IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A242/2010

In the matter between:

I RINQUEST First Appellant

A SUMMERS Second Appellant

and

THE STATE Respondent

Judgment handed down on 26 November 2010

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1. The two appellants appeal against their conviction on three charges of robbery with aggravating circumstances, one charge of housebreaking and, in respect of the first appellant, one charge of possession of a Glöck 9mm pistol without having the necessary licence, and a further conviction of being in possession of three magazines for a firearm and 34 rounds of live ammunition.

2. The robberies took place from 11 December 2002 to 10 April 2003. The appellants were arrested on 14 April 2003. The trial commenced on 15 August 2005 and was only completed on 5 March 2008 when the appellants were convicted and sentenced. During the trial there were changes of prosecutors and legal representatives for the appellants.

3. At the close of the State's case, both appellants were found not guilty and discharged in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977, in respect of five counts of robbery, and the second appellant was found not guilty and discharged in respect of the charges of possession of the firearm and ammunition.

4. The appellants did not lead any evidence and closed their cases.

5. With regard to the remaining three counts of robbery with aggravating circumstances and the one count of housebreaking, the evidence adduced by the State was largely uncontested and may be summarised as follows.

6. In respect of count 2 which arises from a robbery which took place on 11 December 2002 in the afternoon at a residence in Table View, Mrs van Reenen testified that upon her return to her home with her daughter she was accosted by two persons who had pantyhose over their faces. They tied her up, took her jewellery, emptied her handbag, from which they took keys to the safes. They thereafter stole various items including two pistols and a shotgun, magazines and rounds of ammunition. Mrs van Reenen was unable to identify her assailants although she stated that they were people of colour. One was short and stout and dark in complexion, and the other taller and light in complexion.

7. Her husband, on 17 April 2003, identified one of the firearms, a Glöck 40 and three magazines. It is these that form the subject matter of the related charges on which the first appellant was convicted.

8. Captain H F Meyer of the South African Police Services testified that he had found the firearm, three magazines and 34 rounds of ammunition on the morning of 14 April 2003 in a hidden compartment in a cupboard in the main bedroom of a house which was occupied by the first appellant and the girlfriend or wife of the first appellant.

9. The weapon was found pursuant to the execution of a search warrant. I shall return to the execution of the search warrant herein below.

10. Count 6 pertains to the housebreaking which took place at 9 Eyton Road, Claremont, on 7 February 2003. Mrs Baxter testified that she had left her premises in the early evening and had returned just after midnight. She found the padlock on the front gate broken and the burglar bars on a window forced open. Nobody was at home at the time and various items were stolen. On 14 April 2003 she identified some of these items, namely a television set, a portable radio, a camera bag and compact discs, to the police. The defence legal teams had admitted that some of these items were recovered from both the appellants' premises on 14 April 2003.

11. With regard to count 8, Mr Hewitt testified that on 20 March 2003 and at 25 Oxford Street, Hout Bay, at approximately 1 a.m. and after he had finished watching television, he went to lock the main door. He opened a locked trellidoor to gain access to the main door when he was attacked by three people and tied up. One of them went to his wife who was asleep in the bedroom. His assailants took various items. He, as was Mrs van Reenen, was unable to identify his assailants. He, however, on 3 July 2003 identified

various goods. The defence legal teams have similarly admitted that some of these items were recovered on 14 April 2003 from premises occupied by appellant one and two.[1]

12. With regard to the 9th count, Mr Munitz testified that on 10 April 2003 and at 1 Bedburn Street, Camps Bay, at approximately 8 p.m. in the evening and whilst he was at home with his wife watching television in the bedroom, three men came into the room through the sliding door which led onto a balcony on the third floor. They had black stockings over their heads. He and his wife were tied up whereafter the men ransacked the house and took various goods. He was also unable to identify his assailants although they were definitely coloured and spoke Afrikaans. On 16 April 2003, that is, six days later, he identified some of the stolen goods, namely two Cartier watches, two distinctive sunglasses, one pair of zirconium earrings, one leather pouch with old coins, a Russian wedding ring and a pair of diamond earrings. The evidence, largely undisputed, was that some of these items were recovered from the second appellant's premises and others were recovered from the first appellant's premises.

