the car is that he drove or supervised the driving of the car to deliver it to Sello. Can this constitute being "*found in* possession"?

36. Section 36 is a quintessential example of what might be called a 'policeman's crime'. The purpose of the section is to afford an alert police officer the right to lawfully stop and interrogate a person who is honestly and reasonably suspected by the police officer of wrongdoing. It is not a device to circumvent evidential problems on a charge of theft. It is quite unlike, for example, the crime of Assault with intent to do grievous bodily harm, where, if it is unproven that the accused had the requisite specific intent, the scale of the wrongdoing can be ratcheted down to Common Assault. The offence created in terms of Section 36 is not a logical progression from theft. It is an artifice conceived by the legislature to address a different set of circumstances, and simply for policy reasons is it, in terms of Section 264 of the CPA, declared to be a competent verdict on a charge of theft.

37. *Snyman, Criminal Law, 5th Edition (2008) Lexis Nexis, at p 525* discusses the application of Section 36. The author draws attention to the critical element of the goods having to be "found" in possession of an Accused to satisfy the offence created by Section 36. The act 'finding', the author says, in passing, has to be *by the police*. Evidence of an Accused having once upon a time, in the past, having being in possession of the suspected stolen goods does not found a basis to conclude that the Accused has been 'found' in possession' in the sense contemplated by Section 36. (See; **R v Tsotisie & Another 1953 (1) SA 249 (T) at 241A; R v Hassen 1956 (4) SA 41 (N) T AT 42 F –G.)**

38. In **State v Langa 1998 (1) SACR 1 (T),** MacArthur J addressed the question of being 'found in possession'. He remarked that:

> "The expression 'found in possession' has, within the meaning of s 36 as well as s 2 of the Stock Theft Act 57 of 1959, been defined in numerous cases. In *Tsotisie*'s case, *supra*, De Villiers J expressed himself as follows at 240C - E:
>
> 'In my view although an accused need not have actual physical detention of the stock or produce found, *he must be in such control of it at the time that it can be said that he was caught in possession*. I do not think that for the purposes of the section an accused can be said to have been "found in possession" if the stock is found under the direct control of someone else, but it can be proved that the latter held it as agent for the accused. The agent in such a case would be "found in possession" and his explanation that he was holding the stock or produce for C someone else, without any suspicion, will, if not shown to be false, probably be a satisfactory account.'
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> Furthermore, as was shown in *S v Wilson* 1962 (2) SA 619 (A), it is not imperative that the accused should have been actually present when the stolen stock or article is first found. *It is all a question of fact whether the accused has surrendered control of the goods.* In *R v Hassen* 1956 (4) SA 41 (N) the accused had stored some goods with a third party at the latter's house. There were also some other goods found in the accused's room but at the time the goods were found he was in jail. The Court held that he was not in direct control of the goods in either situation."

39. As to the facts with which MacArthur J dealt, it was stated:

> "The next accused was number 2 and it is common cause that nothing was found on the premise where she lived. There was some evidence about what Warrant Officer Mofya was told by her children but it was all inadmissible evidence and does not take the State's case any further. The same applies to accused 5 who is accused 2's husband. He was not found in possession of any of the articles and there is nothing in the evidence to suggest that either accused 2 or accused *5 still had control of the property left with the elderly lady* who was never identified. It follows that in my view accused 2 and accused 5 were wrongly convicted.
>
> *The same reasoning applies also to accused 7 and 8, accused 8 being the person whom the evidence suggests transported the items to Maria Shibambo's house. Neither accused 7 nor accused 8 was found in possession of anything and there is no evidence to suggest they were in control of it.* The evidence in my view goes the other way and points to both accused 7 and 8 having surrendered control of the goods. It follows that they too were wrongly convicted.."
>
> (Emphasis supplied)

40. None of these cases states, explicitly, that the persons who do the 'finding' must be the police. However, in common view with the view expressed in *Snyman*, in my view, it must, logically, be so. It is the police who are authorised to interrogate persons about their possession of goods. It is the police who need to form a reasonable suspicion. A citizen cannot invoke Section 36 to demand an explanation from a passing stranger who is under no obligation to account for his possession of anything under his control to another member of the public.

41. The conclusion to which I am driven is that the evidence of the appellant's possession of the car when delivering it to Sello is not possession of the kind necessary to sustain the offence in Section 36. (Cf: the observation and finding of MacArthur J cited above in paragraph 39 of this judgment.)

