IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A 260 / 2021

In the matter between:

MAZWI NKOSI First Appellant

VUYILE MALITI Second Appellant

and

THE STATE Respondent

Coram: Binns-Ward et Wille, JJ

Heard (By agreement, the matter was determined on the papers in accordance with section 19(a) of Act 10 of 2013).

Delivered by email to the parties' legal representatives: 19th of April 2022

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an appeal from the lower court directed solely against conviction in connection with both appellants. Both appellants were legally represented and they both pleaded not guilty and reserved the right to remain silent. Both the appellants were charged with and convicted for the theft of a motor vehicle.[1] In addition, the first appellant was convicted of reckless and negligent driving. He also appeals this conviction. The facts of the matter are uncomplicated. The application of the law to these facts, remains somewhat more complicated.

[2] The prosecution presented the testimony of (3) witnesses and both the appellants' testified in their own defence. The appellants also called a witness. The witnesses on behalf of the prosecution may be described as the 'arresting' witnesses. The evidence was that the subject motor vehicle was stolen from the complainants during November 2016. The vehicle was stolen

[1] The motor vehicle was an Audi A4 motor vehicle bearing registration number - CA 468297.

in Cape Town.[2] This stolen vehicle collided with another vehicle.[3] This, after an attempt to evade the police after a high-speed car chase.

THE CASE FOR THE PROSECUTION

MR MKAITSHWA

[3] He is a member of the flying squad attached to the police. One evening he was on duty with his partner in a marked police vehicle.[4] He was a passenger in this vehicle. He received a radio report to the effect that some of his colleagues were in pursuit of what was suspected to be a stolen motor vehicle in the area. Shortly thereafter, he observed these colleagues[5], in a high-speed car chase, in pursuit of the stolen motor vehicle.

[4] A collision occurred between the pursued vehicle and another vehicle. When he arrived on the scene he was met by (2) of the witnesses for the prosecution.[6] He was pointed in the direction of the alleged suspects who had fled from the pursued vehicle. He observed an unknown black male dressed in maroon clothing.[7] He observed this fleeing suspect attempting to scale a wall in the nearby vicinity adjoining certain residential premises. He pursued this suspect and apprehended him. This is the second appellant. Upon questioning, he was told by the second appellant that he (the second appellant) was attending to some repair work to the property upon which he was arrested. In addition, he enquired from the owner of the property as

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2 From the complainant's residence in '*Tamboerskloof*' in Cape Town.
3 On the 4th of December 2016.
4 At about 19h00.
5 Attached to the 'Canine Unit' of the police.
6 Mr Flink and Mr Olifant.
7 A maroon 'T-Shirt'.

to the veracity of the version offered up by the second appellant. The owner stated that the second appellant did not reside on the property.

MR FLINK

[5] He too, is a member of the police and was on duty on the day in question. He was the driver of a marked police vehicle with a colleague, as his passenger.[8] They observed the suspect motor vehicle and proceeded to pursue it. A high-speed car chase followed and they in turn reached very high speeds in pursuit of this stolen vehicle.[9] The pursued motor vehicle thereafter collided with another vehicle. This, causing injuries to the occupants of this latter vehicle.

[6] Immediately after this collision, he observed the driver of the pursued vehicle and the passenger alight from the vehicle and they both fled the scene. The driver was dressed in a black shirt and a pair of blue jeans. The passenger was dressed in a white shirt with a long sleeve maroon shirt and a pair of blue jeans. According to this witness, the first appellant was the driver of the pursued vehicle and, the second appellant was a passenger in it.

[7] He pursued both appellants on foot and never lost sight of the first appellant. At some point the appellants separated and went their separate ways. He apprehended the first appellant with the help of his colleague. He emphasized that he never lost sight of the first appellant once he (as the driver), had alighted from the pursued vehicle. Further, he testified that as he was

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[8] Mr Olifant.

[9] Speeds of between 140 and 160 kilometers per hour were reached. This, in a '60-kilometer' restricted speed zone.

running (in pursuit of the appellants), he was able to observe them when they looked back at him.