13. The evidence of the police officers, Captain van Wyk and Captain Meyer, as well as Inspector Linda and Inspector Rosslee was that on 14 April 2003 they were tasked with searching the premises at 3 Chukker Road, Kenwyn, and 7 Rod Lane, Lotus River. The Chukker Road premises were occupied by the first appellant and his female companion, whilst the premises at 7 Rod Lane were occupied by the second appellant and his wife. The various items

[1] Record p 132:25; record p 136:16 – 19

which were seized at these premises were recorded and the recordals introduced as exhibits at the trial. The appellants admitted, in terms of section 220 of the Criminal Procedure Act, that the items reflected in exhibits B and C were recovered from the premises occupied by them and that some of the items were identified by the complainants who had testified.

14. As already stated at the conclusion of the State's case, there was an application for the discharge of the appellants which, in respect of certain charges, was granted. Thereafter the appellants closed their case without adducing further evidence.

15. As the learned Magistrate had found, and as was common cause in argument before us, there was only one factual aspect which was in dispute. This was the testimony by Captain Meyer that the first appellant had told him at the time when the search was executed and the Glöck found, that *"it's my firearm, I bought the firearm,"*[2] as he did not want his wife to be arrested.[3] Appellant one would not disclose from whom he bought it.[4] I pause to point out that Captain Meyer did not mention this incident in his written statement. It was put to him by Mr Morgan, who at that stage represented the first appellant, that the first appellant would deny this when he testified. The learned Magistrate accepted Captain Meyer's evidence. There is no basis for us on appeal to interfere with this acceptance by the learned Magistrate, who had the benefit of observing the witness and who, in my view, had correctly

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[2] Record p 32: 22 – 25
[3] Record p 41: 10 – 14 (though Mr Morgan put it to captain Meyer that this was his testimony, and Captain Meyer confirmed this, the record does not reflect that captain Meyer had in fact stated that the reason, namely to prevent the arrest of the wife was given)
[4] Record p 38: 22

pointed out that there was no evidence to gainsay what Captain Meyer had testified to.

16. The learned Magistrate further found that there was no material challenge to any other State witness. He accordingly found the following to have been proved beyond reasonable doubt:

(a) That during the period December 2002 to 10 April 2003, over a period of four months, the premises of the complainants in respect of counts 2, 6, 8 and 9 were broken and entered into. In respect of counts 2, 8 and 9, the complainants, who were at home at the time, were tied up by persons wearing black stockings over their faces and various items of value were taken from their houses. In respect of count 6, the premises were broken into;

(b) The *modus operandi* most certainly in respect of counts 2, 8 and 9 were all the same. The same pattern of conduct was followed by the assailants in all the incidents, that is, the assailants wore black stockings over their faces, they would break into and enter the premises and would tie up the occupants in a similar fashion, normally with telephone cords and, in one instance, with ties, demand keys for safes and firearms and remove items of value. It appears that there was a predilection for jewellery, expensive perfumes, sunglasses, cameras and electrical appliances. The complainants all described their assailants as coloured males;

(c) Some of the goods stolen from the various complainants (in addition to other goods which were suspected to be stolen) were recovered from premises occupied by the appellants. In respect of count 2 the goods were recovered approximately four months later, in respect of count 9 the goods were recovered four days later, in respect of count 8 the goods were recovered three weeks later, and in respect of count 6 the goods were recovered two months later;

(d) In all instances the complainants were unable to identify the assailants – obviously because of the stockings over their heads – but they all described their assailants as being coloured males;

(e) The two appellants are both coloured males who were found on and occupied the premises where the stolen goods were recovered, with their respective partners who were female;

(f) A cut stocking similar to the one used by the assailants in covering their heads at the time of the robberies was one of the items which was recovered in a vehicle owned by the second appellant[5] at his premises.

17. The learned Magistrate concluded as follows:

> *"It is clear from these proved facts that there is no direct evidence that both the accused were the perpetrators or the assailants as none of the complainants were able to identify them as such. The evidence linking the accused to the crime is pure circumstantial and the State asked the court to infer from the evidence that the accused are the*

[5] Record p 116

culprits. It is trite when reasoning by inference that the court must satisfy itself firstly that the inference sought to be drawn is consistent with the proved facts and secondly the proved facts are such that they exclude every reasonable inference save the one sought to be drawn. As stated the accused did not testify and the court must weigh the cumulative effect of all the circumstantial evidence against the accused together when drawing inferences.

