



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 124/2015

In the matter between:

TSUBAKWANE ELIAS MOTHWA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mothwa v The State* (124/15) [2015] ZASCA 143 (1 October 2015)

Coram: Maya DP, Theron and Mathopo JJA

Heard: 9 September 2015

Delivered: 1 October 2015

Summary: Criminal Law — robbery with aggravating circumstances — inadequacy of proof — doctrine of recent possession restated — State failed to prove appellant's guilt on charge of robbery with aggravating circumstances and competent verdict — appeal upheld — sentence and conviction set aside.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Djaje and Matlapeng AJJ sitting as court of appeal and Gutta J dissenting):

1. The appeal is upheld.
2. The conviction and sentence is set aside.

JUDGMENT

Mathopo JA (Maya DP and Theron JA concurring):

[1] The appellant was convicted by the Regional Court sitting at Lehurutshe in the North West Province for the crime of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 read with the provisions of 52(2), 52(A) and 52(B) of the Criminal Law Amendment Act 105 of 1997 (the Act). He was sentenced to ten years' imprisonment. He appealed to the North West Division of the High Court. The high court, per Djaje AJ and Matlapeng AJ concurring and Gutta J dissenting, dismissed his appeal. This appeal is with the special leave of this Court.

[2] The circumstances giving rise to the conviction and sentence may be summarised as follows: Mr Derick Manganye (the complainant) was robbed at gunpoint of a motor vehicle, a Toyota Corolla belonging to Budget Rent A Car, in Soshanguve on 14 September 2012 by two unidentified male persons. The motor

vehicle was found in the possession of the appellant on 17 September 2012, three days after the incident, at the Botswana border of Skilpadhek. It was common cause that the appellant had in his possession a registration certificate indicating that the motor vehicle was registered in the name of L P Molamudi (Molamudi).

[3] The State called three witnesses, the complainant, Mr Greyling (Greyling), an employee of Budget Rent A Car who identified the vehicle upon its recovery and Warrant Officer Du Plessis (Du Plessis). The evidence of the latter was pivotal to the conviction of the appellant. Du Plessis testified that there was a syndicate operating which transported stolen motor vehicles from South Africa across its borders. During the course of his investigations he identified the appellant as being involved in the syndicate and therefore a suspect. His suspicion was based on the appellant's regular movements across South African borders with vehicles and returning on foot. Based on this, the appellant was blacklisted at all border posts and his pictures were circulated in these areas.

[4] On 17 September 2012 Du Plessis received information that the appellant was at the Skilpadhek border post attempting to cross the border to Botswana with a Toyota motor vehicle. He went to the border and questioned the appellant concerning the ownership of the motor vehicle. The appellant informed him that the motor vehicle belonged to one Adam, a Malawian national who had asked him to take it to Botswana. The appellant could neither provide the contact details of the said Adam nor any information to facilitate any further investigations. He was in possession of a document called 'Arrival/Departure' indicating that he was in transit to Bulawayo, Zimbabwe. Under cross-examination Du Plessis disputed the appellant's version that this vehicle belonged to a certain Charles and testified that the appellant at some stage was arrested for possession of a stolen Mercedes Benz.

[5] In his defence the appellant stuck to his version that he was asked by one Charles to transport his nephew's motor vehicle to Botswana. In short his version is that he met Charles who was living in a flat at Church Street in Pretoria through friends who were gambling and betting racing horses. Charles gave him the registration documents of the said motor vehicle together with an affidavit permitting him to drive the motor vehicle. When Du Plessis asked him to explain his possession of the vehicle, he told Du Plessis that he received it from Charles and further that he also gave him, Charles' cell phone numbers. Du Plessis conceded that he did in fact take the appellant's cellular phone. I will return to this aspect later when evaluating the evidence of Du Plessis and that of the appellant.