MR OLIFANT

[8] He confirmed the testimony of the witness referred to immediately above. He testified that his firearm was drawn but that no shots were fired during the arrest of the appellants. He was unable to testify to any of the facial features of the appellants, but he could give evidence as to the general appearance and build of the two appellants.

FORMAL ADMISSIONS

[9] It was the subject of an admission that the vehicle that the police had chased after was the complainants' vehicle and had been stolen from their residence. Further, that this vehicle was later found after it had been involved in an accident on the 4th of December 2016. It was admitted that the other vehicle to the accident had also been severely damaged. Finally, the accident occurred after a high-speed car chase with the police. The fact that the pursued vehicle was that which had been stolen from the complainants was confirmed after the arrest of the appellants in the circumstances described above.

THE CASE FOR THE APPELLANTS

THE FIRST APPELLANT

[10] The first appellant places himself in the area with the second appellant. Initially, they were travelling together by taxi. They went to visit a friend[10] while waiting for repairs to the second appellant's vehicle to be completed. Thereafter they proceeded on foot together. Whilst on route they heard gunshots being fired. The first appellant denied having stolen the vehicle on the day in question and denied ever driving the stolen vehicle. It was a matter of mistaken identity. The first appellant disclosed that the police had mistaken him for 'Aja' after they arrested him.

THE SECOND APPELLANT

[11] The second appellant testified that his vehicle had broken down and that he had taken it in for repairs. The appellants decided to visit their friend[11], as mentioned by the first appellant. They waited at this friend's residence for the repair mechanic to contact them. Thereafter, they left their friend's residence to collect his vehicle which had now been repaired. On reaching the main road they heard gunshots being fired and he ran in the direction of his friend's residence. He was then arrested by the police. He denied that he was ever a passenger in the stolen motor vehicle and his defence too, is one of mistaken identity. He also made mention of the alleged involvement of a person by the name of 'Aja'. Both the appellants ate and drank when they were at the residence of their friend.

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[10] Aka 'Buti'
[11] Aka 'Buti'

MR MAFTBENI (AKA 'BUTI')

[12] He is a friend to both the appellants. They were at his home on the day in question. He then left his home because he had to go to the gym. Significantly, when he left for the gym on the day in question, he did not hear any gunshots at all. He was also on foot. Further, he testified that anyone coming to visit at his house, would not have enjoyed any liquor, because at that stage he did not consume alcohol at all. This due to his fitness regime.

CONSIDERATION

[13] In *Cassiem*[12], the following was aptly stated in connection with the crime of theft, namely;

'...It has been accepted by our courts that theft is a 'continuing crime'. By this is meant that 'the theft continues as long as the stolen property is in the possession of the thief or of some person who was a party to the theft or of some person acting on behalf of or even, possibly, in the interests of the original thief or party to the theft…'

[14] The rule that theft is a continuing crime means that the theft continues to be committed if the stolen property remains in the possession of the thief or somebody who has participated in the theft or somebody who acts on behalf of such a person. The rule has two important applications. The first is procedural in nature and with reference to territorial jurisdiction. An accused may be tried and convicted if he is found in possession of the stolen property within the court's jurisdiction even if the crime was committed in another jurisdiction and *vice versa.*

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[12] *S v Cassiem* (261/2000) [2001] ZASCA (8) (8 March 2001) at para [8].

[15] The second consequence of the rule is that as a general proposition, our law draws no distinction in respect of the crime of theft between perpetrators and accessories after the fact. Since theft is a continuing crime, the person who after the commission of the theft assists the thief (who is still in possession of the property) to conceal the property, does not qualify as an accessory after the fact. This, because his assistance is rendered at a time when the original crime ('theft') is still uncompleted. The person rendering the assistance is therefore guilty of theft, and not merely of being an accessory after the fact.

[16] This brings me to the oft quoted 'doctrine' of recent possession. The Supreme Court of Appeal has more recently indicated the proper application of the 'doctrine' of recent possession in *Mothwa*[13].

