court file

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A534/2008

DATE: 6 MARCH 2009

In the matter between:

CHARLES MAZOKOZA

versus

THE STATE

JUDGMENT

VAN REENEN, J:

For the sake of convenience, the appellant is referred to as the accused. The accused and two others were charged in the Regional Court, Wynberg, on four counts. The accused, who was represented a legal practitioner, pleaded not guilty.

The charges flow from an incident that took place on 1 September 1999 in Rondebosch when men armed with a firearm hijacked a Volkswagen Golf CL26287, the property of or in the possession of one Louis J W Kotze, whom I shall refer to only as Kotze. That was then the subject matter of count 1, (robbery with aggravating

Circumstances) count 3 (the unlicensed possession of a firearm) and count 4 (the unlawful possession of an unknown quantity of ammunition). The Mazda CA523416 which featured in count 2, which related to the driving of a motor vehicle without the consent of the owner, operator or person in lawful charge thereof, namely one Sizwe Nkwolobi, and which had been left with the accused for the purpose of effecting repairs thereto was found abandoned near the scene of the hijacking.

The accused and his co-accused were arrested shortly afterwards in relatively close proximity to the place where the hijacking had taken place.

After the State had closed its case and the accused had testified and the evidence concluded, the accused was found guilty on counts 1 and 2 and acquitted on counts 3 and 4.

The accused was sentenced to 15 years imprisonment in respect of count 1 and two months imprisonment in respect of count 2 and the Court ordered that the latter sentence be served concurrently with the former.

Mr Loots, who appeared for the accused and Ms Cecil, who appeared for the State, are in agreement that, as the record of the proceedings in the court *a quo* is materially defective, the appeal should be upheld and the convictions and sentences imposed upon the accused set aside.

A perusal of the record on appeal shows that, apart from the accused, the evidence of only Derek van der Merwe, an inspector in the SAPD, and James Bernard, a fingerprint expert, and Charl Adam Kanela, the investigating officer, have been transcribed. It appears from the magistrate's judgment that at least two other eye witnesses testified, the one in respect of the hijacking and the other in respect of the unauthorised driving of the Mazda. The evidence of those witnesses, as well as the preliminary procedures that normally precede the presentation of evidence, have not been transcribed. As regards the impact that a deficient appeal record has on the outcome of a criminal appeal, I refer to what has been said by Brand, J A in S v Tshabele, 2005(1) SA 415 (SCA) at 417 at paragraphs 5 and 6. It is not necessary to repeat verbatim what is said there.

Whilst I am in agreement with counsel that the absence of a transcription of Ms Kotze's evidence in respect of count 1 constitutes a material defect of such a magnitude that the

conviction cannot be allowed to stand, I am less sanguine about count 2. Although the charge sheet does not specifically say so, it is an embodiment of Section 66(2) of the National Road Traffic Act No 93/1996 which provides as follows:-

> "No person shall ride in or drive a vehicle without the consent of the owner, operator or person in lawful charge thereof."

The accused admitted in evidence that the owner of the Mazda left it in his possession for the purpose of effecting repairs to its CV joints and if not directly, at least by implication, conceded that he did not have the owner's permission to drive the vehicle to Rondebosch where it was found. That much is clear from his evidence under cross-examination to the effect that he had left a message at the owner's place that he was going to use the car for that purpose. That appears at page 77, lines 18 to 20 of the record. It accordingly appears that on the accused's own version, and despite the absence of direct evidence, it has been shown that the accused had made himself guilty of having committed the offence as particularised in count 2. I am accordingly inclined to the view that the absence of the transcribed evidence in respect of count 2 does not constitute a defect of such a material nature

that a proper consideration of the appeal is impossible and that it will deleteriously impact on the accused's entitlement to a fair trial as envisaged by Section 35 of the constitution. In that regard see S v Sebothe and Others, 2006(2) SACR 1 (SCA) at paragraph 8.

Accordingly the appeal succeeds partially in that the conviction of the accused on count 1 and the sentence imposed in respect thereof are SET ASIDE.

It is recorded, merely for the sake of clarity, that the appeal in respect of the conviction on count 2 and the sentence imposed in respect thereof has been UNSUCCESSFUL.

As on the facts at my disposal it appears that the accused has been in prison since approximately April 2001 and should therefore already be entitled to hiS immediate release if found guilty only on count 2, the registrar of this court is requested to immediately notify the prison authorities of the outcome of this appeal, that the accused may be released forthwith unless he may be lawfully detained for any other reason.

VAN REENEN, J

I concur.

WEYER, A J