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

CASE NO: A435/11
DATE: 18 November 2011

In the matter between:

GROOVY ZUKILE KUTWANA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

BLIGNAULT. J

Appellant was convicted in the Regional Court, Cape Town, on 30 March 2011 on two charges, namely one, theft of a Volkswagen Golf motor vehicle, the value about R35 000, which took place on 1 to 2 August 2006 at Claremont, allegedly the property of Megan Dale. The second charge was theft of a Volkswagen Golf motor vehicle, the value alleged to be R45 000. This occurred according to the charge on 31 January 2007 and the vehicle was the property of Dean Cannell.

At the commencement of the trial there were certain exchanges between the attorney representing the accused, Mr Ntsimango, and the magistrate and also between the accused and the magistrate. The attorney asked for a postponement of the matter. He explained that he had a difficulty in obtaining further particulars and then he was only able to consult with the accused on the morning of the 12th. He said that he needed more time to consult with the accused -and to get proper instructions from him. The attorney asked for a postponement to the next day. The prosecutor opposed the application because the case had been postponed for trial on several prior occasions. The magistrate placed on record that the matter had previously been enrolled for trial on four occasions and that it was postponed every time due to the accused not being ready to proceed. The detail of these occasions appear from the magistrate's judgment at page 61, the first time the matter was set down for plea and trial on 1 December 2009, and on that occasion the case was postponed because the attorney, Mr Strauss, who then appeared, informed the Court that his mandate had been terminated by the

accused. Then the matter was again postponed to enable the accused to appoint advocate Boswell, this apparently did not occur.

The accused then indicated that he will conduct his own defence. Again the case was postponed for trial to 21 June 2010. On that occasion the accused requested another postponement because he was not ready to conduct his own defence and it was also alleged on that occasion that he was not in possession of certain further particulars, which had been supplied on the previous occasion.

This was the third postponement to 8 November 2010, for plea and trial purposes. The magistrate then quoted from his endorsement on the record that he warned the accused to be ready for trial on 8 November 2010, he must make the necessary arrangements, if he wants to appoint a representative. On 8 November Mr Ntsimango came on record for the accused, and once again there was an application for a further postponement because the defence was not ready for the trial on that day. On that occasion the trial was then postponed to 30 March which was the date on which it actually commenced. The magistrate pointed out that on 1 December 2010 five State witnesses were present and had to be excused. On 21 June 2010 six State witnesses were again at court and had to be excused. One of the witnesses was from Umtata in the Eastern Cape. On 8 November 2010 the witness from Umtata was again present and had to be excused again.

I revert to the exchanges between the attorney and the magistrate on the morning of the 30th March. The magistrate gave the attorney time until 10:30 to prepare for trial. In the circumstances the application for the postponement of the trial was refused. The accused was then asked to plead. His attorney told the magistrate that he is not entering any plea. The magistrate entered a plea of not guilty. Before the first witness commenced with her evidence the attorney advised the magistrate that the accused had instructed him to ask that the magistrate recuse himself. The attorney again asked for a postponement of the matter and the magistrate told him that he had already made a ruling on that issue. The magistrate also refused the request that he recuse himself.

Before the witness was called the attorney placed on record again that the accused wanted the magistrate to recuse himself, but he informed the Court that he had not been able to get proper instructions from the accused. The magistrate once again refused the application. The first witness was about to start with her evidence when there was again an interruption. The attorney informed the Court that he had received instructions not to ask questions and not to proceed with his representation. The attorney was given five minutes to take instructions and he then informed the magistrate that his mandate had been terminated. The magistrate asked him to stay on record and assist the accused. He also asked him to explain to the accused what the consequences of his withdrawal would be. The attorney discussed this with the accused

but the accused told him that he has told the attorney to leave. The attorney then left and the accused informed the Court that he wanted someone else to defend him, who would listen to him. The magistrate informed him that the trial had to proceed. The accused then said he had a headache. The magistrate said the trial must proceed. At this stage the accused said to the Court "it is not your choice, it's my choice, I'm the accused in this case." The magistrate again told him to proceed and he if he caused a nuisance he would have him removed to the court cells. The magistrate asked him to sit down, but he refused to do so. The magistrate again told him that he could proceed without a lawyer, or be taken to the cells. The accused then of his own accord informed the magistrate that he would go down to the cells. The evidence for the State was thereafter led in the absence of the accused.