'The doctrine of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence'

'The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen'

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13 *Mothwa v The State* (124/15) [2015] ZASCA 143; 2016 (2) SACR 489 (SCA) (1 October 2015) at [8] to [10]:

'When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property and the readiness with which the property can or is likely to pass to another person'

'There is no rule about what length of time qualifies as recent. It depends on the circumstances generally and, more particularly, on the nature of the property stolen'

'Courts have repeatedly emphasised that the doctrine of recent possession must not be used to undermine the onus of proof which always remains with the State'

'It is not for the accused to rebut an inference of guilt by providing an explanation. All that the law requires is that having been found in possession of property that has been recently stolen, he gives the court a reasonable explanation for such possession'

[17] In my view, the explanation (or indeed, if no explanation is given) is vital in the adjudication of matters that involve circumstantial evidence, recent possession, and theft as a continuing crime. The explanation in this instance is also multifaceted in law. I say this because the inability to give a satisfactory account is not to be limited to the time when the goods were found in the possession of the alleged perpetrator. The explanation of the possession may be given at any time, including during trial. It will be *'satisfactory'* if it is *reasonably possible* or shows a *bona fide* belief of innocence. This test for awareness of unlawfulness is subjective. The test is one of dishonesty and not one of negligence.

[18] In this case no explanation at all is tendered by the appellants. I say this because the appellants' version of events has been correctly rejected as false. By the same token *contrectatio* and knowledge of the theft need not be proved by direct evidence. In this case the first appellant had *prima facie* possession, at least. Recent possession standing on its own would not ordinarily support a finding of guilt, because it is not inconsistent with innocence. It is however the absence of an explanation which might be reasonably possibly true that gives probative force to the circumstances of such recent possession. If there is no explanation of the possession, then it stands with the fact of no explanation (an explanation which might not be reasonably true is, in legal effect, no explanation).

[19] It is trite that in order to judicially adjudicate circumstantial evidence, in matters in which proof beyond reasonable doubt is required to discharge the onus, the court must rely on inferences. The cardinal rules of logic to be applied were set out in *Blom*[14] as follows;

(i) *'The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn'*

(ii) *'The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct'*

[14] *R v Blom* 1939 AD 188.

[20] What this really means, in my view, is that the circumstantial evidence, ultimately depends on the facts that are proved by the direct evidence. The possibility of an unsafe conviction lies in the fact that a witness may not be telling the truth. It is so that circumstantial evidence is supposed to be less cogent than direct evidence. However, in some cases circumstantial evidence may even be more convincing than direct evidence. No general rules apply. That having been said, one must be acutely aware of the potential dangers that arise when evaluating circumstantial evidence.

[21] The evidence tendered against the appellants must be adjudicated as a whole and the guilt or otherwise, of the appellants, must exist beyond a reasonable doubt. In these peculiar circumstances, if the case for the prosecution is, on the probabilities, credible and, the appellants do nothing to reduce its force, then in that event, the appellants have not done anything to cast any doubt on the case for the prosecution. What follows is then an enquiry as to what is the only reasonable inference to draw to the detriment of the appellants, in these circumstances. The rationalization in *Segalo*[15] is helpful in this connection, with reference to the following remarks;

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities, and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favor of the State as to exclude any reasonable doubt about the accused's guilt...'

[22] It is not incumbent upon the prosecution to eliminate every hypothesis which is inconsistent with the appellants' guilt or which, as it is also expressed, is consistent with their

[15] *Segalo v S* (A543/2010) [2017] ZAGPPHC 41 (14 February 2017) at para [15].

innocence. Of significance and relevant to the facts and circumstances of this case is precisely what was indicated in *Sauls*[16], as follows:

'…The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it, is incriminating…'

[23] Put in another way, this does not mean, as has sometimes been suggested, that the trier of fact is entitled to speculate as to the possible existence of facts which, together with the proved facts, would justify a conclusion that an accused person may be innocent. In *Mlambo*[17], Malan JA, set out in my view the true test to be applied in the circumstances of this case, namely:

'*In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged'*

[24] I hold the view that the evidence against the first appellant is overwhelming. The issue of identification is not a 'live' issue. This, because the witness for the prosecution never lost sight of the first applicant after he alighted from the driver's side of the stolen motor vehicle. He had possession of the stolen vehicle. His version of events was correctly judicially rejected in the lower court. Therefore, legally he gave no explanation of his possession.

