IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

High Court Review Ref: 15242/2015
Kuils River Magistrates' Court case no. B517/2014
Kuils River Magistrates' Court serial no. 06/2015

In the matter between:

THE STATE

and

MNCEDISI MAJIKIJELA

REVIEW JUDGMENT

BINNS-WARD J:

[1] This matter came before me on automatic review in terms of the Criminal Procedure Act 51 of 1977 ('the CPA'). The accused, who claimed to be a scavenger, had been charged in the district court with the theft of assorted property of which he had been found in possession by patrolling policeman when he acted suspiciously and cast away the bag in which he had been carrying it when he noticed the policemen approaching. He entered a plea of not guilty and maintained that the money that was amongst the contents in the bag was his own, while the rest had been picked up by him, having been apparently abandoned. He was convicted of the offence as charged and sentenced to a fine with the option of imprisonment, the whole of which was suspended for five years on the usual conditions.

[2] On considering the record of the trial proceedings it seemed to me that, although it had been established that the property in question had probably been stolen, the evidence fell short of proving beyond reasonable doubt that it had actually been stolen, or that the accused actually knew it was stolen. I therefore queried whether the accused should not rather have been convicted of having committed the offence created in terms of s 36 of the General Law Amendment Act 62 of 1955 ('the

GLA'). That is a competent verdict on a charge of theft by virtue of s 264(1)(b) of the CPA. Section 36 of the GLA provides:

> Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.

[3] The trial magistrate resisted the proposition that a conviction in terms of s 36 of the GLA should have been entered. In a detailed response to my query, the magistrate reasoned that theft was a continuing offence and that it was not necessary for the state to prove who the owner of the property was, as property could even be stolen from a person who was himself in possession of it by reason of having stolen it. Reference was made to the following statement by Mthiyane AJA in *S v Cassiem* 2001 (1) SACR 489 (SCA) at para 8, '*By the same token, contrectatio and knowledge of the theft need not be proved by direct evidence. Their existence can be inferred from the facts and circumstances of the case*'. The magistrate also cited *S v Luther en 'n Ander* 1962 (3) SA 506 (A).

[4] It became evident upon a consideration of the magistrate's response that she had not been astute to the need for the state to have proved all the elements of the offence, including *contrectatio* and *animus furandi*.

[5] The statement from *S v Cassiem* relied upon by the magistrate was cited without due regard to its context. In that case the accused had been found in possession of a significant quantity of goods in circumstances that established beyond reasonable doubt that they had been stolen from one or more branches of various identified retailers, being Woolworths, Foschini and Edgars. The point taken by the appellant in that case was that *contrectatio* had not been proven because the evidence had not identified from which branches of the aforementioned outlets the goods had been taken. The court disposed of that argument at para 9-10 of the judgment as follows:

> I turn to the issue whether the State succeeded in proving the theft. There is no doubt in my mind that this question must be answered in favour of the State. The items of clothing found in the appellant's house were all new; they bore the price and name tags of various stores such as Woolworths, Edgars and Foschini. A large quantity of goods valued at R59 832,52, was found and on the probabilities neither the appellant nor her husband (who was a gardener)

could afford the same. Some of the items were still in the hangers bearing the names of the above-named stores. These factors coupled with the fact that the appellant gave different versions regarding the acquisition and ownership of the goods leads to no other conclusion than that the goods were stolen. The argument that there was no identifiable complainant because the complainants could not prove the loss at their respective branches, is without substance. The charges were formulated widely enough to cover goods stolen from any branches. I agree with the magistrate's finding that if one has regard to the evidence as a whole it was clearly proved that the goods were stolen from the manufacturers or at the distribution points of the above mentioned stores. Theft, being a continuous offence, it made no difference that the goods may not have been removed from the branches of the respective complainants or that the appellant was not involved in the original removal (*contrectatio*) of the goods. Her subsequent participation in disposing of them makes her just as guilty as the original thief.

