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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

525/90.

In the matter between:

SITSANGANI NAPTHAL MWALI ..... Appellant

AND

THE STATE ..... Respondent

Coram: SMALBERGER, F.H. GROSSKOPF, JJ.A. et NICHOLAS, A.J.A.

Heard: 25 May 1992

Delivered: 29 May 1992

J U D G M E N T

NICHOLAS, A.J.A. :

Sitsangani Mwali was charged as accused No. 1, together with three others, with the theft of a motor car in the Regional Court sitting at Durban. He and accused No. 3 were found guilty as charged and sentenced to 2 years' imprisonment. His appeal to the Natal Provincial Division was dismissed, but he was granted leave to appeal to this Court.

It was not disputed that a Toyota Corolla No. ND 211832, the property of I. Haribhai, was stolen from the driveway of his home in Overport, Durban between 8 p.m. and 11.30 p.m. on 8 July 1987; that it was spotted during the early hours of 9 July

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by Constable Roger Deare of the South African Police, who pursued it in his patrol van until it went out of control and finally came to a stop; and that the four accused, including Mwali, got out of it and were arrested then or shortly afterwards.

There was no direct evidence that Mwali was a participant in the actual theft. The case against him rested entirely on two facts:

(1) He was a passenger in the stolen car during the chase. (Deare said in his evidence that Mwali left the car by the driver's door. Mwali said that he was a passenger in the back seat. Accused Nos. 2, 3 and 4 all said that No. 3 was the driver, and that was the finding of the magistrate.)

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(2) On the afternoon of 9 July 1987 Constable Roland Robinson accompanied Mwali to his house in Kwa Mashu, where Mwali pointed out as his vehicle a Volkswagen Golf. In the boot Robinson found a spare wheel. Mwali said that this wheel was his. This was a different size from a Golf wheel, and it was identified by Haribhai as the wheel missing from his Toyota Corolla.

As to (1), the fact that Mwali was a passenger in the stolen car when spotted by Deare does not by itself show that he was guilty of the theft, for there was no evidence that he ever exercised any control over the car. See R. v. Brand 1960 (3) SA 637 (A). But that fact does not stand

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alone. In the absence of an explanation, or other evidence to the contrary, facts (1) and (2) considered together could justify the inference that Mwali was a party to the theft.

He gave this explanation in his evidence. It was his custom to sleep in his car outside his house. On 8 July 1987, he went to sleep at about 8 p.m. His brother, Zwelinjani Mwali, was also sleeping in the car. At about midnight he awoke when four men (the other three accused and a man called Ge) arrived in a car. They left shortly afterwards. He fell asleep again, but was awakened once more when the four men returned at about 1.30 a.m. Ge told him that he had a tyre which would fit Mwali's car. Mwali did not check whether

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it would fit, but agreed to buy it for R30. He placed the wheel in the boot of his car. The men told him that they were going to visit some girls at Newlands East. Mwali was interested and went with them. They were on their way when the police van was encountered.

The magistrate submitted this account to trenchant criticism. He found it highly improbable in a number of respects and formed the impression "that it consisted of a number of loose fragments, each one fitted to the story to some purpose." Mwali's evidence differed in some respects from that of his brother, whom he called as a witness, and that of the other three accused. The magistrate rejected it as false beyond reasonable doubt, and concluded that the only inference

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to be drawn was that Mwali was involved in the theft of the Toyota. This was also the view of the court a quo. It was said in the judgment:

> "I agree with the Magistrate that this story is so unlikely that one simply cannot credit it. In my view there is no reasonable possibility that he was in the vehicle for an innocent purpose or that his possession of the spare wheel which belonged to the stolen vehicle was untainted by guilty knowledge. His story in my view cannot reasonably possibly be true. If one looks at the facts objectively, the only inference is that he knew full well that the vehicle was stolen and was in fact involved in its theft. Accordingly I am of the opinion that the conviction is in order."

In my view there can be no quarrel with the magistrate's rejection of Mwali's story. The question is, however, whether the magistrate's con-

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clusion was correct having regard to evidence that Mwali got into the Toyota for the first time when it arrived at his home. This was the evidence of Mwali himself, and also that of his brother and of each of the other three accused. Despite the magistrate's adverse findings on credibility, I do not think that a finding is justified that this part of their evidence could not reasonably possibly be true. That seems to have been recognized by the court a quo in the judgment granting leave to appeal, where it was said that the magistrate came to his conclusion largely on an assessment of probabilities and that -

> "One cannot exclude the possibility that another Court might take a different view on the probabilities, particularly if one considers that

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> the appellant apparently only joined the venture after the vehicle might well have been stolen by others."

This was also recognized by counsel for the State, who conceded that there were no sound reasons for the conclusion that Mwali stole the Toyota, and agreed that the conviction for theft could not stand. She submitted, however, that there should be substituted a conviction under s. 36 of the General Law Amendment Act, 62 of 1955, namely, of the offence of being found in possession of goods in regard to which there was a reasonable suspicion that they had been stolen and being unable to give a satisfactory account of such possession.