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16 *S v Sauls and Others* 1981 (3) SA 172 (A) at 182 G – H.
17 *R v Mlambo* 1957 (4) SA 727 (A) at 738 B.

[25] The next issue that arises is, whether in these circumstances, the first appellant was correctly convicted of theft. Section 36 of the General Law Amendment Act[18], reads as follows:

'Any person who is found in possession of any goods, other than stock or produce as defined in section 1 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'

[26] In terms of section 264 of the CPA[19], a conviction of the offence created by section 36 of the GLAA is a competent verdict on a charge of theft. In my view, the facts of this case, as they find application against the first appellant, neatly and squarely meet all the elements of an offence of a contravention of section 36 of the GLAA. In terms of section 322(1)(b) of the CPA, an appeal court may give such judgment as 'ought' to have been given at the trial. Besides, the first appellant was legally represented throughout his trial and no prejudice results to the first appellant. No failure of justice will occur, should the first appellant be convicted on the competent verdict under the CPA.

[27] This brings me to the legal position of the second appellant. The legal representative on behalf of the second appellant now wisely concedes that the presiding officer in the lower court correctly accepted the evidence of the arresting witnesses who attended upon the scene of the accident, together with the circumstances under which the second appellant was arrested.

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[18] Act 62 of 1955. ('GLAA')
[19] The Criminal Procedure Act 51of 1977 ('CPA').

[28] Further, it is conceded that the evidence tendered by the second appellant was correctly rejected as false by the court *a quo*. The submission now advanced is that the second appellant is not guilty of theft. This, because he merely could have been an innocent passenger in the stolen motor vehicle and thereafter fled from the police. In my view. this bears further scrutiny.

[29] It is undisputed that the two arresting policemen testified that the second appellant hastily fled the scene with (and in the company of) the first appellant. They only split up and went their separate ways when the policemen caught up with them during their attempted escape. What inference, if any, may be drawn from these undisputed facts? This, *sans* any explanation from the second appellant.

[30] Put in another way, if the second appellant was an innocent passenger (as now suggested for the first time), why would he flee the scene with and in the company of the first appellant? Is this enough to show possession or 'appropriation' on behalf of the second appellant of the 'commodity' by way of inferential reasoning with reference to these facts?

[31] On the facts of this case, as far as the second appellant is concerned, his alleged post-offence conduct does not necessarily lead to an indispensable link in the chain of proving his guilt beyond a reasonable doubt. Whilst I harbour a deep suspicion that the second appellant was very much part and parcel of the 'possession' of this stolen vehicle, this is not the test to be applied. Under the circumstances, the second appellant falls to be given the benefit of the doubt.

[32] In the result, I propose that the following order be granted;

1. That the second appellant's appeal is upheld and that the orders of the trial court convicting and sentencing him are set aside and replaced with an order that he is acquitted and discharged.

2. That the first appellant's appeal against his conviction on the count of theft is upheld and that the said conviction is set aside and substituted with the following conviction:

'*In connection with count (1),the first appellant is convicted of a contravention of section 36 of the General Law Amendment Act'*

3. That the further appeals by the first appellant are dismissed and that the sentences imposed upon him in respect of counts 1 and 2 are hereby confirmed.

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WILLE, J

BINNS-WARD J:

[33] I agree that there is no reason to disturb the trial court's finding of fact that the first and second appellants were the driver and passenger, respectively, in the stolen vehicle. It follows that it was established that the first appellant, being the person in control of the vehicle, had it in possession. The appellant's reaction, when he noticed that the police were following him, by driving the vehicle at dangerously high speed through a residential area in an obvious attempt to evade interception, suggests that he probably knew that the vehicle was stolen. That was insufficient, however, to establish that he was party to its theft. It is reasonably possible that he could have acquired the vehicle, or even just borrowed it, knowing that it was stolen.

