IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A640/2010

DATE: 18 FEBRUARY 2011

In the matter between:

RANDALL PICK Appellant

and

THE STATE Respondent

J U D G M E N T

BOZALEK, J:

The appellant was convicted on one count of theft of a motor vehicle in the Regional Court Parow and, on 14 April 2010, was sentenced to five years imprisonment. With the leave of the magistrate he now appeals against conviction and sentence.

The essential facts which emerged in the trial were that the appellant was found in possession of a Nissan *bakkie*, which was stolen from a secure complex in Parow at around 3 a.m.

on 24 February 2009. Responding to a report, the police arrived at an address in Uitzicht around 2 p.m. or 3 p.m. on the afternoon of the same day where they found the appellant working on the vehicle which had already been extensively stripped of many of its parts. He fled into a wendy-house in the yard where he was arrested.

The state's case comprised the evidence of the owner, a Mr Manuel, and two of the policemen who attended at the scene of the arrest, Messrs Manus and Parring. The appellant pleaded not guilty and furnished a plea-explanation to the effect that one Bradley Geldenhuys had offered to pay him R100,00 to remove the starter, the alternator and the carburettor from the vehicle. He had accompanied Geldenhuys to the backyard in question to find two other men removing parts from the vehicle. These men and Geldenhuys then left and when the police arrived, he, the appellant, took flight and retreated into the Wendy-house. In due course the appellant gave evidence to this effect but called no witnesses.

Grounds of Appeal

On appeal it was contended that the magistrate erred in finding all the elements of the offence proved beyond a reasonable doubt, more particularly in that there had been no direct evidence linking the appellant to the theft of the motor vehicle.

Furthermore, it was contended, that the magistrate had erred in not adequately taking into account the appellant's evidence that he was requested to work on the vehicle not knowing whether it was stolen or not.

The proper approach to dealing with cases such as the present is set out S v Parrow 1973 (1) SA 603 as follows:

> "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, i.e. 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."

In R v Tshabalala & Others 1942 TBD 27 at page 30J, the following was stated:

> "... in every case in which a person is charged with theft or with receiving stolen property knowing it to have been stolen, the Crown must prove that the article alleged to have been stolen was stolen and that the accused was the thief or the receiver.

> There are thus two parts to the inquiry. The second part may be proved by circumstantial evidence, the common one being that where the accused is found in possession of property which is proved recently to have been stolen then, if he gives no explanation or gives a false explanation and all the circumstances of the case warrant it, the inference may be drawn that he was the thief or receiver. The fact of his being in possession of property which is proved to have been stolen in the circumstances, is said to "call for an explanation", although the onus of proof does not shift."

There is no dispute in the present matter that the vehicle in question was stolen from the complainant some 12 hours before the appellant was found in possession thereof. The question then is whether the accused's innocent explanation, namely, that he was asked to work on the vehicle by Geldenhuys and never realised that it was stolen, can reasonably possibly be true.

There are a number of material factors which bear on this issue. In the first place there is the evidence of the complainant that when he recovered his vehicle on the afternoon in question, it had already been extensively stripped;

the fenders, bonnets, doors and seats had been removed and the wiring had been cut out as well as the cables. Repairs to the vehicle had cost him approximately R15 000,00.

Manus testified that parts of the vehicle were lying both in the wendy-house and in the back of the vehicle. He testified furthermore that when he first saw the appellant he was standing in front of the vehicle with a spanner in the one hand and the front grille of the *bakkie*, note not the carburettor, alternator or starter, in the other. This evidence was not disputed in cross-examination on behalf of the appellant. The second important factor was the appellant's reaction to the arrival of the police. Manus testified that he instructed the appellant to stand still but that he had immediately run into the wendy-house. When Manus entered the wendy-house the appellant was attempting to escape through its window but was blocked by the burglar-bars. The appellant admitted that he fled into the wendy-house but said that this was because he had taken fright when the policed arrived and pointed guns at him. He denied attempting to escape through the window.