When one considers the proven facts that the modus operandi in all these incidents were the same and the stolen goods were recovered soon after the incidents from the premises occupied by the accused, the fact that the complainants who saw the assailants said that they were all males and that a stocking fitting the description of that used by the assailants was found in accused 2's vehicle, the court finds that all of them combined to paint a very persuasive picture against the accused that they were in fact the assailants or the perpetrators and in this court's view it became incumbent on the accused to give an explanation. Both the accused chose not to testify or call witnesses and it has been argued by the defence that the premises where the stolen goods were recovered were not only occupied by the accused, but by their female partners and that they could have possessed the goods, not the accused. However this is not the evidence on record and the defence chose not to take the court into its confidence with regard on (to) this aspect and the court cannot speculate with regard to the defence on behalf of the accused. In any case this argument – the court finds that this argument flies in the face of the evidence of the complainants who all stated – who, the complainants who in fact had seen their assailants all described the assailants as being males and not females. Further the court cannot believe and no evidence has been placed on record that both the accused were unaware that the stolen goods were on the premises occupied by them. The court finds as proof beyond reasonable doubt that the recently stolen goods were found in the possession of both the accused and they have failed to give an explanation of such possession. The only reasonable inference to be drawn from this in the absence of any explanation by the accused is that they possessed same with guilty knowledge. This applies also to accused 1 with regard to his possession of the firearm and the ammunition. The accused – court finds that the accused's failure to testify in the face of this considerable evidence against them tends only to strengthen the inference that they were the persons who broke into the premises of the various complainants and robbed and stole from them."

The Court accordingly convicted the appellants as aforesaid.

18. The question before us was whether he was correct in doing so, and in particular, whether the inference could be drawn that the appellants were the perpetrators of the robberies and breaking-in given the time that elapsed between the respective robberies and breaking-in and the recovery of some of the property in their possession. Mr Mihalik who appeared for the first appellant submitted that at best convictions of receipt or possession of stolen property, a permissible conviction, should have been made.

19. It is common cause that the robberies occurred on 11 December 2002 at 4 Belloy Street, Table View, at which stage the Glöck pistol was also stolen; on 11 December 2002 at No. 29 Glen Crescent, Oranjezicht; on 3 January 2003 at 3 Nahoon Road, Constantia; on 24 January 2003 at 8 Salisbury Avenue, Bishops Court; on 7 February 2003 at 9 Eyton Road, Newlands; between 7 and 10 March 2003 at Upper Orange Street, Oranjezicht; on 20 March 2003 at 25 Oxford Street, Hout Bay; and on 10 April 2003 at 1 Medburn Street, Camps Bay. The appellants were found in possession of property stolen from these premises when the raids on 14 April 2003 at 3 Chukker Road, Kenwyn, and at 7 Rodlane Road, Lotus River took place. That is within four days after the commission of the last robbery on 10 April 2003.

20. Can the inference properly be drawn from this timeline, the fact of the consistent *modus operandi,* the vague – but matching descriptions of the assailants, together with possession of some of the stolen goods, the black stocking found in the motor-vehicle of the appellant two, and the failure by the appellants to adduce evidence, that they were the perpetrators of the robberies and the breaking-in?

21. In S v Manamela & Another (Director – General of Justice intervening) 2000 (3) SA 1 (CC) O'Regan J and Cameron AJ in a minority judgment[6] summarised the legal position as follows at paragraph [86]:

> *"Where an accused is caught in possession of stolen goods, their mere possession may, by itself, give rise to an inference that the accused is criminally connected with the unlawful removal or receipt of the goods. If the accused is caught soon after the goods are stolen, common sense may lead to the conclusion that the only reasonable inference is that he or she stole them or participated in their theft.[7] If the period between theft and apprehension is longer, in the absence of a satisfactory explanation the appropriate inference may be that the accused is guilty of the common-law offence of receiving stolen property knowing it to be stolen,[8] the closer the proximity in time between theft and possession, the more easily the State will be able to rely upon an inference of criminal conduct on the part of the accused. In all these cases, however, the conviction of theft or criminal receiving depends upon the State being able to establish the requisites of the crime beyond reasonable doubt: an inferential probability does not suffice. Where the time lapse is so great that an inference of theft or related criminal conduct or knowing receipt cannot be drawn at all, the State's predicament is great. The accused can in these cases with relative ease advance a trumped up story relating to the acquisition of the goods with little risk that the State will be able to rebut it to the requisite degree of proof."*

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[6] The majority did not disagree with the summary of the applicable principles.