[34] In determining that a conviction of the charge of theft was justified, the magistrate applied the doctrine of recent possession. The applicability of the doctrine is dependent on the factual context of the given case, for it is nothing more than the product of inferential reasoning; see *S v Mothwa* supra, at para 8 and 9, and also *S v Madonsela* 2012 (2) SACR 456 (GSJ) and *S v Skweyiya* [1984] ZASCA 96; 1984 (4) SA 712 (A) which are cited in the footnotes to the first-mentioned judgment.

[35] Prevailing authority holds that motor vehicles are 'easily circulated' articles, with the result that a court's ability to infer from mere possession of a stolen vehicle that the possessor was party to the theft is quite tightly circumscribed. As the forementioned judgments illustrate, the period of three weeks or so that intervened between the date of the theft of the vehicle and the date on which the first appellant was found in possession of it significantly exceeds the limits

considered in the jurisprudence to be reasonable for the doctrine's application in respect of the theft of motor vehicles.

[36] But that does not put an end to the matter. My Brother, Wille J, has pointed out that a conviction in terms of s 36 of the General Law Amendment Act 62 of 1955 is a competent verdict on a charge of theft. I concur in his judgment that a conviction of the first appellant in terms of the competent verdict would have been appropriate on the proven facts. For that reason we invited the first appellant's legal representative and counsel for the state to make supplementary submissions on the question whether the first appellant's conviction on the charge of theft should not be substituted with a conviction in terms of the competent verdict. We are grateful for the supplementary submissions that were subsequently received from both of them.

[37] There is no indication on the record that the appellants were apprised of the competent verdicts. Ideally, their attention should have been drawn to the competent verdicts at the commencement of the trial. The failure to inform them was not a fatal defect, however, unless a conviction on a competent verdict would render their trial unfair within the meaning of s 35(3) of the Constitution. A determination whether something is fair or not depends on the peculiar circumstances and essentially involves a value judgment made with reference to such circumstances; cf. *S v MT* 2018 (2) SACR 595 (CC) at para 40.

[38] In my judgment, the first appellant's trial was not rendered unfair by his attention not having been drawn to the competent verdict. It is apparent from his evidence that he did not

intend to offer an explanation of his possession of the vehicle. The charge that was put to him was sufficient to alert him to the need, if he judged, as he did, that the state's evidence called for an answer, to give an exculpatory explanation for his possession of the vehicle. He chose not to explain his possession of the vehicle, but instead to falsely deny that he had been found in possession of it.

[39] A criminal trial is not a game. The purpose of informing an accused of the charge with sufficient detail for him to meet it is to afford him a fair opportunity to gather the facts and evidence necessary to properly present his defence, not to assist him to tailor a fabrication. The first appellant gave an explanation for his arrest in connection with his possession of the vehicle. It was a false one. It would be contrived and contrary to the sound administration of justice to allow in the circumstances that had the appellant been alerted to the competent verdict he might have given a different explanation in complete contradiction of the defence that he did advance.

[40] A person convicted of an offence in terms of s 36 is subject to the same penalties as a thief of the property involved would be. In the circumstances, I find no reason to alter the sentence imposed by the magistrate, and against which there was no appeal.

[41] It is for these reasons that I agree with the order proposed by my Colleague in respect of the appeal by the first appellant.

[42] I also agree that the appeal of the second appellant should succeed. I do not consider that it may be inferred from the mere fact he is being conveyed in it that a passenger is in possession of the vehicle and, as with the first appellant, there was no evidence that established that the second appellant was party to the theft. Accordingly, dubious as I also am of his innocence, it was not proven beyond reasonable doubt that he was guilty.

[43] In the result, an order will issue in the terms formulated by Wille J.

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BINNS-WARD, J