REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

APPEAL CASE NO: A296/2016

DPP REF NUMBER 10/2/5/1 – (2016/457)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. ✓

4/9/19 .....

In the matter between:

De-Conceia, Castro Nora — Appellant

and

The State — Respondent

Judgment

Van der Linde, J:

[1] This is an appeal, with the leave of the court *a quo*, against a conviction on two counts of robbery with aggravating circumstances. The appellant was charged as accused number two,

with two other accused, on these two charges, but also on a third count of corruption. He was found guilty on counts one and two but discharged on count three. His co-accused, charged as accused number one and accused number three, were discharged on all counts.

[2] The charges arose out of the hijacking of two vehicles, count one relating to a Hyundai bakkie and count 2 to an Isuzu bakkie. In respect of count one, the evidence of the complainant was that while he was driving his vehicle being the Hyundai, he was cut off by a Nissan vehicle that blocked his pathway. Two men with firearms alighted from the vehicle, and got into his vehicle, moving him to the middle of the front seat, obscuring his vision, and driving off with him, eventually – after trying to dismantle the tracking device – dumping him. All of this occurred on 14 January 2014.

[3] The essence of the evidence against the appellant was that of the first complainant, who identified the appellant as the driver of the Nissan vehicle as the incident was occurring; thereafter at an identification parade; and finally – in court – by way of a dock identification. In addition, on the next day, 15 January 2014, the police, having received information that a vehicle had been hijacked, this being the Isuzu bakkie which refers to the second count, came upon a panel beater's workshop and there found not only the Isuzu but also the Hyundai.

[4] The three accused were all present, and according to the evidence of two policemen who were called to testify for the State, the keys of the Hyundai were found in the possession of the appellant. Finally, as regards count two – about which more below - the evidence of accused number three (and all three accused testified in their own defence) was that the Isuzu vehicle was brought to those premises by the appellant, and handed over to the third accused.

[5] The second complainant was also hijacked in a similar fashion but he was unable to identify his assailants, not during the incident nor afterwards at the identification parade. The evidence against the appellant on this count two was therefore his control of the vehicle concerned, in bringing it to the panel beater – accused number three – and instructing him to remove the signage on the vehicle and thereafter to polish it up.

[6] The defence of the appellant was an alibi. He testified that on 14 January 2014 (not the next day, 15 January 2014, when the second vehicle was hijacked) he was in the company of his employer, a building contractor, all day long and therefore could not have been a participant in the hijacking of the vehicle of the first complainant. The employer was also called to support the appellant's version.

[7] Ultimately the magistrate, having analysed the evidence: the probabilities and credibility and reliability of the witnesses, held that there was no case against accused number one, who was a security guard who merely lived on the premises of the panel beater and had nothing to do at all with the business being conducted there. The magistrate held that accused number three was a credible witness, and accepted his evidence that he was given the key of the Isuzu bakkie and instructed by the appellant to remove the signage off this second hijacked vehicle. He rejected the evidence of the alibi and held the appellant guilty of the charge under counts one and two.

[8] As to the charge under both counts, the magistrate held that the appellant was part and parcel of the hijacking gang and therefore, although the appellant was never seen with a firearm in his hands, on the evidence of the two complainants other members of the hijacking gang wielded firearms, and so the appellant must have shared a common purpose with them to commit the crime of robbery with aggravating circumstances.

[9] On appeal, the findings of the magistrate were attacked. Those findings were, of course, findings of fact and the general approach of deference by an appeal court such findings is a threshold which the appellant must clear before us, for the appeal to succeed.

[10] The principles which should guide an appellate court in an appeal purely upon fact were summarised as follows by the Appellate Division (Davis AJA) in R v Dhlumayo, 1948 (2) SA 677 (A) at 705-706, in these terms:

1. An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.

2. Those principles are in the main matters of common sense, flexible and such as not to hamper the appellate court in doing justice in the particular case before it.

3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.

5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.

6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.

7. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.

8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

13. Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a civil or criminal case.

14. Subject to the difference as to onus, the same general principles will guide an appellate court both in civil and criminal cases.

15. In order to succeed, the appellant has not to satisfy an appellate court that there has been 'some miscarriage of justice or violation of some principle of law or procedure.