[7] "S v Parrow 1973 (1) SA 603 (A) at 604B-F; S v Skweyiya 1984 (4) SA 712 (AD) at 715-716"; see also Schmidt and Rademeyer, Law of Evidence, loose leaf, Lexis Nexis at 5-36; S v Screech 1967 (2) SA 407 (E) See also S v Jantjies 1999 (1) SACR 32 (C) in which the court correctly declined to follow S v Tandimali 1998 (1) SACR 119 (C), wherein it was found that the doctrine of recent possession only applied in respect of the crime of theft, and not also to housebreaking with the intent to commit a crime. In S v Nkomo 1966 (1) SA 831 (A), 833B-C, the presumption was so widely applied that the joint possession of stolen goods was taken a *prima facie* proof of a common intent not only to commit housebreaking and theft, but to commit the murder which had been perpetrated during the housebreaking and theft.

[8] As the court inferred in S v Skweyiya, *supra*.

22. In R v Maseko, cited in R v Morgan 1961 (2) SA 377 (T) at 378 B – D, Broome J stated as follows

> *'If the property is such that it would ordinarily change hands rapidly, a very short period only would suffice. If the property is not of a negotiable character, the period would be longer. Furthermore the class of person to which the possessor belongs must also be taken into account. It is impossible to lay down precise rules, and even the giving of examples may be dangerous."*

23. In the instant case in respect of count 9 the goods were recovered four days after the crime had been perpetrated. As Holmes JA pointed out in S v Parrow, *supra*, at 604C

> *"On proof of possession by the accused of recently stolen property, the court may (not must) convict him of theft in the absence of an innocent explanation which might reasonably be true. This is an epigrammatic way of saying that the court should think its way through the totality of the facts of each particular case, and must acquit the accused unless it can infer, as the only reasonable inference, that he stole the property."*

24. In my view, the short period of time between the last robbery and the raid, permits the inference to be drawn that the appellants had participated in that robbery. Mr Munitz testified that the robbers wore black stockings over their faces. A similar stocking was found in the vehicle of second appellant. Stolen items from the Munitz house were found in the possession of both appellants 4 days after the robbery. The appellants failed to adduce evidence in rebuttal of these facts. The appellants' convictions on count 9 should accordingly remain.

25. The question which then arises is whether, if in respect of the remainder of the charges the elapse of time is too long for the inference to be drawn in respect of each such individual charge, can the conspectus of facts nonetheless permit the inference to be drawn. Regard should be had to the totality of the evidence, including the fact of the other robberies and that the goods robbed were also found in the possession of the appellants.

26. The Supreme Court of Appeal has recently, in *Naude & another v S* (488/10) [2010] ZASCA 138 (16 November 2010) affirmed[9] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449j-450b, where the following was stated by Nugent J (as he then was):

> *'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'*

27. Navsa JA continued as follows at paragraph [29]

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[9] at paragraph [29] per Navsa JA

"Importantly, in that case Nugent J warned against separating evidence into compartments and to examine either the defence or State case in isolation.[10] *See also S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101a-e, S v Trainor 2003 (1) SACR 35 (SCA) at 40f-41c and S v Crossberg 2008 (2) SACR 317 (SCA) at 349f-i and 354b-g."*

28. The appellants were found, not only with goods from a single robbery, but from three robberies and in addition one housebreaking. In respect of the first robbery (count 2) it had taken place four months earlier, but one of the items stolen was the Glöck pistol. The court in R v Maseko, *supra*, qualified its example that if the property was not of a negotiable character, a longer period could still lead to an inference of theft, by saying that it is impossible to lay down precise rules. In South Africa in 2010, we have learned that firearms possessed illegally can change possession fairly quick so it is not realistic to suggest that first appellant's possession of the Glöck pistol places him on the scene of the robbery in count 2.