[10] Turning to the question whether the appellant was aware that the clothing was stolen, there can be no doubt that the appellant was so aware. She did not want to disclose her residence to the police and deliberately lied to Sergeant King about where she lived. Her explanation that she told the police that she lived at her daughter-in-law's place because that is where she was going to spend the night, is so improbable that it was rightly rejected by the magistrate as false beyond a reasonable doubt. When the appellant got to her residence she was reluctant to let the police into the house. They only managed to get in purely fortuitously. The different versions given to the police as to the acquisition and ownership of the clothes is also a factor which bears on whether the appellant knew whether the clothing was stolen. I agree with the submission that her initial version that the clothing belonged to her daughter was an attempt to shift the blame away from her husband. But after her husband died he was then conveniently alleged to have been the owner of the clothing. Allied to this factor is the question whether she asked her husband where he had obtained the clothing. It is to my mind unlikely that the appellant would not have asked her husband about the source of the goods. Furthermore the appellant had been receiving clothing from her husband for two years prior to her arrest. It seems to me that she must have been alerted to the fact that there was something amiss about these goods, when her husband kept on saying *'hou jou mond op*' whenever she asked him where the clothing came from. If it had been acquired innocently it should have been clear to any adult that there would have been no reason for him to keep on saying that she should keep her mouth shut. Her husband was just an ordinary gardener employed at a government hospital but he repeatedly brought home four plastic bags full of clothing every weekend. It should have been plain to her that the goods were stolen. In the circumstances I am satisfied that the State has succeeded in proving that the appellant was aware that the clothing found in her possession was stolen.

[6] It is clear from Mthiyane AJA's summary of the facts in *Cassiem* that the factual context of the matter differed materially from that in the current case. Ownership of the goods was identifiable and the evidence concerning the

circumstances of the appellant's receipt of such goods over a prolonged period proved that she must have been aware that they were stolen. The only point of comparison between the two cases is that the accused in the current case gave contradictory explanations for his possession of some of the goods, as did the appellant in *Cassiem*. The giving by the appellant in *Cassiem* of two different explanations for her possession of the goods was, however, just one further incriminating factor in the factual matrix of that case considered as a whole. It is clear that it would not have been enough, on its own, to prove that she had known that goods had been stolen. Conflicting explanations as to their possession of the goods are just as likely to be elicited from possessors of property reasonably believed to be stolen, as they are from persons who actually stole it.

[7] The magistrate's reference to *S v Luther* was also misplaced. The statement by Van Blerk JA, at 511A of the judgment, on which the magistrate relied, was '*Aangesien hul besluit het om die masjien op te tel en nie geweet het wie die eienaar daarvan is nie was die aangewese weg, en die veiligste vir hul, om dit aan die polisie te oorhandig*'. The statement had no bearing whatsoever on whether the appellants in that case had been properly convicted of theft. In fact, their appeal against their conviction on a charge of having stolen the machine was upheld. The appellants in that case, who were two traffic policemen, had picked up a machine on the side of the road in Lyttleton, Pretoria. It was obviously brand new and was contained in a box marked with particulars indicating that it had been despatched by Cutler and Wilson (Pty) Ltd to Burroughs Machines Ltd in Pretoria. The appellants had made enquiries about the value of the machine at Burroughs Machines and evidence had been adduced that they had taken steps to try to sell it there at a discount to its commercial value. The appellants, however, offered an innocent explanation for their possession of the goods and conduct at the premises of Burroughs Machines, which the appeal court - differing in that respect from the trial court and also the Transvaal Provincial Division in a first appeal - held could reasonably possibly have been true. Mr Justice van Blerk nonetheless remarked in passing, having already found that the appeal would be upheld, that the appellants' conduct '*was* [nie] *wat mens sou verwag van verantwoordelike persone in hul posisie nie; en hul het dit seker net aan hul self te danke dat hul in die strafhof beland het, want hul onbesonne optrede kon lig die indruk gewek het dat hul gesind was om die masjien toe te eien*'. It was

in that context that the statement relied on by the magistrate was made. It has no bearing on the issue raised in my query.

[8] There was no evidence in the current case, apart from his own unsatisfactory explanations, of the circumstances in which the accused came into possession of the goods. Circumstantial factors of the sort that were able to support a conviction in *Cassiem* supra, were lacking. The state did not prove that the accused came into possession of the goods *animo furandi*. It did prove that he was in possession of goods in regard to which there is reasonable suspicion that they had been stolen and that he had been unable to give a satisfactory account of such possession. The accused could therefore not properly be found guilty of theft, but he could be convicted of the offence created in terms of s 36 of the GLA.