[6] The trial court convicted the appellant on the basis of circumstantial evidence after applying the doctrine of recent possession. The high court dismissed the appeal on the same basis. They found that the appellant's explanation was false and riddled with numerous inconsistencies. It also placed reliance on his failure to provide Du Plessis with Charles' details and his failure to explain how the particulars of the registration certificate in the name of Molamudi was found in the motor vehicle. Furthermore, they relied on the evidence of Du Plessis to the effect that the appellant was profiled and blacklisted for transporting vehicles across the border of South Africa. Based, on these facts the high court concluded that because the appellant failed to rebut the evidence of Du Plessis, no reasonable inference could be drawn other than that the appellant was one of the perpetrators of the robbery. The minority differed with this reasoning and, relying on *S v Madonsela*,¹ held that a motor vehicle is in today's times capable of exchanging hands literally within minutes and hours and thus the appellant could not have been one of the perpetrators of the robbery.

¹ *S v Madonsela* 2012 (2) SACR 456 (GSJ).

[7] Before us counsel for the appellant contended that the three day interval between the robbery and the possession of the motor vehicle by the appellant was a sufficient period for the vehicle to exchange hands. Counsel for the appellant contended that the fact that, within three days of the theft, the motor vehicle already had different registration numbers and was registered in the name of L P Molamudi was sufficient basis for the argument that the vehicle could have exchanged hands. It was argued that the inference of guilt was not the only inference to be drawn and we were urged to accept the appellant's explanation regarding his possession of the motor vehicle as reasonably possibly true.

[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.² 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.³

[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.

² *S v Skweyiya* 1984 (4) SA 712 (A); *R v Bharolu* 1945 AD 813 at 822-823; *R v Nxumalo* 1939 AD 580 at 587.

³ *Skweyiya* above.

[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.⁴

[11] The fact that the appellant was arrested three days after the robbery and immediately gave an explanation of his possession to Du Plessis which was supported by other documents makes his version more probable. One cannot ignore the fact that when he was arrested, the appellant was in possession of the registration documents in the names of Molamudi. As to why no investigation was conducted to verify the information provided by the appellant and the identity of Molamudi is not explained at all by Du Plessis. It would have been easy for Du Plessis to follow up on the appellant's explanation to test its veracity. The appellant cannot be blamed for Du Plessis's dereliction of duty. The State had the opportunity and the means to verify it. It failed to do so. That the registration was effected within three days is clear evidence of how easy it is for a motor vehicle to exchange hands. The evidence of the appellant at the trial was clear consistent and straightforward. It could not be rejected as not being reasonably possibly true. The State failed to prove his guilt beyond reasonable doubt. It follows that the appeal against the conviction of robbery must succeed.

[12] The question that now remains is whether the appellant can be convicted of s 36 of the General Law Amendment Act 62 of 1955 or theft. Relying on the case of

⁴ *Zwane and another v The State* (426/13) [2013] ZASCA 165 (27 November 2013 para 12).

De Vries v The State,⁵ where, the appellant was convicted of two counts of theft arising from the robberies in the Western Cape even though he had not participated in the robberies, the court held that, the fact that, he purchased stolen cigarettes at the time when he must have been aware that they were stolen, made him guilty of theft. Counsel for the State submitted that by a parity of reasoning the appellant in this case should be convicted of theft because he must have known or at least been aware that the motor vehicle he was transporting across the border must have been stolen. I do not agree. The evidence of Du Plessis is based on suspicion and speculation. The appellant provided a reasonable explanation which was supported by documents for his possession of the vehicle. It follows that the conviction on any competent verdict cannot be sustained.

[13] In the circumstances the following order is made:

1. The appeal is upheld.
2. The conviction and sentence is set aside.

R S Mathopo
Judge of Appeal

⁵ *De Vries v The State* (130/11) ZASCA 162 (28 September 2011).

Appearances

For Appellant:

N L Skibi

Instructed by:

Mahikeng Justice Centre, Mahikeng

Bloemfontein Justice Centre, Bloemfontein

For Respondent:

D P Rantsane

Instructed by:

The Director of Public Prosecutions, Mmabatho

The Director of Public Prosecutions, Bloemfontein