IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A435/2006

DATE: 8 FEBRUARY 2008

In the matter between:

ZAZA MADLOVU Appellant

and

THE STATE Respondent

JUDGMENT

POTGIETER, AJ:

[1] This is an appeal with the leave of the Court *a quo* against appellant's conviction of being an accessory after the fact to robbery and the unlawful possession of firearms, as well as his sentence of five and two years respectively (to run concurrently) in the Cape Town Regional Court on 15 March 2006.

[2] The convictions and sentences arose from an incident that occurred just after 8pm on 21 September 2004 when the complainant, Mr Mvelazi, was robbed at gunpoint of a Toyota Cressida motor vehicle at Nyanga. The

complainant testified that he had gone to a shop to buy bread. On his return to the vehicle he was confronted by a gun-wielding assailant after he had gotten into the vehicle and was about to take out the keys. The assailant was standing next to the open door and ordered him to hand over the keys and get out of the vehicle. After he got out of the vehicle and had handed over the keys, the assailant called a companion who was standing nearby. They sped off with the vehicle. He only saw the vehicle a week later at Stikland when he attended an identity parade. The complainant initially pointed out two of the accused at the trial as the assailants, but it transpired that he was in fact unable to identify the attackers. In fact, appellant's three co-accused were all acquitted.

[3] The remaining two State witnesses were the arresting officer Sergeant Leoli and Constable Seagram who are members of the Cape Town City Police. They were both on duty in a patrol car when they received a radio message at approximately 10pm that a white Toyota Cressida vehicle with registration number CA 850447 was hijacked by two armed men at Nyanga terminus and was heading towards Lansdowne Road. They proceeded towards Lansdowne Road and spotted the hijacked

vehicle driving in their direction at high speed and without lights.

[4] They followed the vehicle and apprehended the occupants after the vehicle had stopped at a red traffic light. The vehicle was searched and a 9mm pistol was found on the floor on the front passenger side and a shotgun at the back. These firearms were clearly visible inside the vehicle. Appellant was the driver of the vehicle and upon enquiry he told the police that he was asked to take the vehicle to Khayelitsha. The four occupants of the vehicle were arrested and taken to Nyanga police station.

[5] Appellant testified in his own defence. He indicated that on the night in question he had been watching television at the house of one of his co-accused. He left at some stage to go home to eat. After having eaten, he proceeded back to the house of the co-accused. On the way a former schoolmate, one Simphiwe, stopped next to him in a Cressida motor vehicle followed by another white Cressida. Simphiwe asked him to take the white Cressida to Mong's Tavern in Khayelitsha. He was at first reluctant to do so but he eventually agreed. His co-accused accompanied him. On the way they were

arrested by the police. He never saw any firearms in the vehicle.

[6] Appellant's elder sister, Nomzane Madlovu, testified in appellant's defence. She basically pointed out that two vehicles had stopped at their house on the night in question and that the appellant drove off in one of the vehicles.

[7] The Court *a quo* assessed the evidence and found that the arresting officers were credible witnesses whose versions should be accepted. Appellant did not make a favourable impression as a witness on the Court *a quo* and his version was found to be contradictory and improbable. He was, moreover, contradicted by his sister.

[8] The Court *a quo's* assessment of the evidence cannot be faulted in my view. The Court *a quo* found that appellant was not one of the robbers but that he knew that the vehicle was stolen and he was assisting the robbers. Appellant was accordingly convicted of being an accessory after the fact to robbery and of possession of firearms.

[9] Mr Pretorius, who appears on behalf of the appellant, submitted that the Court *a quo* erred in not finding that appellant's version was reasonably possibly true. He submitted that the Court *a quo* correctly held that the State case was based upon circumstantial evidence but erred in finding that the only reasonable inference was that appellant was an accessory after the fact to robbery. He also submitted that the Court *a quo* acted irregularly by descending into the arena and cross-examining the appellant.

