
SOUTH AFRICA / JUDGMENT

Kopsani and Another v S (CA & R 123/2017) [2019] ZAECGHC 23; 2019 (2) SACR 53 (ECG) (14 March 2019) [2019] ZAECGHC 23

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M J Lowe, G H Bloem

CASE / FILE NUMBER

CA&R123/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R123/2017

Date heard: 20 February 2019

Date delivered: 14 March 2019

In the matter between

LULAMA KOPSANI

First

Appellant

LUNGILE KEPE

Second Appellant

and

THE STATE

Respondent

JUDGMENT

LOWE, J

INTRODUCTION

- [1] In this matter Appellants were convicted of the theft of two motor vehicles. At the trial there were various alternative charges the most significant being a contravention of Section 36 of the General Law Amendment Act 62 of 1955 – the inability to give account of possession of goods suspected of being stolen. At the trial there were four Accused, First and Second Appellant being Accused 1 and 4 respectively.
- [2] I should mention that counsel for Appellants astonishingly argued this Appeal without a copy of the record (at the Appeal hearing) whether on paper or electronic. This is in my experience unprecedented and undesirable as any reference to the record during argument was then clearly problematic. Counsel's explanation was that his attorney (who was not present at the Appeal) had only furnished him with an electronic copy thereof.

THE

FACTS

- [3] The facts relevant to the charges in this matter can be summarised from the lengthy evidence relating to the theft of two vehicles which were brand new models, the model range not yet having been released

being Velvet Red and Switchblack Silver Cruze motor vehicles, the first a 2.0 LS vehicle and the second a 1.6 LS vehicle.

- [3.1] The following observations facts fell to be accepted:

[3.1.1] In summary two General Motors employees were called to establish that the two vehicles were in the control of General Motors represented by Roche Moore when the theft took place. They were removed from the General Motors premises with their own car keys and an “inside job” was suspected. There is no doubt on the evidence that General Motors owned the two vehicles, that they were stolen but by whom was the first issue. There was no direct evidence in this regard whatsoever.

[3.1.2] The two brand new vehicles, to the joint value of R526,000.00, were stolen from the General Motors factory on the night of the 11-12 September 2012.

[3.1.3] The same two vehicles were recovered by the police on 12 October 2012, one month later, at a spot next to the N2 in the Motherwell area just outside Port Elizabeth.

[3.1.4] Both these vehicles had travelled, in total, approximately 20 to 30 kilometers after having been stolen.

[3.1.5] Information about the vehicles received by the police resulted in a police “sting operation” which led to the recovery of the vehicles.

[3.1.6] Two police officers, Constable Zachele and Warrant Officer Lebaka acted as undercover agents in the said police operation and were set the task of buying the said vehicles, from those holding same.

[3.1.7] Warrant Officer Lebaka was at the time in possession of cash in order to be utilized in the operation to purchase the stolen vehicles.

[3.1.8] All the Accused were arrested under a bridge at the spot where the vehicles were recovered.

[3.1.9] Accused 1 (First Appellant) was arrested by Constable Hempe, Accused 2 was arrested by Constable Bhungweni, Accused 3 was arrested by Constable Bhekwayo and Accused 4 (Second Appellant) was arrested by Constable Sabalele in the execution of their duties as per the planned police operation in the presence of Constable Zachele and Warrant Officer Lebaka.

[3.2] The State called 9 witnesses. All of the 4 Accused testified on their own behalf.

[3.3] The sting operation, according to the State case, was one in which Constable Zachele posed as a buyer of vehicles, making contact with the four Accused and meeting them on the evening prior to the arrest. It was agreed at the meeting that the Constable would buy the vehicles for the sum of R40,000.00 upon delivery thereof the next day. This was denied by the Accused.

[3.4] On the day of the arrest the State's case was that Constable Zachele accompanied by two plain clothes policemen Bhekwayo and Bhungwene drove to a prearranged place meeting a Golf 5 vehicle containing all four Accused. First Appellant discussed the deal with the policemen – he wanted to see the money and First Appellant went to Blue Water Bay to meet policewoman Lebaka who showed him part of the money. They then went back to the meeting spot. The two stolen vehicles arrived driven by Second Appellant and Accused 2. The Golf 5 was driven by Accused 3. Lebaka and other police arrived and the vehicles had been moved. All four Accused were arrested while attempting to flee.

[3.5] First Appellant testified that on the morning of the day of his arrest he was at his house, as he had been the previous evening. During the morning Second Appellant came to visit him and they shared some liquor. At that time a friend by the name of Tyler called First Appellant and asked to be fetched from a hiking spot. As First Appellant had certain problems with his vehicle he called Accused 2 for assistance. Soon thereafter Accused 2 and 3 arrived at his house with a white Golf vehicle that belongs to Accused 2. Accused 3 drove the Golf. Soon thereafter Tyler called and said he was at the hiking spot at Trucker's Inn and they must come and fetch him, which the four of them did in the Golf. Tyler was not at the arranged spot and he called him only to hear that he [Tyler] had moved to a different hiking spot. They proceeded to this place and saw Tyler standing with another gentleman. Shortly thereafter a vehicle stopped and Tyler's

friend was given a lift. While he was conversing with Tyler the police arrived, shots were fired and he (First Appellant) was arrested. He saw the stolen vehicles in the vicinity.

