HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

26/8/16

Not reportable

Not of interest to other Judges

CASE NO: A505/2014

In the matter between:

ALFRED MLANGENI NKOSI Appellant

And

THE STATE Respondent

JUDGMENT

SETHOLE, AJ

1. The appellant was convicted in the Regional Court, Volksrust, of robbery with aggravating circumstances wherein a fire arm was used and sentenced to 15 (fifteen) years imprisonment in terms of section 276(1)(b) of act 51 of 1977.

2. No leave to appeal was granted by the trial court and the appellant had to petition for leave to appeal in respect of both conviction and sentence.

3. At the hearing of this appeal it was contended by the counsel for the appellant that the record of the three witnesses who testified in the trial court is missing and that the appeal court could not have adequate / sufficient facts to adjudicate this matter. The missing record referred to the testimony of the Mr Falla Lehlokonyana (the complainant), Jacobus Meiring and constable Nkuna. The remaining record is the testimony of Mr Thabo Motsoeneng, the testimony of the accused, the address by the state and the defence and finally the judgement by the presiding officer.

4. I disagree, and I am of the view that there is adequate / sufficient facts from the remaining record to adjudicate this matter for the following reasons:

4.1 From the remaining record the facts are briefly, as follows: that on the 27th July 2006 at the Volksrust/Standerton road, according to Mr Thabo Motsoeneng two men robbed Mr Fala Lekonjana of his new Toyota Dyna truck ("the truck") using fire arms. It was around 18h00 when the robbery took place. It was dark and the complainant could not identify his assailants. He was later dumped in the veld and subsequently he laid a charge of robbery. The state

called a witness with regards to identity namely, Mr Thabo Motsoeneng who testified that he identified accused number one which is irrelevant for the purposes of this appeal as the appellant is accused number (4)four.

4.2 The second state witness from the remaining record, Jacobus Meiring testified that he is a training and telephone consultant and works with the SAPS employed by Net tracker. He received information that the truck which was moving around Nelspruit was stolen and that is what led to him following the truck. He called the SAPS followed the truck which eventually became involved in a collision with various objects, including a Nissan 1400. The driver of the truck jumped out of the truck and fled. It was at that time when the driver was chased by Jacobus Meiring and Constable Nkuna, the third state witness, until he was caught at a butchery.

4.3 The third state witness, Constable Nkuna testified also that he chased the driver of the truck from the scene of the collision until he caught and arrested him at Jackson's butchery and he never lost sight of him at any stage. While chasing the truck driver, it was a distance of about 35metres but the gap between him and the

appellant was always within 5-6 metres until he was caught. Both the second and third state witnesses identified the appellant as the person who was driving the truck at the time of the collision. This third state witness identified the appellant also, with the clothes that he wore on the day, namely a red T-shirt and a silver grey trouser.

4.4 Appellant on being caught, was assaulted by the public as he drove over people when the collision occurred.

4.5 The appellant's defence was a bare denial. His testimony is that it happened on the 23rd of August, (which date is not the date mentioned on the charge sheet) he was on his way to Johannesburg. When he arrived at Nelspruit, there were no taxis anymore, as a result he decided to sleep over. He then took his cousin's child and went back to the taxi rank. Because the taxi was still empty with only four people inside, he decided to leave his cousin's child inside taxi and went to Jacksons Butchery to buy coffee, bread and polony. While he was busy eating, the police arrived and informed him that there is a person who ran out of the truck. It was four police officers and inside Jacksons Butchery there were seven people including the appellant. Four people were arrested including the appellant but the other three were released

the same day at the police station. The appellant was together with John Mathebula when he was arrested. He denied having any knowledge of the truck and the robbery that happened the previous day.

4.6 On cross examination the appellant conceded that he was indeed found inside Jacksons Butchery. It was put to the appellant that he was the only person inside the butchery and he had high breath as a result of fleeing from the scene. The appellant disputed that. The clothing that the appellant was wearing was admitted during cross examination as described by Constable Nkuna. He denied that he had anything to do with the robbery of the truck, that he can drive and that he drove over people at the time of the collision. On question by the court, the appellant replied that at the time the police arrived at Jacksons Butchery, he had already finished eating and the cups were already taken from him.