29. The first appellant made a statement at the time to the investigating officer that he had bought the pistol. During the trial it was put by his legal representative that he would deny this. He, however, failed to testify, as was presaged in the cross-examination of captain Meyer. Neither of the appellants put up any explanation for their possession of the stolen goods and chose not to testify.

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[10] *"At 449g-i and see also D T Zeffertt, A P Paizes, A St Q Skeen The South African Law of Evidence (2003) pp 151-152."*

30. The failure to testify has its own set of consequences. On the one hand an accused is presumed to be innocent. Section 35(3)(h) of the Constitution accords to every accused person the right to a fair trial, which includes the right to be presumed innocent. In S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (C) O'Regan J, speaking for the Court, held that:[11]

> *'(T)he presumption of innocence is an established principle of South African law which places the burden of proof squarely on the prosecution. The entrenchment of the presumption of innocence in s 25(3)(c) must be interpreted in this context. It requires that the prosecution bear the burden of proving all the elements of a criminal charge. A presumption which relieves the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. Such a presumption is in breach of the presumption of innocence and therefore offends s 25(3)(c).'*

31. Moreover, an accused is entitled to exercise a right to silence, which is inextricably linked to the right against self-incrimination and the principle of non-compellability at his or her trial. In S v Manamela, *supra*, the Constitutional Court affirmed that:

> *'"(T)he right to silence, like the presumption of innocence, is firmly rooted in both our common law and statute", and "is inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness at his or her trial".'*

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[11] at paragraph [15], 394G – I

32. A decision not to testify, however, is not without risk and carries its own consequences. In Osman and Another v Attorney-General, Transvaal 1998 (4) SA 1224 (CC) Madala J held that at par [22]

> *'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of adversarial system of criminal justice.'*

33. In S v Boesak 2001 (1) SA 912 (CC) Langa DP, speaking for the Court, pointed out that the right to remain silent has different applications at different stages of a criminal prosecution. On arrest a person cannot be compelled to make any confession or admission that may be used against her or him; later at trial there is no obligation to testify. The fact that she or he is not obliged to testify does not mean that no consequences arise as a result. If there is evidence that requires a response and if no response is forthcoming, that is, if the accused chooses to exercise her or his right to remain silent in the face of such evidence, the Court may, in the circumstances, be justified in concluding that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused. This will, of

course, depend on the quality of the evidence and the weight given to that evidence by the Court.

34. In S v Naude, *supra*, Navsa held at paragraph [37]

> *[37] The court below stated that the State produced 'weighty' evidence against all of the accused which called for an answer. I agree. Two months ago this court reiterated that a court is unlikely to reject credible evidence which an accused has chosen not to deny.*[12] *In such instances an accused's failure to testify is almost bound to strengthen the prosecution's case. In S v Chabalala 2003 (1) SACR 134 (SCA) para 21 the following was stated:*
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> > *'The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. If he was innocent appellant must have ascertained his own whereabouts and activities on 29 May and be able to vouch for his non-participation. . . . To have remained silent in the face of the evidence was damning. He thereby left the prima facie case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt.'*
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> *See also S v Boesak 2001 (1) SACR 1 (CC) para 24."*

35. We were referred to S v Mavinini 2009 (1) SACR 523 (SCA) and it is apposite to repeat in full what Cameron JA had there held

> *"[26] It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the*

[12] Mapande v S (046/10) [2010] ZASCA 119 (29 September 2010).

accused. Though the notion of 'moral certainty' has been criticised as importing potential confusion in jury trials,[13] *it may be helpful in providing a contrast with mathematical or logical or 'complete' certainty. It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence und inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights – remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system."* [14]

36. S v Parrow, *supra*, makes it clear that the accused's "*absence of an innocent explanation*" may lead to a conviction of theft if the totality of the evidence supports that conclusion. In *casu*, the totality of the evidence on counts 2, 6 and 8 supports a conviction of receiving stolen goods knowing them to have been stolen, but not robbery, because the appellants were not identified by any of the complainants nor were they connected to the crime scene by DNA or any other evidence. The fact of the robberies and the fact that the goods stolen were found in the possession of the appellants can equally lead to the conclusion that the appellants were illegally in possession of the goods.