That would be a competent verdict in terms of s. 264 (1) (b) of the Criminal Procedure Act, 51 of

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1977. The possibility of such a conviction was not brought to Mwali's attention at any stage, but the decided cases show that that is not necessarily a bar to such a course. It is well established that it is desirable that if the State contemplates asking for an alternative verdict in terms of s. 264 (1), the offence concerned should be formally charged as an alternative, or it should be brought to the notice of an accused during the course of the trial that he can be convicted of one of the offences mentioned in s. 264 (1). Even though neither course be followed, however, the accused would not be entitled to succeed in an appeal against or review of the conviction unless it appeared that he was prejudiced by the failure. See R. v. Dayi and

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Others 1961 (3) SA 8 (N) at 9 E-G; S. v. Mogandi 1961 (4) SA 112 (T) at 114 A; S. v. Arendse en 'n Ander 1980 (1) SA 610 (C) at 613 A-B; and S. v. Human 1990 (1) SACR 334 (C) at 336-338.)

In S. v. Vaaltyn 1966 (3) SA 728 (E), the accused had been charged with the theft of a bicycle on 9 April 1966. The evidence was that he was found in possession of a bicycle which was an exhibit before the court, and the wheels and stand of which were identified by the complainant as having formed part of his stolen bicycle. The accused gave several explanations for his possession of this exhibit, all of which were rejected by the magistrate, who convicted the accused of contravening s. 36 of Act 62 of 1955. In

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a judgment given on review the court of appeal considered that such a verdict would only be justified if it related to the possession of the articles alleged in the charge sheet to have been stolen, because then the charge sheet would have directed the attention of the accused to the allegations he would be required to meet. It was held at 729 D-E that

> "The present verdict relates to other goods than those referred to in the charge sheet, and, therefore to my mind, ought not to have been arrived at on the present charge. (Cf. R. v. Kahn and Another 1956 (2) SA 39 (N) and R. v. Argyle and Burns 1957 (2) PH H 153 (E)."

In Kahn's case the appellants had been charged with the theft of a motor car but were convicted of receiving stolen property, namely, certain of its

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fittings (viz a radio converter, four hub caps, an electric fan, a hub cap assembly and a cigarette lighter). It was held at 41 G-H that -

> "If the charge which they were defending themselves on had sufficiently informed them that they might be convicted of receiving the accessories even if they successfully defended themselves against the charge of the theft of the car, their defence might very well have been different. Thus they were prejudiced and their conviction cannot stand."

Plainly, where the goods possessed are not the same as, or comprised in, the goods alleged in the charge to have been stolen, a conviction under s. 3 (b) would not be competent. But where that is not the case, the test is that of prejudice to the accused.

In my opinion there is no technical ob-

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stacle to the substitution of a verdict in terms of s. 3 (b). The spare wheel was an accessory of the Toyota Corolla. It was proved that it was stolen and that is sufficient proof that there was a real suspicion that such was the case. See R. v. Mkize 1961 (4) SA 77 (N) at 78 G. As to prejudice, the submission on behalf of the State was that there would be none and counsel for Mwali agrees. I am of the same view. Mwali must have known that his possession of the Toyota wheel lay at the crux of the State case and that he was called upon to explain it. In his evidence he did give an explanation on which he was exhaustively cross-examined. It does not seem that if he had been charged under s. 36, or if he had been told that he stood in jeopardy of a

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conviction under that section, his conduct of his case could have been any different or that he could have had any other line of defence.

The appeal is upheld to the extent that the conviction and sentence are set aside. There is substituted the following verdict:

> "Guilty of an offence under s. 36 of the General Law Amendment Act 62 of 1955 in respect of the spare wheel of Toyota Corolla ND 211832."

There remains the determination of an appropriate sentence. In its terms, a person convicted under s. 36 shall be liable to the penalties which may be imposed on a conviction of theft. Generally speaking, a conviction for theft of a spare wheel should carry

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a lesser penalty than a conviction for the theft of a motor car. It appears from the record that Mwali had no previous convictions. He was 27 years old at the time of his conviction. He had been a student constable in the SAP for six months and had then been employed as a furniture salesman. He had passed Std. X at school, and he informed the magistrate that he wanted to go to Teachers' College. In the circumstances I do not think that an unsuspended prison sentence is called for. He appears to be able to pay a fine, because he found the bail which the court a quo granted in the amount of R1000. The following sentence is imposed in respect of the altered conviction:

"The accused is sentenced to a fine of R500,

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and in default of payment to imprisonment for 6 months. In addition he is sentenced to 6 months' imprisonment suspended for 5 years on condition that he is not during the period of suspension convicted of an offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine."

H.C. NICHOLAS, A.J.A.

SMALBERGER, J.A.)
F.H. GROSSKOPF, J.A.) concur