42. However, whether the appellant is guilty of the other competent verdict in terms of Section 264 of the CPA, ie, Section 37 of GLA 62 of 1955 (Section 37) (Receiving Stolen goods without a reasonable belief that they are the property of the person from whom they were gotten) remains open for enquiry. Since the decision in **State v Manamela & Another (Director–General of Justice Intervening) 2000 (3) SA 1 (CC)** struck down the reverse onus, Section 37 has been amended to read:

> "Absence of reasonable cause for believing goods properly acquired-
>
> (1) (a) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a

conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.

(b) In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause. "

43. The 'possession' required for guilt under Section 37 includes mere detention on behalf of another. (**State v Moller 1990 (3) SA 876 (AD).**) An example of a person who drove a vehicle well knowing the car was stolen being held to have had the necessary possession to be guilty of being an accessory to the theft is **Rex v Von Elling 1945 AD 234 at 250.**

44. In the present matter, it has been proven that the car was stolen and that the appellant possessed or was in control of the car, at least, for the purpose of delivering it to Sello. Applying the provisions of Section 37(2), cited above, is there evidence which 'raises a reasonable doubt' to displace the inference of culpable possession of the stolen car?

45. Not only did Appellant deliver the car, he also delivered the fraudulent registration papers. He told W/O Ntuli he dealt with so many cars he could not recall this one. His explanation for his involvement with the car was that he was the agent of his brother Shane, who (on the findings above) is a figment.

46. In my view this evidence does not raise a reasonable doubt that the appellant might have had reasonable cause to believe the car was lawfully in his possession or of the person who gave it him. The appellant is therefore guilty of contravening Section 37.

The Question of the failure of the Magistrate to warn the appellant of the implications of the risk of being convicted on an alternative competent verdict

47. Counsel for the appellant contended that the appellant did not get a fair trial because he was not warned about the competent alternative offences upon which he might be convicted, if theft was unproven.

48. Unquestionably, an Accused cannot enjoy a fair trial unless the defence of the Accused is conducted with an awareness of the power of the court to convict him on other offences not expressly mentioned in the charge sheet. Counsel invokes much authority on the issue at stake. (See: **State v Mashinini 2012 (1) SACR 604 (SCA); State v Feilies 2006 (1) SACR 302 (C); State v Jugazi & Another 2001(1) SACR 107 (C); State v Chauke 1998 (1) SACR 354 (V); State v Kester 1996 (1) SACR 461 (B)**)

49. All these cases have one thing in common: they deal with the circumstances of an undefended Accused. That fact distinguishes them from this case, where throughout the trial the appellant was represented. No prejudice occurred. No failure of justice occurred. In **State v Mukwevho 2010 (1) SACR 349 (GSJ)** , a case dealing with minimum sentences, the court expressed the view that it was desirable to spell out all the risks of exposure for undefended accused, but did not suggest that a blanket duty could be imposed on a Magistrate to warn an Accused who had a legal representative to advise him. The absence of a warning to the appellant about competent verdicts had no effect on the fairness of this trial.

Conclusion on the merits

50. Accordingly, the conviction of the appellant of the offence under Section 36 was in error and must be set aside. However, the appellant should have been convicted of a contravention of Section 37.

Sentence

51. Because the appellant has, on appeal, had the conviction set aside and substituted with another offence, he follows that the question of sentence must be addressed afresh.

52. Nevertheless there is one aspect of the Magistrate's remarks about sentence which warrant comment. The original sentence of seven years of which three years were suspended was challenged as being shockingly inappropriate for several reasons. One aspect was curiously not mentioned; ie the passage which follows the noting of the prevalence of car theft from the OR Tambo Airport, which reads:

> " to be honest with you, since the beginning of the year [ie, 2012] I have decided that such particular theft from that particular area, I am not giving anything less than seven years."

In my view, this approach is incorrect. It seems to be an expression of exasperation rather than a dispassionate assessment of a social problem.

53. The approach of taking a view about a 'minimum sentence' for a particular kind of crime committed in given circumstances is not a novel idea. Indeed, Parliament has thought it

fit to do so and impose on courts the burden of imposing minimum sentences. (See: The Criminal Law Amendment Act 105 of 1997 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.)