[3.6] Accused 2 testified that First Appellant phoned him on the day of his arrest and asked for assistance to fetch a friend of his who was at Trucker's Inn. He approached Accused 3 and asked him to assist by driving his vehicle as he was under the influence. He and Accused 3 went to First Appellant. The friend called First Appellant and the four of them proceeded to Trucker's Inn. At Trucker's Inn First Appellant made a phone call, as his friend was not there, and they proceeded to a hiking spot next to the N2. They found Tyler at the hiking spot standing with another person. This person got a lift to Queenstown. A mini-bus stopped on the other side of the road, people alighted from the mini bus, firing shots and he was arrested.

[3.7] Accused 3's evidence is similar to that of his co-accused. He drove the white Golf, belonging to Accused 2, to the hiking spot and parked the vehicle. As he approached the hiking spot close to a bridge he saw the stolen vehicles parked under the bridge. He was arrested.

[3.8] Second Appellant testified that he was at the residence of First Appellant on 12 October 2012. They drank beer and later Accused 2 and 3 arrived in a vehicle after which they all left in the vehicle driven by Accused 3. They stopped at Trucker's Inn, First Appellant spoke on his phone after which they drove to the spot where he was arrested. Accused 3 parked in front of the stolen vehicles and First Appellant got out first as he had seen the person who he had come to fetch. He heard shots and was told to lie down and was arrested.

THE LEGAL APPROACH

APPROACH TO EVIDENCE:

[4] In *S v Van der Meyden*[1] the following is stated:

"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."

[5] Importantly, in that case Nugent J warned against separating evidence into compartments and to examine either the defence or State case in isolation. [2]

[6] In summary then it is important to consider the position of both Appellants, the totality of the evidence and to bring into account all material evidence.

[7] The State must discharge the onus that falls upon it to prove its case beyond reasonable doubt, the emphasis thus not falling on the degree of probability but on the degree of doubt.

[8] In this regard I have kept in mind the following passage from *Van der Meyden and Van Aswegen*[3], it is as follows:

“It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is 'completely acceptable and unshaken'. The passage seems to suggest that the evidence is to be separated into compartments, and the 'defence case' examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence.”

[9] It follows from the requirement that the State must prove an accused person's guilt beyond reasonable doubt that the onus rests on it to prove every element of the crime alleged, including that the accused is the perpetrator of the crime, that he or she had the required intention, that the crime in question was committed and that the act in question was unlawful. It also follows from the fact that the onus rests upon the State to prove the guilt of an accused beyond reasonable doubt that no onus rests on the accused to prove his or her innocence and I refer to *S v Mhlongo*[4] and *R v Hlongwane*[5] in this regard.

[10] In order to be acquitted, the version of an accused need only be reasonably possibly true. The position was set out thus by Nugent J (as he then was) in *Van der Meyden* [6]:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383).”

[11] There are not separate and independent tests but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt which will be so only if there is at the time no reasonable possibility that an innocent explanation by an accused person which had been put forward might be true. The two are inseparable, each being the logical corollary of the other.

[12] As was pointed out in *S v Hadebe and Others*[7], there is no substitute for a detailed and critical evaluation of each and every component in a body of evidence but once this had been done it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, it was pointed out one may fail to see the wood for the trees.

[13] Further, in weighing the evidence, this must be weighed against the intrinsic probabilities[8]. In *S v Singh*[9], the following appears:

“The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case.” [10]

THE APPROACH ON APPEAL

[14] In a matter such as this it is well worthwhile reminding of the general principles according to which a Court of Appeal should consider the appeal. In short the Court must bear in mind that the trial Court observed the witnesses in person and could assess their demeanour. If

there was no misdirection of fact by the trial Court, the point of departure is that its conclusion was correct. The Court of Appeal will only reject the trial Court's assessment of the evidence if convinced that the assessment is wrong. Even if the Court is in doubt the trial Court's

judgment

must remain in place. Of course Court of Appeal has greater liberty to disturb the findings of the Court below when dealing with inferences and probabilities. The Court of Appeal does not look zealously for points upon which to contradict the trial

Court's conclusions. The Court of Appeal's doubts about the trial Court's correctness on the facts are insufficient to set aside the decision. If however the Court of Appeal is convinced that the trial Court reached an incorrect factual conclusion it will reject the conclusion. One must of course not only analyze the trial Court's findings but also its

reasons.

[15] The reluctance of the Court of Appeal to depart from the Magistrate's credibility finding has long been maintained. In this regard it is of course true that not every error made by witnesses, not every contradiction or deviation necessarily affects the credibility of a witness. These issues must be carefully weighed viewing the evidence as a whole in order to decide whether the truth has been told despite possible shortcomings[11].

