

SOUTH AFRICA / JUDGMENT

Mothobi v S (A25/2023) [2023] ZAFSHC 308 (8 August 2023)

[2023] ZAFSHC 308**COURT**

Free State High Court, Bloemfontein

BEFORE

D.P. Mthimunya, N.S. Daniso

CASE / FILE NUMBER

A25/2023

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: A25/2023

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

CIRCULATE TO MAGISTRATES: NO

In the matter between: T A MOTHOBHI Appellant and THE STATE Respondent

CORAM: DANISO, J et MTHIMUNYE, AJ

HEARD ON: 24 July 2023

REASONS

BY: MTHIMUNYE, A

DELIVERED ON: Delivered by email to the parties' legal representatives and by release on SAFLII. The reasons shall be deemed to have been handed down at 11:00 on 08 August 2023

[1] Judgment on this matter was handed down ex-tempore on 24 July 2023 with reasons to follow and these are the reasons.

- [2] The appellant was arraigned in the Regional Court of Welkom on charges of theft a motor vehicle to wit a Toyota Etios with registration number FYF[...] (“the Etios”) and for possession of suspected stolen property, to wit a Toyota Hilux bakkie with registration number HHC[...] (“the Hilux”), in contravention of Section 36 of the General Law Amendment Act 62 of 1955. He was convicted on both counts by the learned Magistrate Ramdeyal on 27 September 2022 and sentenced to five years’ imprisonment in respect of the theft and two years’ imprisonment in respect of possession of suspected stole property. Both these vehicles were found parked inside the garage in his place of residence in Thabong township, Welkom, on 23 October 2021 after

being reported stolen on the 21st and 22nd October 2021 respectively. This is an appeal against both convictions.

- [3] The appellant assails the convictions on the following grounds:

- (a) That the court a quo erred in finding that the State had proved the appellant’s guilt beyond a reasonable doubt.
- (b) That the court a quo erred in accepting that there was sufficient evidence against the appellant that he participated in the stealing of the vehicle in Count 1 when there was no video footage from the mall where the car was reportedly stolen, neither was there footage from the Tollgate from Bloemfontein to Welkom and no fingerprints lifted from the vehicle and no cell phone records indicating that the appellant was part of the commission of the crime were obtained.
- (c) That the court further erred in not applying the doctrine of recent possession correctly and gave no consideration to the possibility of the appellant’s version being reasonably possibly true.

Ad Conviction 1

- [4] In proving its case against the appellant, the State called three witnesses namely Ms Elizabeth Strydom (the complainant in Count 1), Constable Mosholiba and Sergeant Aubrey Harmse. Ms Strydom testified that on 21st October 2020 she parked her car (the Toyota Etios) on the first floor of the Waterfront shopping centre in Bloemfontein and went into the shopping centre. On her return her car was no longer there. She reported the matter to the police and the vehicle was recovered two days later (23rd October 2020) in Welkom, whereupon she was called to identify it and she positively did.
- [5] Constable Mosholiba testified that on 23 October 2020, whilst working in Welkom, his unit received information that led them to house 1108 Tladi Street in Thabong township, which is the appellant’s home. As he was driving towards the house, he saw the appellant jump a fence at the back of his house towards the street where he was driving and ran past his car. He did not make anything of it but only realised when he arrived at the given address that it was in fact the appellant’s home they were led to. He knew the appellant as he once visited his house with a colleague and the appellant also used to visit the police station for

assistance when one of his vehicles was reported stolen.

- [6] On arrival at the house, they were met with high walls on the front side of the house but were able to gain access as the gate was not locked. In the garage they discovered the Etios and the Hilux, both of which were reported stolen a day and two days earlier respectively. They recovered the vehicles and only came back a month later to arrest the appellant.
- [7] Sergeant Harmse testified that on 23 October 2020 he also received information that a white Hilux bakkie had been stolen in the Welkom area that morning. The tracking device on the vehicle alerted them of its whereabouts and the track signal led them to the appellant's house where the vehicle was discovered and recovered.
- [8] The complainant on the Hilux theft did not testify as he was said to have travelled or relocated to Dubai.
- [9] The appellant's version was that he did not steal the cars and had no knowledge of how they ended up in his garage. On the day that the vehicles were discovered in his garage, he was in Carletonville where he works. Although the house in Thabong is his family home, he is not always there as he sometimes stays with his wife and children in Klerksdorp and other times he is Carletonville. To prove his alibi, he produced a bank statement that showed that he had made some transactions in Carletonville on the date of the discovery of the vehicles. He testified that during his absence, the house in Thabong is usually looked after by his nephew, Kamohelo. He only got to know about the vehicles when Kamohelo called him on the day the police came and discovered the vehicles. He came back to Welkom a month later to perform a traditional ceremony and in that week, the police came and arrested him.
- [10] In convicting the appellant, the learned Magistrate relied on the evidence of Mr Mosholiba, who was a single witness in respect of the appellant's identification. Mr Mosholiba's evidence faces two impediments; first he was a single witness and secondly his evidence in respect of the identification of the appellant was not uncorroborated, but faced destruction at the production of the Bank statements by the appellant. Cautionary rules apply to evidence of a single witness. In *R v Mokoena* 1982 OPD 79 at para 80 the court held:

"The uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by section 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material aspect."