54. Although it may be within the power of Parliament to do so, the propriety of choosing to do so, not being altogether free from doubt, judicial officers do not bind themselves in such a manner under any circumstances. The judicial function, free of legislative impediments, in order to remain true to its fundamental values, in an examination of a sentence to be imposed upon a given Accused in a given set of circumstances in respect of any given crime, is never constrained from evaluating, as exactly as humanly can be achieved, a sentence appropriate to the very case.

55. I turn to deal with the imposition of a sentence.

56. What is advanced about the appellant, albeit without real substantiation, is as follows;

56.1. He is 34 years old.

56.2. He has a B.Com degree.

56.3. He has three children, at the time of trial in 2012, aged 6, 4 and 2. Their mother is engaged to the appellant. They live in centurion.

56.4. He is in business as the proprietor of Doma Logistics CC in the transport business, mainly as a recipient of State tenders. The business employed two staff

members. The business is suspended owing to the appellant having being in custody awaiting trial for an unstipulated period, but seemingly, about 8 months.

56.5. He earned R13,000 per month.

56.6. The mother of his children earns about R6000 per month plus commission of an undisclosed sum. She has to support herself and the children on this income alone if the appellant is imprisoned.

56.7. The appellant was until shortly before the trial contributing to the support of a younger brother, Ishmael. Apparently, Ishmael is now self supporting.

57. The Asset Forfeiture Unit has apparently seized the appellant's assets. What these assets might be were not disclosed at the time the magistrate imposed sentence, but were the subject of a subsequent application. Accordingly, the record does not reflect the size or contents of the appellant's estate.

58. The appellant had been previously convicted, on 25 May 2005, of the crime of fraud when he was sentenced to three years imprisonment, suspended for five years on condition that he was not within that period of suspension found guilty of a crime of fraud, theft or attempted theft, committed during the period of suspension. Noone at the trial thought to enquire into the nature of the fraud of which he was convicted. The offence in terms of Section 37 which he committed in 2010/2011, is a crime of dishonesty. It was committed only just outside the five year period of suspension. Plainly, the chance offered by the suspended sentence did not encourage the appellant to strive for greater probity.

59. The crime in terms of Section 37 is especially pernicious. He who receives stolen property and trades with it constitutes the marketplace for thieves, if not also for robbers. Trading in stolen motor cars is an activity that is harmful to individuals who lose their cars and to individuals who are duped into buying stolen cars. It involves the co-operation of corrupt public officials to conceal the crimes. The appellant's culpability, albeit as a minor player, in such a web of lawlessness remains substantial.

60. The magistrate gave weight to the fact that the suspension period of the previous conviction had expired and he gave weight to the period spent by the appellant whilst in custody awaiting trial. That was appropriate and I concur with that approach.

61. In my view imprisonment is appropriate. His previous dishonesty and the pernicious nature of the crime require that. Because of the peculiarity of the outcome of the appeal in terms of which the conviction has been changed from Section 36 to Section 37, a question arises about the prospect of a longer period effective period of imprisonment, as in my view, Section 37 is a more serious offence than Section 36. However, I am of the view that this factor should incline a court not to contemplate a more severe sentence than the appellant was at risk of when he noted his appeal.

62. It was argued that the approximately 8 months awaiting trial should receive more visible weight than was the case when the magistrate addressed sentence. Because it is rightly considered that such detention is harsher than imprisonment as a convicted person, this is a consideration that must been seen to have been taken into account.

63. Accordingly, in weighing these several factors, I would impose a sentence of a period of four years imprisonment of which one year will be suspended on appropriate conditions.

The Order

64. The appeal against a conviction of a contravention of Section 36 of Act 62 of 1955 is upheld.

65. The conviction is set aside and substituted with a conviction of a contravention of Section 37 of Act 62 of 1955.

66. The Sentence imposed in respect of the conviction of a contravention of Section 36 of Act 62 of 1955 is set aside.

67. In respect of a conviction of a contravention of Section 37 of Act 62 of 1955 the following sentence is imposed:

67.1. Four years imprisonment.

67.2. Of such four years, one year shall be suspended for five years on condition that the appellant is not convicted of an offence involving dishonesty, including fraud, theft or any offence that is a competent verdict upon a charge of fraud or theft, committed during the period of suspension.

67.3. This sentence shall be effective from the date upon which the Magistrate initially convicted and sentenced the appellant on 18 June 2012.

SUTHERLAND J

I agree.

TWALA AJ

Hearing: 14 May 2013.
Judgment delivered: 21 May 2013

For the appellant:
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