[11]The advantages which the trial court enjoys should, however, not be over-emphasised 'lest the appellant's right of appeal becomes illusory'. The Constitutional Court said in President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) para 79, that the truthfulness or untruthfulness of a witness can rarely be

determined by demeanour alone without regard to other factors including, especially, the probabilities. It cannot be assumed that all triers of fact have the ability to interpret correctly the behaviour of a witness. This is so because the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact.

[12]Finally, in Medscheme Holdings (Pty) Ltd v Bhamjee, Medscheme Holdings v(Pty) Ltd v Bhamjee 2005 (5) SA 339 (SCA) para 14, Nugent JA said:

"It has been said by this Court before, but it bears repeating, that an assessment of evidence on the basis of demeanour - the application of what has been referred to disparagingly as the 'Pinocchio theory' - without regard for the wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the Court a quo. Indeed, on many issues, the broad credibility findings, undifferentiated as they were in relation to the various issues, were clearly incorrect when viewed against the probabilities."

[13]In this case the appellant's hurdle is a challenging one, because the magistrate analysed the evidence thoroughly and his analysis was based on the probabilities of the versions. It is true, as counsel for the appellant submitted, that the appellant is entitled to an acquittal if his version is reasonably possibly true. But it is often forgotten that the version of an accused is required to be reasonably possibly true, given the version put up by the state against the version of the accused, and particularly the strength of the state case. In other words, what is required is a consideration of all of the evidence put up – that by the state as well as that by the accused – and then the assessment must be whether the version of the accused is reasonably possibly true.

[14]It is as well that one refers again to S v Van der Meyden 1999 (2) SA 79 (W) at 80 ff:

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so

only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. In R v Hlongwane 1959 (3) SA 337 (A), after pointing out that an accused must be acquitted if an alibi might reasonably be true, Holmes AJA said the following at 340H--341B, which applies equally to any other defence which might present itself:

'But it is important to bear in mind that in applying this test, the alibi does not have to be considered in isolation. . . . The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.'

Counsel for the accused referred us to three cases which are frequently cited in this Court in elaboration upon that test. In S v Kubeka 1982 (1) SA 534 (W) Slomowitz AJ said the following at 537F--H:

'Whether I subjectively disbelieve (the accused) is not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true.'

That passage does no more, in effect, than to reiterate that the conclusion of a criminal court is not to be reached merely by choosing what it considers to be the better of two competing versions (Hlongwane's case supra at 341A; S v Singh 1975 (1) SA 227 (N)). Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true - there is not even a possibility that both might be true - the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation.

S v Munyai 1986 (4) SA 712 (V), to which we were also referred by counsel, should accordingly, in my view, be approached with some circumspection. At 715G Van der Spuy AJ interpreted the abovementioned passage from Kubeka's case as follows:

'In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false.'

It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is 'completely acceptable and unshaken'. The passage seems to suggest that the evidence is to be separated into compartments, and the 'defence case' examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. Although the dictum of Van der Spuy AJ was cited without comment in S v Jaffer 1988 (2) SA 84 (C), it is apparent from the reasoning in that case

that the Court did not weigh the 'defence case' in isolation. It was only by accepting that the prosecution witness might have been mistaken (see especially at 89J--90B) that the Court was able to conclude that the accused's evidence might be true."

[15]As I see it, the fact that the keys of the first hijacked vehicle were found in the pocket of the appellant, is dead against the appellant. And it is not possible for the police to have made up that story – how else would they have been able to drive that vehicle away from the panel beater? Where could the key have come from, if not from the appellant? Of course, one can think up various possibilities to explain the presence of the key in the vehicle as it was driven away to be taken into police custody. But all of those possibilities would amount to no more than speculation, since there is no evidence to back them up.

[16]Once one accepts the correctness of that evidence – as it seems to me in inevitable that one must – then the version of the appellant baldly denying that the key was found on him, falls to the ground. Then he was found in possession of the key to the hijacked vehicle, hijacked the previous day, the day in respect of which he put up an alibi. Now one can expect that the mere fact that he lied about the provenance of the key in his pocket does not of itself prove that he was driving the Nissan vehicle as part of the hijacking gang.