Finally, there is the matter of the appellant's explanation for his possession of the vehicle and the stage at which it was given. Manus testified that the appellant was initially completely evasive saying that he had done nothing to the

vehicle, that it was not in his possession, that it was not his *bakkie* and he didn't know whose it was. Later, however, he had heard the appellant tell Parring that he had been asked to remove certain parts from the vehicle for payment in the sum of R100,00. Parring testified, but was unable to recollect any such explanation being furnished to him by the appellant.

However, the appellant's version of events in this regard was at best highly inconsistent. During Manus' cross-examination it was put that during the arrest he could not give any explanation because everything was too chaotic. A little later it was stated that at Parow Police Station he had been questioned but had chosen to remain silent and to explain only in court. Yet a little later it was put to Parring that the appellant in fact did try and furnish an explanation at the police station. In his evidence in chief, the appellant testified that no explanation was asked from him at the scene but then contradicted himself, stating that he had been asked for an explanation but "*hulle wou my nie kop toe gevat het nie*". The appellant then testified that he had given an explanation to Manus but this was not put to the latter in cross-examination.

The explanation itself excites scepticism if not suspicion. If Geldenhuys already had two men stripping the vehicle, as the appellant claims, why would he need the appellant to remove

those three parts. The appellant was unable to give an address for Geldenhuys or anything beyond vague detail relating to him and the two men who allegedly accompanied the latter.

The magistrate, by implication, accepted the evidence of the state witnesses, in my view correctly so. She found that the only reasonable inference was that the appellant had stolen the *bakkie*.

Whilst the evidence fell short of proving that it was the appellant himself who had physically stolen the *bakkie*, in my view the state succeeded in proving beyond any reasonable doubt that the appellant, at the very least, must have known that he was working on a stolen vehicle. I say this for the following reasons. Within 12 hours of the vehicle being stolen the appellant was found as the only person working on a vehicle which had been extensively stripped; a vehicle, moreover, which was in perfect running condition less than 12 hours before. The appellant's reaction of fleeing from the scene and trying to escape through the wendy-house was hardly that of someone who had an innocent explanation for working on the vehicle.

His failure to immediately tell the police the identity of the

person who had allegedly asked him to work on the vehicle is further confirmation that, when apprehended, he had no ready explanation and that this was a later fabrication. His inability, even at the trial, to furnish any details as to the identity or whereabouts of Bradley Geldenhuys is the final nail in the coffin of his version. Theft being a continuing offence, the appellant was properly convicted on the count. See S v Kruger 1989 (1) SALR 785 (A). In the circumstances I am of the view that the appeal against the conviction has no merit.

Sentence

On behalf of the appellant, it was contended that the magistrate had overemphasised the seriousness of the offence and the interest of society and had given insufficient weight to the fact that the appellant was young, a first offender and capable of rehabilitation. The appellant's personal circumstances were that he was 23 years of age at the time of sentencing and no previous convictions were proved against him. In rejecting the notion that the appellant should be sentenced to correctional supervision, the magistrate remarked that the interest of society demanded a person such as the appellant should be "punished harshly". In my view this statement amounted to a misdirection on the part of the magistrate. What must always be striven for is a balanced sentence and one which is appropriate having regard to the

nature of the offence, the personal circumstances of the accused and the interests of society.

That being the case, this court is entitled to consider sentence afresh. Having regard to all the circumstances of this matter, I consider that the offence is sufficiently serious to justify a custodial sentence notwithstanding that the appellant was a first offender. The term of imprisonment of five years appears to me appropriate but given the appellant's youth and his clean record, I consider that two years of that sentence should be conditionally suspended.

In the result, I would uphold the appeal against sentence and substitute it with a sentence of **FIVE (5) YEARS IMPRISONMENT, TWO YEARS OF WHICH ARE SUSPENDED FOR FIVE (5) YEARS** on condition that the appellant is not found guilty during the period of suspension of an offence involving the element of dishonesty and in respect of which he is sentenced to imprisonment without the alternative of a fine. The new sentenced will antedated to 14 April 2010.

BOZALEK, J

/bw

HENNEY, AJ: I agree.

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HENNEY, AJ