5. Indeed some parts of the record of the proceedings are missing. The question is whether the remaining record is adequate/sufficient for the appeal court to adjudicate on the appeal.

6. ***It was held in S v Chabedi 2005(1) SACR 417 par [5] 'On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible'. Par [6] 'The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal'.***

7. The next enquiry relates to the nature of the issues to be adjudicated on appeal. ***Whether with the common cause issues raised on trial namely, that a robbery took place, the appellant was found in possession of the truck, to mention but a few, can the court come to a just conclusion. If the answer is positive, then the appeal court may adjudicate on such record. (My emphasis)*** I am of the view that the remaining record is adequate/sufficient for the appeal court to adjudicate on the appeal.

8. Counsel for the appellant argued on appeal for a conviction on a lesser charge, that is, either theft or contravention of section 37 of act 62 of 1955 that is, receiving stolen property knowing it to be stolen. It was further not disputed by appellant's counsel that appellant was the driver, alternatively, was found in possession of the truck.

9. If that be so, I will turn back to the merits of this matter.The robbery occurred at about 18h00 on Friday, the 27th July 2006 at the Volksrust/Standerton road and the truck was recovered, through its tracking device, in Nelspruit on Saturday at about 18h00 , the 28th July 2006, after about 12(twelve) hours.

10. I am of the view that a truck is something that cannot be easily disposed of like a cellphone. The question is, can it be said that the actual robbery of the truck and its subsequent recovery, is recent enough to invoke the application of the doctrine of recent possession?

11. Hunt, ***South African Criminal Law and Procedure***, Volume II, third edition (1996) 20 (by J.R.L. Milton). Page 636 describes the approach as follows:

> *"... the doctrine of recent possession, is to the effect that if three requirements are satisfied the court may infer that X stole the goods which were found in his possession. As such the doctrine is simply a common-sense observation on the proof of facts by inference."*

He goes on to say, this approach involves three questions which are not always easily answered, namely:

(a) whether the goods were stolen; and

(b) how recently the property was stolen, if it was indeed stolen; and

(c) whether the accused's explanation for his possession is reasonably possibly true.

12. On the application of the doctrine of recent possession in *S v Parrow 1973(1) SA 603(A) 604 B-C* Holmes JA said the following:

> *"On proof of possession by the accused of recently stolen property, the court may (not must) convict him of theft in the absence of an innocent explanation which must reasonably be true. This is an epigrammatic way of saying that the court should think its way through the totality of the facts of each particular case and must acquit the accused unless it can infer, as the only inference, that he stole the property."*

13. In *S v Letoba 1993(2) SACR 615(O) par [17]* it was held that it is a requirement that the goods must have been recently stolen. The nature of the stolen article is an important element in the determination of what is recent.

14. In *S v Shabalala [1999]* 4 All SA 583(N) *at 587-588* it was held that possession of the stolen vehicle on the day of the robbery or the day thereafter, was accepted as sufficient for the doctrine of recent possession to apply.

15. In *S v Mavinini 2009(1) SACR 523 (SCA)* it was held that the Appellant's possession of the stolen vehicle less than 24 hours after the robbery, taken

together with his elusive conduct, overwhelmingly suggested his criminal involvement in the robbery.

16. In the recent case of *Mothwa v The State (124/15) [2015] ZASCA 143 par [8]* in was held that:

> *"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."*

It was further held in par [10] that:

> *"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".*

17. I am of the view that the doctrine of recent possession find its application in this matter for the following reasons:

1. The robbery occurred 12(twelve) hours prior to the vehicle being recovered.
2. The appellant was in possession of the truck.

3. The conduct of the appellant upon being confronted by the police was to flee.
4. That a truck is not something that can readily change hands within a short period, unless if there was a potential buyer before the robbery.
5. The appellant failed to give a reasonable explanation regarding his possession of the truck instead he decided to run away.

18. Finally, I find it improbable for the appellant to leave his cousin's child inside a taxi and went to Jacksons Butchery to eat. And furthermore strange for the appellant to fail to call his witness John Mathebula who was travelling with him on the day to corroborate his defence. As a result the appellant's version is rejected as false.

