IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

31/05/2021
DATE

SIGNATURE

CASE NO: A195/2020

In the matter between:

FANA ELIAS TSHABALALA Appellant

and

THE STATE Respondent

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE AND TIME OF HAND DOWN SHALL BE DEEMED TO BE 31 MAY 2021 AT 12H00.

Introduction:

1 Originally there were two accused persons in this matter before the trial court. Accused 2 was discharged on a Section 174 Application brought by his legal representative at the close of the State's case.

2 On 24 May 2018 and in the Pretoria Regional Court, Accused 1, the Appellant in this matter was found guilty of 2 charges, namely:
Count 1 - Robbery with aggravating circumstances, to which the Appellant was sentenced to 15 years imprisonment; and
Count 2 – Possession of property (to the value of R17 000, 00) in contravention of Section 36 of the General Law Amendment Act, Act 62 of 1955 (Possession of suspected stolen property), to which he was sentenced to 5 years imprisonment.

3 The trial court did not order that the sentences should run concurrently. The Appellant was also found unfit to possess a firearm. The Appellant was represented by Legal aid Counsel at the stage of conviction and sentencing.

4 On 29 June 2020 leave to appeal was granted on conviction and sentence only in respect of the second count.

The Evidence:

5 I shall give a brief overview of the evidence in this matter, concentrating more on the evidence relating to the second charge.

6 On 20 July 2015 a filling station in Pretoria was robbed. A firearm was used during the commissioning of the crime. A drop safe was robbed, which drop safe was found on the back of a cream-white Nissan 200 LDV bakkie the Appellant was driving shortly before his arrest.

7 The arresting officers testified that whist on duty in Mamelodi in the early morning hours, they got a call to look out for a cream-white Nissan 200 LDV bakkie without a numberplate that was driving at a high speed. The bakkie turned off and they followed it. The Appellant, who was driving, lost control over the bakkie and it went into a ditch and collided with a concrete wall. The Appellant and his accomplice got out and ran off. The two officers chased them and the Appellant was caught by one of the officers. His accomplice got away. The arresting officers discovered a safe on the back of the bakkie. The bakkie was later towed away and booked into Pretoria-West vehicle pound.

8 They later heard on the radio that a cream-white Nissan LDV 200 bakkie was used in the robbery of the filling station. The next day the financial manager employed by the filling station confirmed that the safe found on the back of the bakkie was the safe robbed from the filling station.

9 Both the arresting officers testified that they saw the Appellant driving the bakkie. On the trial record is noted at pages 50 and 63 that both the arresting officers saw him getting out of the vehicle and running away, whereafter he was apprehended by the one of them.

10 The Appellant testified that he was walking back from a social when he was approached by the Police, assaulted and arrested. He knows nothing of the armed robbery or the bakkie. On being questioned upon his arrest, he told the police that he was "***only the driver***" and knew nothing about the safe or the bakkie. During trial he testified that he knew nothing about the safe or bakkie.

He even goes as far as saying that he cannot drive

Issues to be decided by Court:

11 Whether the Court a quo erred in convicting the Appellant on the second charge of which the elements are the following:

- Unlawful possession of the Nissan LDV 200 bakkie by the Appellant;
- Reasonable suspicion that the Nissan LDV 200 bakkie was stolen;
- No satisfactory account of such possession given by the Appellant.

12 Whether the Appellant received a fair trial in respect of the second charge and whether the sentence which was imposed was appropriate under the circumstances?

The applicable law:

13 **Section 36 of the General Law Amendment Act, Act 62 of 1955** reads as follow:

"... 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..."

14 **Section 23(a) of Act 51 of 1977** reads as follow:

"23. *On the arrest of a person, the person making the arrest may –*

(a) If he is a peace officer, search the person arrested and seize any article

referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested…"

15 In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059 at 36J – 37E and 1089E – 1090B (BCLP):**

"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point to direct the witness' attention to the fact by question put in cross-examination showing that the imputation is intended to be made, and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn [(1893)] 6 R 67 (HL] and has been adopted and consistently by our Courts.

[62] The rule in Browne v Dunn is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses …"

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed… particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to

deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions in which reliance is to be placed."

16 **Doma v S (2012/A447) [2013] ZAGPJHC 116 (21 May 2013)** the learned Judge Sutherland said the following:

"36. Section 36 is a quintessential example of what might be called a 'policeman's case'. 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 the intent to do grievous bodily harm, where, if it is unproven that the accused had a requisite specific intent, the scale of wrongdoing can be ratcheted down to common assault. The offence created in terms of Section 36 is not a logic 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."