Ms Megan Dale testified that she was at her flat in Claremont on 1 August 2006. She was the owner of a Volkswagen Citi Golf which was parked outside her flat, it was locked. The next morning she saw that the vehicle was gone. The value of the car was about R35 000. Two policemen came to take a statement from her. Seven to nine months later she was called to the Stikland Police Station where she identified the car. The car's engine was severely damaged and various items in the car had been damaged, or severely tampered with. The damage amounted to about R25 000.

At the end of her evidence the Court Clerk was sent down by the magistrate to the cells to inform the accused that he could return to cross-examine their witness. The accused elected not to return.

The next witness was Constable Sibuyile Booi. In 2007 he was stationed at Nyanga Police. He testified that he went to the premises at 2[...] D[...] Street, Tableview with one Bongani in order investigate the possible theft of a different vehicle, a white Golf. Bongani identified the accused as the person who sold the white Golf to him. Whilst on the premises he saw a blue Golf in a garage. He tested the numbers on the blue Golf and it corresponded to the vehicle which had been stolen in Claremont. He arrested the accused and took the car to the Bellville South Police Station. At the conclusion of this witness's statement the magistrate again informed the accused in the cells that he could question the witness, but again the accused elected not to return attending the trial.

Mr Maritz R Coetzee testified that he is employed in the vehicle registration section of the S A Police Services. On 6 March 2007 he examined the identification numbers on a white Volkswagen Golf car and found that it corresponded with a stolen vehicle reported at Diep River Police Station with original numbers plates C[...]. Mr Bongani Ntengo was the next witness. The magistrate again explained to the appellant that he was entitled to participate in the trial. He indicated that he did not want to take part. Mr Ntenga testified that he purchased a white City Golf registration C[...] from one Joe for R40 000. The accused promised to send the papers of the car to him in Umtata but he did not do so.

He came to Cape Town, that is now the witness, Ntenga, came to Cape Town and the accused gave him temporary papers and told him that the permanent papers would follow. They again did not arrive. He came to Cape Town and took the car to the police where it was examined by Mr Booi. He took Mr Booi to the house of the accused in Tableview where the accused was arrested. He never received the sum of R20 000 that he had paid for the car.

Mr Andy Swart testified next for the State. He testified that he bought motor vehicle C[...] through an insurance company and sold it to Barnard Auto Spares. The vehicle was deregistered by him. The purpose was to cancel or scrap the vehicle.

Mr Dean Cannell testified that he was at his home at […] C[...] Road in Meadowridge, Cape Town. He was the owner of a white Golf 3 motor vehicle. At about 8 am on 21 January 2007 he found that his car was not where he had parked it the previous night. He reported it to the police. The registration number was C[...]. It's value was about R45 000. The police recovered the vehicle later. He identified it at Stikland by the engine number and items such as the leather interior, the wheels and the steering wheel. The damage to the vehicle was about R15 000.

Mr Sidney Spencer worked at Barnard Auto Spares. He testified that they bought the vehicle, C[...], to break up for spares. They bought it from H and H Spares in Wellington. The various parts of the vehicle was sold and the rest was sold to a scrap metal dealer. They still had the registration papers for the vehicle which meant that it had not been sold by them.

That concluded the evidence for the State. The magistrate caused the accused to be brought into court. He explained his rights to him. The accused said that he was not going to testify as he knew nothing about the case. He also declined the invitation to listen to the prosecutor's address.

The magistrate gave judgment on 1 April 2011, the accused was brought up from the cells and he said that he wanted to listen to the judgment. The magistrate dealt fully with the events that gave rise to the accused absenting himself from the proceedings. He then summarised the evidence presented by the State. The magistrate said, in short, that there was no reason to question the reliability or credibility of any of the evidence given by the State witnesses. He found that in all the circumstances of the case the accused had the two cars in his possession and that he must have been aware of the fact that they were stolen cars. He accordingly convicted the accused on both counts.