THE MAGISTRATE

[16] The Magistrate found that the two main State witnesses Constable Zahele and Warrant Officer Lebaka made a good impression although their evidence was not without criticism. In a careful analysis of all the evidence the Magistrate, taking into account differences and contradictions found, correctly in my view, that on the whole the State's case was more than acceptable and that the Accuseds' version was not reasonably possibly true.

[17] The Magistrate then concluded as follows:

"There is no direct evidence that the four accused stole the two Chev Cruze vehicles as described in the charge sheet. From the evidence it is clear that during negotiations with the agents of the police they were in possession of the two vehicles. The four accused did not give any explanation for their possession and in fact they denied that they were in possession of the vehicles. I have rejected their defence that they had nothing to do with these vehicles. The only inference that the Court can draw from the accepted facts is that the accused stole these vehicles. It is clear that the four of them acted in concert."

[18] On the appropriate approach the Magistrate's factual and credibility findings cannot be disturbed and I am most certainly not convinced that they are wrong.

- [19] The issue is however whether the inference drawn that the Accused stole the vehicles is justified on those facts.
- [20] I think not. It seems to me that in the light of the evidence it cannot be properly concluded by inferential reasoning that the Accused were linked to the theft sufficiently to justify the conclusion of theft in their hands. In my view this amounted to mere conjecture neither rule of logic as set out in *R v Blom*[12] being satisfied.
- [21] In the result the conviction of First and Second Appellants for theft cannot stand and must be set aside.
- [22] That is however not the end of the matter. This was drawn to the attention of the parties' legal representatives. Prior to argument of the appeal we called for additional heads on the alternative charge raised by Section 36 of General Law Amendment Act 62 of 1955, which provides as follows:

“Failure to give a satisfactory account of possession of goods

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.”

- [23] The elements of the offence are:

“(a) the “goods”;

- (b) X must be found in possession; (c) there must be a reasonable suspicion that the goods have been stolen, and
- (d) X must be unable to give a satisfactory explanation of the possession.” [13]

- [24] In this matter on the acceptable evidence both Appellants and all the Accused were most certainly found in possession of the vehicles concerned – having personal and direct control thereof. This was possession at the time the vehicles were found by the police and upon their arrest. There was at the time a reasonable suspicion that the goods were stolen, an objective test being applied to the facts. At no time, up to and including the Appellants' trial, did any of the Accused give a satisfactory explanation (or any account at all) of their possession of the vehicles (as found by the Magistrate perfectly correctly). This amounts to a refusal to give an account and it can be inferred that the remaining Accused and the two Appellants were unable to give such account.[14]
- [25] Appellants' counsel despite being given an opportunity to do so could not put up any substantial argument to the contrary – those which he did being devoid of any merit whatsoever. In the result the Appellants fall to be convicted of the alternative count being a contravention of Section 36 of Act 62 of 1955.

SENTENCE

[26] The Magistrate in sentencing the Accuseds (and Appellants) correctly applied the relevant legal principles and took into account Appellants' personal circumstances for theft by the Magistrate.

[27] Section 36 specifically provides for the same penalties which may be imposed on a conviction of theft.

[28] I am aware however that it does not follow necessarily that the same sentence be imposed. I can find no reason, however, in the circumstances of this matter to alter the sentence imposed.

ORDER:

[29] The appeal succeeds to the extent that the conviction of theft is set aside.

[30] The conviction however is replaced with the following:

1. 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.
2. The sentence imposed by the Magistrate on 3 February 2017 is confirmed.

M.J. LOWE

JUDGE OF THE HIGH COURT

BLOEM, J:

I agree.

G H BLOEM

Obo the Appellants: Adv B C Harker

Instructed by: Wayne MacGear, Aneesah Campbell, Port Elizabeth

Obo Respondent: Adv M L le Roux

Instructed by: National Director of Public Prosecutions, Port Elizabeth

[1] 1999 (1) SACR 447 (W) at 449j – 450b

- [2] At 499G-I and see also D T Zefferdt, A P Paizes, A St Queen The South African Law of Evidence (2003) pp 151-152. 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] ZASCA 13; 2008 (2) SACR 317 (SCA) at 349f-i and 354b-g.
- [3] (supra)
- [4] [1994] ZASCA 172
- [5] 1959
- (3) SA 337 (A)
- [6] (supra) at 448F-G
- [7] 1998 (1) SACR 422 (SCA) at 426f-h
- [8] See S v Maseti 353/13 ZASCA 160 (25 November 2013).
- [9] 1975 (1) SA 227 (N) 228 G – H
- [10] See also S v Guess 1976
- (4) SA 715 (A) at 718 H.
- [11] S v Dhlumayo 1948
- (2) SA 677 (A) and Minister of Safety and Security and Others v Craig and Others NNO 2011 (1) SACR 469 (SCA) [58]
- [12] 1939 AD 188 at 202-3
- [13] Snyman Criminal Law, 5 ed page 524
- [14] S v Khumalo 1964
- (1) SA 498 N 501 F; S v Majikijela 2015 ZAWCHC 143

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