- [11] In respect of the identification of the appellant by Mr Mosholiba on the day the vehicles were discovered, the Appellate Division, as it then was, in *S v Mthethwa* 1972 (3) SA 766 (A), set out the following approach:

"Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors such as lighting, visibility and eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation;

the extent of his prior knowledge of the appellant, the mobility of the scene; corroboration; suggestibility; the appellant's face, voice, built gait and dress; the result of identification parades; if any, and of course evidence by or on behalf of the appellant. The list is not exhaustive, these factors or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of evidence and the probabilities"

- [12] The factors listed in the above paragraph have to be considered in the light of the totality of evidence and the probabilities and they are not individually decisive, see *R v Dladla and Others*, 1962 (1) SA 307(AD). In casu, although the second state witness stated that he knew the Appellant well, and it was in the morning when he saw him jumping the wall, his evidence in this respect was not corroborated by anyone. The appellant's alibi on one hand was corroborated by the Bank statement that depicted transactions in Carletonville on that particular day. Although it is trite that the accused bears no onus to prove his alibi, the appellant went further and prove it, yet the learned Magistrate rejected it. In *R v Hlongwane* (1959) 3 All SA 308 (A), the Appellate Division, as it then was, gave the following instruction in evaluating the defence of an alibi:

"At the conclusion of the whole case the issues were: (a) whether the alibi might reasonably be true and (b) whether the denial of complicity might reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown failed to prove beyond reasonable doubt that the accused was one of the robbers."

- [13] Despite the contrary version by the appellant that he was in Carletonville on the date in question, the learned Magistrate rejected the appellant's version and accepted Mr Mosholiba's version that he had seen the appellant jump a fence and running on the day of the discovery of the vehicles. In his rejection of the appellant's version, the learned Magistrate stated that the Bank Statement depicts transactions in Carletonville only on 26th October 2010 and this was an error as the transaction in Carletonville were made on 23 October 2020, very same day the cars were discovered. Also, during cross-examination when asked why he did not arrest the appellant on the date of the discovery of the vehicles since he had seen him, Mr Mosholiba said he had to go back to his base station in Kokstad but he had given information to his colleagues on the day that the cars were discovered that he had seen the appellant jump the fence. This does not make sense and in my view, the production by the appellant of the Bank Statements depicting that the Appellant had made a transaction in Carletonville on the same day casts doubts on whether the person said to have been seen by Mr Mosholiba jumping a fence from the back of the appellant's house into the street was indeed the appellant.
- [14] The only link that the learned Magistrate relied on in convicting the appellant was that the cars were found in his home and that Constable Mosholiba had seen him run. The appellant's version and the bank statement indeed casted doubt on Constable Mosholiba's version of having seen him in Welkom on 23rd October 2020. Further in the absence of a footage from the mall and the toll gates from Bloemfontein to Welkom and lack of fingerprints showing that the appellant had touched the cars, there was no direct evidence

linking the appellant to the theft with which he was convicted of in respect of Count 1.

- [15] It is trite that the State must prove its case beyond reasonable doubt and that no onus rests on the accused person to prove his innocence. Further that where there is doubt, the benefit thereof must be given to the accused person. In view of all these factors, it cannot be said that the State proved its case beyond a reasonable doubt. It follows then that this conviction cannot stand.

Ad Conviction 2

- [16] In convicting the appellant on this count, the learned Magistrate relied on the doctrine of recent possession. In terms of this doctrine, "...the court is permitted to make an inference that the possessor of the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence" – *Motwa v S 124/2015 ZA SCA 143* para 8. No evidence by the complainant was given to the court in respect of the Hilux. The only link to the appellant was that it was found in his garage. It was not proven before the court a quo that the appellant had come into contact with the vehicle. No finger prints were lifted from the vehicle to make this link. When looked against his version i.e. that he was not in his house on that day and was not even aware that the cars were at his garage, the court's application of this doctrine was indeed amiss.

Order

Consequently, I make the following Order:

1. The appellant's appeal against both convictions is upheld.
2. Both the appellants' convictions are set aside.

D.P. MTHIMUNYE, AJ

I concur.

N.S. DANISO, J

Appearances: For the Appellant: Mr JD Reyneke Legal Aid SA Bloemfontein Justice Centre For the Respondent: Adv S Giorgi Office of the Director of Public Prosecutions, Free State

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Prepared on 11 October 2026 · Esheria