[10] Insofar as the latter aspect is concerned, it is trite that a trial court can ask questions to clarify any relevant issue, provided that it does not amount to cross-examination in support of the prosecution case, see R v De Klerk 1930 AD 308 as well as R v Ntembu 1965(1) Prentice Hall L7 at page 20 where the Court made the following observations:

> "Moreover, these *dicta* of the magistrate seem to indicate that he makes a habit of telling his prosecutors how to conduct their cases in his court. This is not the duty of a judicial officer sitting in a case. In most cases justice demands that a magistrate should put some questions to the witnesses and the accused. In many cases he will

have to call or recall a witness, this should however not be carried too far".

It is also apposite in this regard to refer to the well-known quote that was referred to with approval by the then Appellate Division in the matter of R v Roopsingh 1956(4) SA 509 (A) at 514A-B:

> "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue".

[11] While the Court *a quo* in some respects did subject appellant and his witness to excessive questioning, they were not treated unfairly in my view. It appears that some of the questioning resulted from language problems and problems of interpretation. By way of example reference could be made to the following extract on page 183 of the record starting at line 4:

> " Nee, nee maar wys my afstand hier in die hof. aan meneer. --- Hier waar die tolk sit is dit die hek by ons se huis en dan is dit die pad soos hy daar by daardie motor is soos ek nou van ons se huis 'n kant afkom.
>
> Is dit so moeilik om te verstaan dat u net vir my afstand moet aandui. U verstaan nou die plek waar die kar langs jou stop, hier is jou huis se voorhekkie. Wys net vir my aan hoe ver in reguit lyn af met die hof waar het die kar langs u gestop, verstaan u dit? Verstaan u die vraag? --- Die kar het agter my gekom.
>
> Het u my vraag verstaan, het u my vraag verstaan want u antwoord nou nie eers dit nie? --- Ja ek het die vraag gehoor Edelagbare.
>
> Herhaal my vraag, herhaal my vraag wat ek vir jou gevra het. --- Hoe ver is dit van ons se huis

af tot daar by daardie pad wat ek nou sou oorgaan Edelagbare.

Waar die kar langs u gestop het, verstaan u dit? --- Daar waar ek saam met die kar gestaan het".

It is clear, in my view, that this results from a misunderstanding concerning the question. Some of the magistrate's remarks are, however, unfortunate and reference could be made in this regard to the following extracts from the record. I refer firstly to page 184 lines 3-4 where the magistrate made the following remarks:

" Hemel, hoeveel keer moet ek dit herhaal, stap en gaan wys vir my waar dit is, stap, stap af".

The magistrate then records the result of that little exercise. Then on page 187 of the record lines 11-12 the following remarks appear:

" Ja, maar meneer kyk u is nou mooi groot nê, u verstaan mos nou wat ek vir u vra. Dit is nie asof ek nou hier antwoord by u kry nie. U sê vir my, en in alle billikheid, want soos ek reeds gesê het, huishoudings verskil."

Then on page 190 of the record starting at line 1:

" Meneer, weet u ek begin die indruk kry dat jy my vrae ontwyk. Jy het mos reeds vir my gesê jy het nie toestemming gehad voor die aand nie. Jy

het nie hierdie aand toestemming gehad om by Zandile TV te kyk nie. En my indruk sover was, jy het nie – jy het toestemming gehad om daar die begin van TV – na donker daar te wees en ook nie later die aand nie. En ook as my indruk verkeerd is dan het u nou die geleentheid om dit reg te stel. Wat is u getuienis, want ek het die punt waar ek moet kom en ek kom nie daar nie, want u het aanmekaar dwaalspoortjies."

Then at page 189 starting at line 4 and on the same theme:

" Nou ja presies, nou is u – nou is ons weer terug by die eerste ou blokkie. Hoekom ontken jy dit en gaan by die dwaalpaadjies af meneer dit is mos nie nodig nie. U het mos reeds in hoof getuig. Nou ontken u dit. En dan erken u dit weer. Is dit nou nodig? Hoekom doen u dit?"

[12] In spite of the remarks that I have referred to and highlighted this has not, in my view, led to a failure of justice as is referred to in the proviso to section 322(1) of the Criminal Procedure Act, 51 of 1977. The proviso reads as follows:

"Provided that notwithstanding that the court of appeal is of the opinion that any point raised might

be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect".