The matter was postponed for sentence to 23 May 2011. The accused was then legally represented and at this stage he elected to give evidence himself. He testified that his current age was 36 years old, his highest level of education is standard 8, he has six

children, they are all dependant upon him as well as two children of his brother. He was running a few small businesses before he was arrested, namely a construction company and a tavern and he also sold clothes. He estimated that he paid about R6 000 per month for the maintenance of his dependants. Appellant admitted that he had previously been convicted for possession of stolen property. He was convicted on 27 May 2010 and sentenced on 27 May 2010. I may add in parenthesis that this was not in the circumstances regarded as a previous conviction as such, and the magistrate did not take it into account as a previous conviction.

The magistrate then sentenced him to three years imprisonment on each charge, that is six years imprisonment in total. Ms Sussana Kuun appeared on behalf of appellant on appeal. She attacked appellant's convictions in the first place on the grounds that he did not have a fair trial in that the evidence was led in his absence and he did not have any legal representation. I do not agree. As to his absence, he himself elected to depart from the proceedings. The magistrate did not force him, provided he behaved himself properly which he elected not to do.

The provisions of Section 159(1) of the Criminal Procedure Act 51 of 1977 is applicable in this situation. It reads:

> "If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impractical the Court may direct that he be removed and that the proceedings continue in his absence."

This section is dealt with in the commentary in the work of Hiemstra's Criminal Procedure at page 22/41, and the author says ***inter alia*** the following:

> "it is also desirable to cause the accused to be brought back at a suitable time for the Court to see whether they have realised that they should change their attitude

The author refers here to authority.

> "It may even be desirable if at all possible to allow the case to stand down for a postpone in order to allow the accused to come to their senses. The accused shall also be informed pertinently that the case can proceed in their absence. Given that real prejudice can follow such removal it is submitted that the presiding officer should also inform the accused of such possible prejudice. The events in Mokoa, one of the cases mentioned, underlines the fact that patience is an indispensable component of judicial conduct."

It is not necessary to repeat the facts that preceded the appellant's election to absent himself from the trial. In my view the magistrate fully complied with each and every one of the precepts set out in the passage which I have quoted above, in fact the magistrate in my view exhibited an admirable degree of patience in this matter.

As to the question of appellant's lack of legal representation the facts again speak for themselves. He was given ample opportunity to be ready for trial. He had a number of legal representatives before. He knew that he had to be prepared and that he would have had to consult with his attorney before the appearance. Yet he arrived without any consultation or preparation shortly before the trial was about to commence. In my view in these circumstances the magistrate did not err in deciding to proceed without any further postponement.

Ms Kuun's second attack on the conviction is that the Court relied on the doctrine of recent possession and that it had not been shown that the two vehicles had been stolen recently, that is recently before the discovery of them in the possession of appellant. I must point out first that one is not dealing here with any legal doctrine, one is simply dealing with a presumption of fact, which will arise, or may not arise, from the facts. The period between the commission of the offence and the date on which the stolen article was found in the possession of the appellant is but one of the factors from which an inference of guilt can be drawn.

In the present case there are two other important factors. The first is that the appellant never furnished an explanation for his possession of these vehicles, not at the time when he was arrested nor at the trial. If he had an innocent explanation it would not have been difficult for him to convey that to the Court even after he had not listened to any of the State evidence.

The second factor is that appellant was found in possession, not only of one vehicle, but of two stolen vehicles which had been stolen on two separate occasions. In these circumstances it is not reasonably possible that he could have been innocent in respect of both these vehicles. Such a coincidence can in my view practically be ignored.

Ms Kuun also submitted that the sentences imposed by the magistrate are shocking, startling or disturbingly inappropriate. Once again I do not agree with the submission. It appears from the judgment on sentence that the magistrate adopted a balanced approach. In State v Gerber 2006(1) SACR 618 SCA Conradie, JA provided a brief survey of sentences recently imposed for motor vehicle theft. It appears from this that a sentence of three years imprisonment tends towards the lower end of the range. In the circumstances I am not persuaded that the magistrate erred at all.

APPELLANT'S APPEAL AGAINST THESE CONVICTIONS AND SENTENCES ARE

ACCORDINGLY DISMISSED THE CONVICTIONS AND SENTENCES ARE CONFIRMED

BLIGNAULT, J

I agree.

ROGERS, AJ