19. As a result I concur with the trial court that the state has proved its case beyond reasonable doubt and it follows that the appeal against the conviction cannot succeed.

20. Whilst it is trite that the sentencing powers are pre-eminently within the judicial discretion of the court that tries and convicts the accused, the appeal court will interfere where a sentence is based on incorrect facts or it is shockingly inappropriate or where there is an irregularity or misdirection. *S v Rabie 1975(4) SA 855 (A) AT 857 D-E.*

21. I now turn to consider the personal circumstances of the appellant placed on the trial record and arguments advanced on his behalf. At the sentencing stage the appellant was 42 years old at the time of the trial, he stays at 374 Kanani township - Nelspruit, he is married and had one child aged 6 years, he was employed at Isando engineering in Kempton park and earned a salary of R 2000,00 per month. He has a previous conviction of possession of stolen property and sentenced to three years imprisonment on the 27th July 2007 which sentence was suspended for five years on condition that appellant was not convicted of a similar offence during the period of suspension.

22. Not only has this court to take into account the personal circumstances of the appellant, but also the seriousness of the offence and the interests of the society. The seriousness of the offence relating to the fact that the truck was robbed from the complainant was still brand new and without number plates.

23. This appeal court is to exercise its jurisdiction as the appeal court, is in essence called upon to oversee the fairness of the proceedings in the court *a quo* and to determine whether the ultimate outcome was underpinned by the dictates of justice or not. We have to ensure that the personal circumstances of appellant as stated above have been properly taken into consideration and that his profile has been evenly balanced against the backdrop of the crime committed as well as the interest of society offended. The delicate balancing act demands careful

and objective measure of restraint. Great care has to be taken in order to see to it that no cornerstone of the triad is overemphasised or underemphasised at the expense of another – ***S v Zinn*** 1969 (2) SA 537 (A).

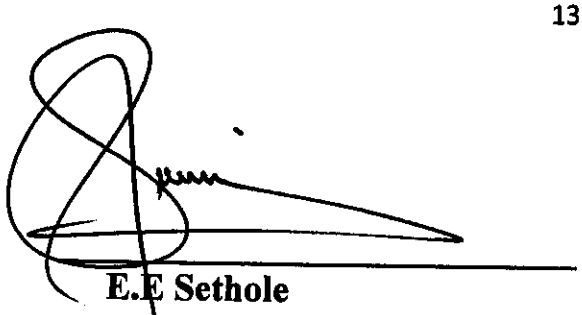
24. Sitting as the appeal court, this court cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if this court is the trial court and then substitute the original sentence with a different sentence simply because this court reckon it is more preferable than the one imposed by the trial court – ***S v Malgas*** 2001 (1) SACR 469 (A) at 478d – e.

25. This courts judicial power to exercise interference is limited and for sound reasons. Where the original sentence imposed by a trial court is in all circumstances shockingly severe and thus inappropriate, the appeal court can also interfere with the sentencing discretion of a trial court – ***S v De Jager*** 1965 (2) SA 612 (A).

26. In the premises, and having considered all the fact regarding sentence, I do not find the sentence of the trial court to be shockingly inappropriate or that there is an irregularity or misdirection.

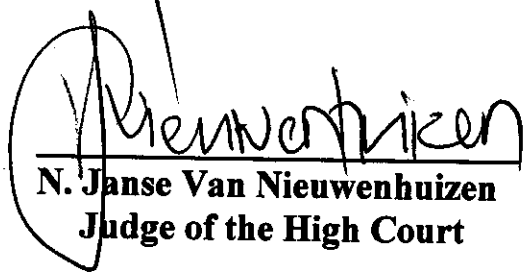
27. In the result I make the following order:

1. The appeal against conviction and sentence is dismissed.



E.E Sethole
Acting Judge of the High Court

I agree and it is so order.



N. Janse Van Nieuwenhuizen
Judge of the High Court

Date of Judgment:	26 August 2016
For the appellant:	Adv. A. Thompso
Instructed by:	Pretoria Justice Centre
For respondent:	Adv. J.J Kotzé
Instructed by:	Director of Public Prosecutions, Pretoria