[9] The magistrate, however, seemed to consider that the failure of the prosecutor to have included a charge in terms of s 36 of the GLA in the charge sheet, or to have expressly advised the accused during the proceedings that the state might ask for the competent verdict precluded resort to s 264(1)(b) of the CPA. In this regard, she relied on the *dictum* of Nicholas AJA in *S v Mwali* 1992 (2) SACR 281 (A), at 284*b-c*, that '*It is well established that it is desirable that, if the State contemplates asking for an alternative verdict in terms of s 264(1), the offence concerned should be formally charged as an alternative, or it should be brought to the notice of an accused during the course of the trial that he can be convicted of one of the offences mentioned in s 264(1).*' Yet again, however, the magistrate has failed to put the statement that she has relied on its context. The sentence she has quoted appears in the following paragraph of the judgment, in which the learned judge of appeal, after recording the prosecutor's concession that the conviction on a count of theft could not stand, and noting the state's argument that it should be substituted with a conviction under s 36 of the GLA, said:

> That would be a competent verdict in terms of s 264(1)(b) of the Criminal Procedure Act 51 of 1977. The possibility of such a conviction was not brought to Mwali's attention at any stage, but the decided cases show that that is not necessarily a bar to such a course. It is well established that it is desirable that, if the State contemplates asking for an alternative verdict in terms of s 264(1), the offence concerned should be formally charged as an alternative, or it

> should be brought to the notice of an accused during the course of the trial that he can be convicted of one of the offences mentioned in s 264(1). Even though neither course be followed, however, the accused would not be entitled to succeed in an appeal against or review of the conviction unless it appeared that he was prejudiced by the failure. See *R v Dayi and Others* 1961 (3) SA 8 (N) at 9E-G; *S v Mogandi* 1961 (4) SA 112 (T) at 114A; *S v Arendse en 'n Ander* 1980 (1) SA 610 (C) at 613A-B; and *S v Human*1990 (1) SACR 334 (C) at 336-8.)

[10] In *Mwali*, the appeal court in fact entered a conviction in terms of s 36 of the GLA notwithstanding that the accused had not been alerted during the trial to the possibility of such an eventuality. It held that to be a competent result in the absence of any indication that the appellant had been prejudiced by the omission. That actual prejudice is the test was confirmed in *S v Jasat* 1997 (1) SACR 489 (SCA) ([1997] 2 All SA 63), at 494*a* (SACR), (per Nienaber JA).

[11] Having regard to the facts of the current case, there is no reason to believe that the accused could, or would, have conducted his defence differently had he been alerted to the competent verdict. Thus, on the approach enunciated in *Mwali*, there was no bar to the competent verdict being pronounced.

[12] The goods found in the accused's possession included a certain sum of cash, which he claimed belonged to him. In *R v Monyane* 1960 (3) SA 20 (T), and *S v Boshoff* 1962 (3) SA 175 (N), it was held that the word 'goods' in s 36 of the GLA did not include notes or coin in current circulation. However, in *S v Ganyu* 1977 (4) SA 810 (RA), MacDonald CJ (Beck AJA concurring), after a critical consideration of those judgments, took a different view of the import of the wording in subsections 14(1) and (2) of the Miscellaneous Offences Act, Chap. 68, which were the similarly expressed Rhodesian equivalent of ss 36 and 37 of the GLA, and held that there was no good reason to exclude money in any form from the ambit of 'goods'. The interpretation of s 36 in the relevant respect does not appear to have been revisited in any reported judgment since the judgment in *Ganyu*. In my respectful view, the reasoning in *Ganyu* is compelling, and therefore, for the reasons given in that judgment, I am disinclined to follow the earlier Transvaal and Natal decisions.

[13] The cash found in the possession of the accused in the current case was contained in a purse, which had in it other material that suggested that it must have belonged to someone other than the accused. The context thus supported a reasonable suspicion that the money had been stolen.

[14] In the circumstances the conviction on the charge of theft will be set aside and a conviction in terms of s 36 of the GLA substituted in its stead. There is no need to alter the sentence imposed, which will be confirmed.

Order

1. The accused's conviction on the charge of theft is set aside.
2. A conviction in respect of the offence in terms of s 36 of the General Law Amendment Act 62 of 1955, to wit, of being found in possession of the property described in the charge sheet in regard to which there is reasonable suspicion that it has been stolen and being unable to give a satisfactory account of such possession, is substituted for the aforementioned theft conviction.
3. The sentence imposed by the magistrate on 30 January 2015 is confirmed.

A.G. BINNS-WARD
Judge of the High Court

BOZALEK J:

I agree.

L.J BOZALEK
Judge of the High Court