[17]But the difficulty is that no other explanation for the presence of the key in his pocket was raised with him all the state witnesses in cross-examination. The only reasonable explanation that beckons in these circumstances is that he was,in fact, the driver of the Nissan vehicle. There is, once that inference is drawn, corroboration to be found in the identification by the first complainant of the appellant on three different occasions, as being the driver of the Nissan vehicle.

[18]There was criticism against the way in which the identification parade was conducted, but it goes to form and not to substance. The suggestion that the complainant would have spotted the appellant outside of the charge office as he was being brought from the police cells to the venue of the identification parade, and that this would have influenced the complainant, was

roundly rejected by the complainant who denied seeing the appellant being brought to the identification parade.

[19]In the light of the evidence considered as a whole, and particularly the discovery of the key of the first hijacked vehicle in the pocket of the appellant, I do not see a misdirection on the part of the court *a quo*, and the conviction of the appellant on the first count must stand.

[20]As to count two, the alibi was not raised, and the second complainant was not able to identify the appellant at the identification parade. But here there is the pertinent evidence of accused number three who places the appellant squarely on the scene by in control of that vehicle on the very day on which it was hijacked. The magistrate found accused three to be a credible witness who obviously had opportunity to observe the goings-on, and to that must be added the removal of the signage as instructed by the appellant which feeds into the probability of the vehicle having been hijacked. There is no countervailing version of the appellant that exculpates him, despite being in control of that vehicle: he denies ever being in control of the vehicle.

[21]What does distinguish count two from count one is the absence of any identification. There is no direct evidence that the appellant was on the scene of the second hijacking. There is also no direct evidence that the appellant was associated with robbers who were wielding firearms. At the hearing counsel for the State conceded that he could not defend the conviction of robbery with aggravating circumstances under count two.

[22]But was that concession correct? In matters such as these there, is often reference to what has been called the so-called doctrine of *"recent possession"*. That so-called doctrine holds that if an accused is found in possession of an object which is proved to have been applied in the commission of a crime of which the accused is charged, and if such possession by the accused is established shortly after the commission of the crime, then the accused may be found guilty of the commission of the crime itself. See for example Principles of Criminal Law by Jonathan Burchell, fifth edition, page 17 footnote 87.

[23]In Mothwa v The State (124/15) [2015] ZASCA 143; 2016 (2) SACR 489 (SCA) (1 October 2015) the true fit of this *"doctrine"* was put as follows by Mathopo, JA:

> *"[8] The doctrine of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence. The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, the readiness with which the property can or is likely to pass to another person.*
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> *[9] There is no rule about what length of time qualifies as recent. It depends on the circumstances generally and, more particularly, on the nature of the property stolen. If the property stolen is commonplace the time might be very short as it is always easy to trade it. It can thus change hands easily and much quicker. Property such as money and motor vehicles are easily circulated.*
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> *[10] Courts have repeatedly emphasised that the doctrine of recent possession must not be used to undermine the onus of proof which always remains with the State. It is not for the accused to rebut an inference of guilt by providing an explanation. All that the law requires is that having being found in possession of property that has been recently stolen, he gives the court a reasonable explanation for such possession."*

[24]On the established facts here the appellant had possession of the Isuzu bakkie, a vehicle which was proved to have been hijacked very recently. The evidence of the second complainant was uncontested in this regard. He explained that on 15 January 2014 he was driving the vehicle on duty for his employer. He was in Booysens when, approaching a robot, he stopped behind two vehicles. At that stage a person knocked on the passenger side, with a firearm, and told him to open. This person entered the vehicle.

[25]He was instructed to drive back in Booysens Road in the direction of the police station and then to go towards Ford Street. When he stopped a person came from behind switched off the vehicle and removed the keys. His cap was then pulled ovaries eyes and he was forced to lie down with his head on the lap of the person that had gotten into the vehicle.

[26]The complainant was then driven in a different car in which he was covered with a blanket. He arrived at an unknown place at which the car was switched off. There they remained for

about 45 minutes to an hour and he was then taken to get another place. There he was taken out and instructed to walk away with his face turned downwards. At the corner of a building, he was told to sit and to look down facing the wall. He stayed like that for about 10 minutes, and since he had been left alone he decided to get up and to seek help.