[13] In my view, the Court *a quo* was justified in rejecting appellant's version with regard to his possession of the vehicle. His version that he innocently acquired possession of the vehicle cannot be reasonably possibly true. He acquired possession under suspicious circumstances and must have been aware of the firearms in the vehicle. His denial in this regard lacks credibility. He must have known in the circumstances that the vehicle was obtained by illegal means and he reconciled himself with that fact. However, it does not follow, in my view, that the only reasonable inference that could be drawn in the circumstances is that appellant was assisting the robbers to evade justice. The latter is an essential element of the offence of being an accessory after the fact (see S v Williams & Others 1998(2) SACR 191 (SCA) at 193c-e:

"As the appeals are directed against the appellants' convictions as accessories after the fact it is

necessary to say something about this branch of the law which fortunately appears to be reasonably settled. In considering the issues raised in this appeal I shall accept for the purposes of this judgment that the *obiter* remarks in S v Morgan & Others 1993(2) SACR 134 (A) at 174A-E are a correct reflection of our law.

According to this judgment, the narrower approach to the definition of an accessory, a person who assists the perpetrator to evade justice, is to be preferred to the wider approach according to which it is sufficient if the accessory associates himself in a broad sense with the offence.

Counsel were also agreed that it was essential for the State to establish that the appellants, as accessories, intended to help the perpetrators evade justice. This concession was correctly made by the State for the intention to assist the main offenders in evading detection is an important ingredient of accessorial liability".

(See also Jonathan Burchell:Principles of Criminal Law (3rd ed.) page 611)

[14] It follows that the Court *a quo* erred in convicting the appellant of being an accessory after the fact to robbery.

As indicated above, appellant was patently not in innocent possession of the vehicle but was aware that the vehicle was stolen. Accordingly, in my view, appellant should have been convicted of being in possession of stolen goods in contravention of section 36 of the General Law Amendment Act, 62 of 1955. The latter is a competent verdict in respect of a charge of robbery pursuant to the provisions of section 260(f) of the Criminal Procedure Act.

[15] There is no merit in the appeal against the conviction of being in unlawful possession of firearms, which conviction should be confirmed.

[16] Insofar as the appeal against sentence is concerned, the Court *a quo* did not err or misdirect itself in any respect with regard to the sentence imposed in respect of the unlawful possession of firearms. All relevant factors were properly considered and the sentence is appropriate in the circumstances and should be confirmed.

[17] It follows that the sentence imposed in respect of the conviction of being an accessory after the fact to robbery should be set aside and be substituted with an appropriate sentence in respect of a conviction of a

contravention of section 36 of Act 62 of 1955. The latter is a serious offence. This is evident from the fact that the section provides for the same penalties which may be imposed on a conviction of theft. In my view, a sentence of direct imprisonment is appropriate in the circumstances.

[16] In the circumstances I would make the following order:

1. Appellant's conviction of being an accessory after the fact to robbery and the sentence of five years' imprisonment are set aside.
2. Appellant is convicted of a contravention of section 36 of Act 62 of 1955 and is sentenced to five years' imprisonment with two years suspended for a period of five years on condition that appellant is not convicted of an offence of which dishonesty is an element during the period of suspension.
3. Appellant's conviction of being in unlawful possession of firearms and the sentence of two years' imprisonment are confirmed.
4. The sentences imposed shall run concurrently.

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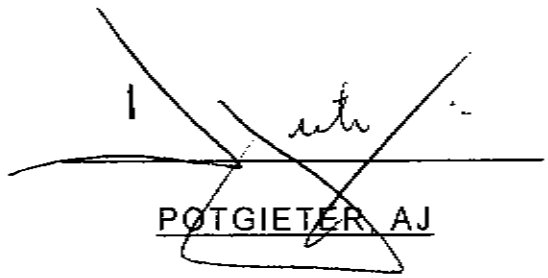

POTGIETER, AJ

ALLIE, J: I agree and it is so ordered.

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ALLIE, J