37. It can accordingly not be concluded that the state has proved the appellants' complicity in counts 2, 6 and 8 beyond reasonable doubt. The state's

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[13] "*See the decision of the Supreme Court of the United States of America in Victor v Nebraska (92-8894), 511 US 1 (1994), accessed on 27 November 2008 at http:llwww.law.cornell.edulsupct/html/92-8894 ZO.html.*"

[14] See also S v Tandwa 2008 (1) SACR 613 (SCA) at para 53

evidence, albeit credible, is insufficient to sustain a conviction on the offences in question.

38. I would accordingly set aside the convictions on counts 2, 6 and 8 and replace them with convictions on the competent verdict, of possession of stolen property knowing them to have been stolen.

39. In view of this conclusion, I would set aside the sentences imposed on counts 2, 6 and 8 and I would replaced them with the following sentences:

(a) On count 2, 5 years imprisonment.

(b) On count 6, 5 years imprisonment.

(c) On count 8, 5 years imprisonment.

40. The first appellant was also convicted on the charge of the possession of a firearm (the Glöck pistol) (count ten) and the ammunition (count eleven) in contravention of section 2 read with section 1, 12, 39(1)(h), 39(2) and 40 of the Arms and Ammunition Act, 75 of 1969.

41. He had pleaded not guilty to this charge on 15 August 2005.[15]

42. The date of commencement of the Firearms Control Act, 60 of 2000 was 1 July 2004. It repealed the Arms and Ammunition Act, 75 of 1969 with effect from 1 July 2004 in terms of section 153 of the Firearms Control Act, read with Schedule 3 and subject to Schedule 1 of the Firearms Control Act.

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[15] Record p 5:1

43. In the circumstances it is necessary to set out in full the provisions of section 8 of Schedule 1 which provide as follows

> *"**8. Matters pending under previous Act**.- (1) Subject to subitems (2) and (3), this Act does not affect any proceedings instituted in terms of the previous Act which were pending in a court of law immediately before the date of commencement of this Act, and such proceedings must be disposed of in the court in question as if this Act had not been passed.*
>
> *(2) Proceedings contemplated in subitem (1) must be regarded as having been pending if the person concerned had pleaded to the charge in question.*
>
> *(3) No proceedings may continue against any person in respect of any contravention of a provision of the previous Act if the alleged act or omission constituting the offence would not have constituted an offence if this Act had been in force at the time when the act or omission took place.*
>
> *(4) (a) Despite the repeal of the previous Act, any person who, before such repeal, committed an act or omission which constituted an offence under that Act and which constitutes an offence under this Act, may after this Act takes effect be prosecuted under the relevant provisions of this Act.*
>
> *(b) Despite the retrospective application of this Act as contemplated in paragraph (a), any penalty imposed in terms of this Act in respect of an act or omission which took place before this Act came into operation may not exceed the maximum penalty which could have been imposed on the date when the act or omission took place."*

44. The first appellant only pleaded on 15 August 2005, more than a year after the Firearms Control Act came into operation and repealed the act under which the appellants were charged. It is moreover clear that the Firearms Control Act contemplates, in section 8(4) of Schedule 1, that any prosecution may (not should) take place in terms of the Firearms Control Act.

45. It is apparent from the record that both the learned Magistrate and the various prosecutors were aware of the repeal of the Act.[16] They proceeded on the basis that a formal amendment to the charge sheet would be made.[17] Mr Morgan adopted the stance that the charge was "*null and void*" but did not, himself, raise any further objection,[18] contending that that "*there is no need to object.*"[19] Later Mr Borchards, for appellant two contended that all that was required was reference to the new Act.[20] This amendment was never sought.

46. The governing principle is that where a charge substantially follows the wording of the prohibition under which the prosecution claims the penalty, and where no prejudice was occasioned to the accused by the misquotation, the charge may be amended on review or appeal.[21]

47. More importantly, the mere fact that a statutory provision which the accused person is alleged to have contravened had been repealed at the time when he was charged with the offence in question does not debar the State from prosecuting him in respect of his alleged offence (*S v Kruger* 1968 (1) SA 507 (T); *R v Wolpert* 1918 TPD 45; *S v Theledi* 1978 (1) SA 563 (T) at 565G).