[27]He went to a garage nearby and the police were phoned. He went to the police station. At the police station he reported the incident. His statement was taken down. Thereafter, at about 5 o'clock, while he was still at the police station, he was informed that the vehicle had been recovered.

[28]The evidence of the second complainant formed part of the reconstructed record. This reconstruction was based on the notes of the magistrate. Either the magistrate did not note at what time precisely the second complainant was hijacked, or the second complainant simply did not say. Since there was no cross-examination of the second complainant by the appellant it is therefore not possible to determine precisely when the hijacking took place.

[29]But it can be inferred that the hijacking, and the subsequent spiriting away of the second complainant, his reporting of the matter to the police, and the recovery of the hijacked vehicle, all must have taken place within a span of about 2 to 3 hours that afternoon.

[30]The evidence of the police officer Serage is that it was about 4:20 that same afternoon that he and his co-officer received a complaint of a hijacked vehicle, this being the Isuzu bakkie. This led them to a plot 506 Zuurbekom where they found the second hijacked vehicle and, as already indicated, also the first hijacked vehicle. Three men were busy removing stickers from the second hijacked vehicle, and the appellant was one of those three persons.

[31]Add to this the accepted evidence of accused number three who testified that the appellant was in control of the second hijacked vehicle which was brought to those premises earlier in the afternoon, and it becomes clear that the inference is overwhelming that the appellant was involved in the hijacking of the second vehicle. The appellant's exculpatory version, to pass

muster, has to be reasonably possibly true within the context of the evidence as a whole, including this evidence on behalf of the state; Van der Meyden, supra.

[32]The involvement of the appellant with the second hijacked vehicle, and specifically his driving of the vehicle towards the third accused within the premises after the appellant had arrived at the premises with two other gentlemen, places the appellant in a position of co-control of the hijacked vehicle within the very timeframe within which the hijacking had occurred. In these circumstances, I cannot accept that he is version is reasonably possibly true.

[33]It follows that here too there was no misdirection on the part of the court *a quo*, the conviction on the second count must stand, and that the concession by the State was ill-advised.

[34]For the sake of completeness, I refer to a competent verdict that might, in any event, have applied on count two. Under section 260 of the Criminal Procedure Act 51 of 1977, if the evidence on a charge of robbery does not prove the offence of robbery but an offence under section 36 or 37 of the General Law Amendment Act 62 of 1955, the accused may be found guilty of the offence so proved.

[35]Under section 36 of that Act, any person who is found in possession of any goods that are reasonably suspected of having been stolen, and is unable to give a satisfactory account of such possession, is guilty of an offence. Despite the ostensibly reverse onus, this provision was upheld as constitutionally compliant in Osman the Attorney-General, Transvaal 1998 (4) SA 1224 (CC).

[36]Under section 37 of that Act, a person who receives into possession of stolen goods without having reasonable cause for believing that such goods are the property of the person from whom he received them, is guilty of an offence. Mere proof of possession is sufficient evidence of the absence of *"reasonable cause"*, in the absence of evidence to the contrary which raises a reasonable doubt.

[37]In this case section 36 of the General Law Amendment Act might have found application. The appellant was found in possession of stolen goods. Ought he reasonably to have suspected

that the Isuzu bakkie was stolen? There is no direct evidence of the circumstances under which that vehicle came into his possession. What one does know is that the vehicle was hijacked shortly before he came into possession of it.

[38]One would have expected that a reasonable person would in those circumstances have suspected that the vehicle was stolen. His discredited denial (in the light of accused three's evidence) of possession of the vehicle may be relied on to draw the inference that the vehicle ought reasonably to have been suspected of having been stolen; and his denial of course further serves also as the absence of a satisfactory account of his possession.

[39]But as I have already indicated, in my view the conviction on both counts one and two must stand and I propose the following order:

The appeal is dismissed.

WHG van der Linde
Judge, High Court
Johannesburg

I agree, and it is so ordered.

KE Matojane
Judge, High Court
Johannesburg

Date hearing: 29 August 2019
Date judgment: 4 Sept 2019

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