17 In **S v Rabie [1975] 4 All SA 723 (A) 724; 1975 (1) SA 855 (A) 857 E-F** and **S v Pillay [1977] 4 All SA 713 (A) 717; 1977 (4) SA 531 (A) 535 E-G,** the Court remarked that punishment is pre-eminently a matter for the discretion of the trial Court. Sentence should only be altered (by this Court) if the trial Court did not exercise its discretion judicially or properly.

Application of the Law to the evidence:

18 The State called the two arresting police officers. Both testified that they saw the Appellant driving the Nissan LDV 200 bakkie (pages 50 and 63 of the record). They saw the Appellant exiting the Nissan LDV 200 bakkie. The officer who caught the Appellant after chasing him, says that he did not lose sight of him whilst chasing him. The arresting officers and the Appellant testified that the street was quiet, and the Appellant was the only one there. It was past 02h00 in the morning.

19 The Appellant's evidence is that he knows nothing about the bakkie. On his arrest he said he was *"only the driver and knew nothing of the bakkie"*. During cross-examination the Appellant had the chance to tell the Court where he got the bakkie and whether he was in lawful possession thereof. He had a chance to clarify any ambiguities. Instead he chose to deny having any knowledge of the bakkie that the two officers saw him driving and getting out of. During trial he stuck to a bare denial. It is trite that an offence under section 36 of the of the General Law Amendment Act, 1955 (Act 62 of 1955) is a competent verdict to theft. Theft is an ongoing crime. The thief does not necessarily need to be caught red handed.

20 The vehicle was driven at high speed and ran into a ditch and ultimately hit a concrete wall. The Nissan 200 LDV did not have any number plates and was used in an armed robbery. The robbed safe was found on the back thereof. The Appellant and his accomplice abandoned the vehicle.

All of this goes in against the reasonable behaviour of the legal owner or possessor of a motor vehicle. The police officers quite rightly had a suspicion that the vehicle was stolen.

21 Both officers were asked whether they knew who the owner of the Nissan 200 LDV bakkie was and they both replied in the negative.

22 The Magistrate in the Court a quo was under the impression that the vehicle spoken about during trial was hi-jacked during the commission of the armed robbery. The make and description of the two vehicles differ. The vehicle that was hi-jacked during the armed robbery was found abandoned shortly after the robbery. The Appellant was charged in terms of Section 36 of Act 62 of 1955 in respect of the Nissan 200 LDV bakkie. The police had a reasonable suspicion that the bakkie was stolen. This Court can find no grounds as to why the Appellant should be acquitted on this charge. The correct vehicle was properly identified in the charge sheet.

23 In respect of sentence, this Court has to place on record that the Appellant's first transgression was in 1999, at the age of 17 years. He was thereafter convicted of another 11 charges of theft between 2000 and 2011. In 2006 he was convicted of robbery and already declared unfit to possess a firearm. In 2006, and under a different name, he was found guilty of malicious damage of property and assault with the intent to cause grievous bodily harm. On the same occasion he was found guilty of possession of an unlicenced firearm and ammunition. The Appellant is no stranger to the criminal justice

system.

24 The Appellant is hardly a candidate for rehabilitation. The Court of first instance only imposed a sentence of 15 years imprisonment in respect of the armed robbery with aggravating circumstances. Having considered all the factors placed before it, it rightfully decided to impose another 5 years imprisonment in respect of charge 2. The sentences in respect of two charges should not run concurrently.

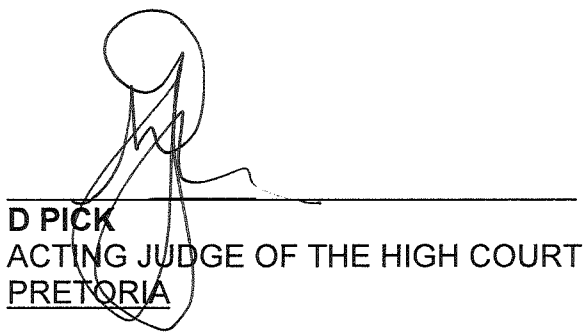
25 This Court can find no compelling reason to alter the sentence imposed by the court a quo.

Conclusion:

26 This Court is satisfied that the Appellant had a fair trial and the Court a quo did not err in finding the Appellant guilty, or imposing sentence on charge 2. The appeal against conviction and sentence on charge 2 cannot succeed.

Order:

27 The Appeal on conviction and sentence should be dismissed.



D PICK
ACTING JUDGE OF THE HIGH COURT
PRETORIA

I agree, and it is so ordered.

MALI N.P.
JUDGE OF THE HIGH COURT
PRETORIA