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[16] The learned Magistrate first pointed this out R 29: 16 – 23
[17] At record p 134: 21 – 135: 11
[18] At record p 30: 2
[19] At record p 30: 19
[20] Record p 135: 14 – 18
[21] Landsdowne and Campbell South African Criminal Law and Procedure, Vol V, at 193, citing *R v Robinson* 1954 (3) SA 449 (O), *S v Dhludhla* 1968 (1) 459 SA (N), *R v Alexander and others* 1936 AD 445 at 461; *R v Brand* 1952 (2) SA 131 (T), *S v Burger* 1969 (4) SA 292 (SWA)

48. In terms of the section 12(2)(d)[22] of the Interpretation Act, 33 of 1957 any offence in terms of the Arms and Ammunition Act is to be adjudicated as if the Firearms Control Act had not been enacted (see also S v Thebe; S v Mere 1979 (3) SA 1181 (O) at 1188G *en fin*; R v Mazibuko 1958 (4) SA 353 (A) at 357E – G;).

49. In Chagi and Others v Special Investigating Unit 2009 (2) SA 1 (CC) Yacoob J held as follows at paragraph [31]

> *"[31] Section 12(2) applies when one law repeals another law. The purpose of the provision is to control the consequences of the repeal of a law so as to ensure that the dislocation and unfairness that might follow upon the repeal would, if not altogether avoided, be kept to an absolute minimum.[23] Section 12(2) is of application here because the 1997 proclamation has been repealed and replaced by the 2001 proclamation."*[24]

50. Despite Mr Mihalik's submission to the contrary, the charges in respect of counts 10 and 11 were correctly framed in terms of the provisions of the Arms and Ammunition Act.

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[22] "12. ***Effect of repeal of a law***. – *(1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.*
(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not
...
(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,
and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

[23] "*See Oudebaaskraal (Edms) Bpk en Andere v Jansen Van Vuuren en Andere 2001 (2) SA 806 (SeA) at 811 G – H and R v Sillas 1959 (4) SA 305 CA) at 309H."*

[24] See also Transnet Ltd v Ngcezula 1995 (3) SA 538 (A)

51. It is a requirement for the convictions in respect of counts 10 and 11 that evidence be adduced that the weapon found in the possession of appellant 1 was in working order and that the ammunition was live. The evidence adduced was that the Glöck was licensed to the owner and that the live ammunition was clearly marked. This evidence was not challenged.

52. In the premises the first appellant was correctly convicted in respect of counts 10 and 11.

53. The learned Magistrate had already in his judgment expressed his dissatisfaction with the failure of the State to lead the evidence it ought to have done. I add to this the following: it appears from reading the record that after the discharge of the appellants on some of the charges, the State had applied to reopen its case. It is clear from reading the record that that application was brought as a result of one of the complainants making enquiry, it seems on a regular basis, as to the progress in the matter. She was described as one Mrs le Roux, an old lady whose husband was robbed in her presence.[25] This particular complainant had not been called as a witness though he or she was clearly willing and able to testify. No justice was done to the wrong inflicted upon those victims by the failure of the State to prosecute that charge. Not only are the accused entitled to a fair trial, but so also are complainants. They are entitled to have their complaints adjudicated by a court. They were deprived of this by a failure of the prosecution.

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[25] Record p 153 5 – 8

54. In summary, and in respect of the convictions, I would order as follows

(a) the conviction of both appellants on count 9 is confirmed;

(b) the conviction of the first appellant on counts 10 and 11 are confirmed

(c) the convictions of both appellants on counts 2, 6 and 8 are set aside and replaced with convictions on the possession of stolen property knowing them to have been stolen.

55. In summary, and in respect of the sentences, I would order as follows

(a) First appellant is sentenced, with regard to

(i) count two, five years imprisonment

(ii) count six, five years imprisonment.

(iii) count eight, five years imprisonment.

(iv) count nine, fifteen years imprisonment.

(v) counts ten and eleven, two years imprisonment.

(vi) The above sentences run concurrently with each other.

(b) Second appellant is sentenced, with regard to

(i) count two, five years imprisonment

(ii) count six, five years imprisonment.

(iii) count eight, five years imprisonment.

(iv) count nine, fifteen years imprisonment.

(v) The above sentences are to run concurrently with each other.

OLIVIER AJ

I agree and it is so ordered.

ALLIE J