IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A222/2010

DATE: 3 SEPTEMBER 2010

In the matter between:

VICTOR RALPH MKANDE Appellant

and

THE STATE Respondent

J U D G M E N T

ROUX, AJ:

The appellant was convicted in the Regional Magistrate's Court in Cape Town on a count of theft of a motor vehicle and sentenced to five years imprisonment. Leave to appeal against the conviction and sentence was sought and granted.

The appellant was legally represented during the proceedings. He pleaded not guilty to the aforestated charge. He was also charged with negligent driving and he initially pleaded guilty to that charge. However, it later transpired that he had already been convicted of driving under the influence of alcohol arising from the same set of facts and the charge was accordingly not proceeded with.

One Peter Palkimitno was charged together with the appellant on the same charge of theft. He was acquitted by the magistrate at the end of the proceedings.

The first witness called on behalf of the State was Constable Gerald Koopman of the Metro Police. Constable Koopman testified that on 4 February 2005 he was on duty with Officers Meyer and Estcourt. They patrolled the Observatory area. At approximately nine/ten o'clock that evening they saw a vehicle travelling in the wrong direction in a one-way street. They followed the vehicle and pulled the vehicle over in Lower Main Road, Observatory. On approaching the vehicle Constable Koopman saw two men in the vehicle, one of whom was the appellant. They contacted radio control and were notified that the vehicle had been reported stolen. On further investigation they also discovered that the appellant, who had been driving the vehicle, was under the influence of alcohol. Constable Koopman testified that Officer Estcourt made the arrest. Constable Estcourt has since resigned from the Metro Police.

In cross-examination, Constable Koopman testified that Officer Estcourt had interviewed the appellant and that he was accordingly unable to relate what was spoken between Officer Estcourt and the appellant. When it was put to Constable

Koopman that the appellant would testify that when the police stopped them there was in fact another passenger in the vehicle, besides the co-accused, namely one Patrick, who must have left as soon as they were stopped, he could not dispute that, commenting that it was in fact very busy that night in Lower Main Road. He could also not dispute that the appellant may have explained to Officer Estcourt that he and his co-accused were unaware of the fact that it was a stolen vehicle, since they had been invited by the said Patrick, who was driving the vehicle, to accompany him from a party in Milnerton, and that at some stage he, the appellant, took over the driving because Patrick was too intoxicated to drive safely.

The State handed in two formal statements from the owner of the vehicle without any objection from the appellant's legal representative. Copies of the statements handed in are not included in the record, but the essential parts thereof are quoted in the judgment. According thereto the owner had left the vehicle in Arnold Street in Observatory earlier that day and had discovered at about 10 p.m. that the vehicle was missing. Later on in that month he identified his motor vehicle at Stikland. The bumper and the ignition were damaged.

The State also called Constable Matholla of the South African Police Service. Constable Matholla was not present when the

appellant was stopped and arrested on the night in question. He only became involved later as the appointed investigating officer. He confirmed that one of the accused had told him that they were innocent inasmuch as they had not known that it was a stolen vehicle. The explanation given to him was that they were given a lift by a friend in a vehicle from a party and that one of them had later taken over the driving, because the driver was too intoxicated. According to Constable Matholla he was, however, not provided with that person's name or address. That was the end of the State's case.

According to the appellant's testimony he had attended a party in Summer Greens, Milnerton, earlier that day. His friend and co-accused, Palkimitno was with him and the party was hosted by one Anwar. Later that evening an acquaintance of theirs, one Patrick, suggested that they accompany him to a nightclub in Observatory. He and Palkimitno were at the time standing outside the party venue smoking and Patrick was already sitting in the vehicle which later turned out to be stolen. Patrick asked them to push-start the vehicle.

On the way to Observatory it became apparent that Patrick was too intoxicated to drive, so he, the appellant, asked Patrick to stop and he took over the driving. The vehicle was never switched off. He further testified that he, too, was

intoxicated at the time. In Observatory the police stopped them for failing to observe a one-way sign. He was then arrested for drunken driving and also for the theft of the motor vehicle. Only he and his co-accused were arrested. He could not say what had happened to Patrick, inasmuch as he was kept busy by the police and was thereafter taken to the Milnerton Police Station. According to the appellant the investigating officer was not interested when he gave him his version of events in order to prove his innocence. When testifying, the appellant gave the address where Patrick was staying at the time.

The appellant's co-accused, Palkimitno, also testified. He confirmed the appellant's version in all material respects. He testified that Patrick had in fact run away when they were stopped by the police. According to his testimony there were a lot of people and a lot of activity where they were stopped in front of a pub. He testified that the police were forced to stop some 30 metres in front of them, because there was no other place to stop.

The magistrate correctly pointed out that since there was no direct evidence that the appellant had stolen the vehicle, it had to be determined whether the only reasonable inference which could be drawn from the proven facts was that the appellant

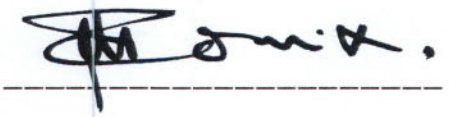
had stolen the vehicle. See S v Masweni 1985(1) SA 590 (E). The magistrate then went on to refer to inconsistencies in the appellant's evidence and concluded that the appellant's version cannot be reasonably possibly true.

In my view the magistrate misdirected himself in this regard. The inconsistencies referred to by the regional magistrate are not, in my view, material and do not detract from the essence of the appellant's version. The magistrate himself found that the evidence of the appellant's co-accused was almost similar to that of the appellant. It cannot, in the circumstances, be said that the version put up by the appellant and his co-accused, namely that they had been invited that evening by Patrick to accompany him to Observatory in the vehicle, not knowing that it was a stolen vehicle, that the appellant had en-route taken over the driving, and that Patrick had fled from the scene as soon as they were stopped, cannot reasonably possibly be true. Especially where the arresting officer was not called to testify and the only other policeman who was on the scene at the time of the arrest conceded in evidence that there may have been a second passenger in the vehicle.

In S v Shackell 2001(4) SA 1 (SCA) at 12I-13B, the Supreme Court of Appeal stated the test to be as follows:

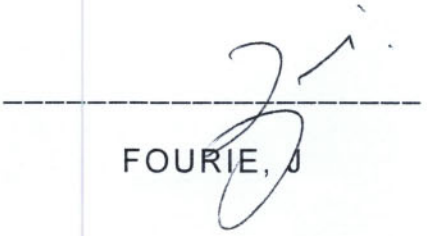
"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that the mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on acceptance of that version."

On this inquiry, I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true. I would accordingly allow the appeal and set aside the conviction and the sentence.



ROUX, AJ

FOURIE, J: I agree and it is ordered accordingly.



FOURIE, J