

SOUTH AFRICA / JUDGMENT

Mothwa v S (CA19/2014) [2014] ZANWHC 32 (6 November 2014)

[2014] ZANWHC 32

COURT

North West High Court, Mafikeng

BEFORE

T J Djaje, D I Matlapeng, N Gutta

CASE / FILE NUMBER

CA19/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

WEST DIVISION, MAHIKENG)

CASE

NO.: CA 19/2014

In

the matter between:

TSUBUKWANE
ELIAS
MOTHTWA
APPELLANT
and
THE
STATE
RESPONDENT
CRIMINAL
APPEAL
MATLAPENG
AJ AND DJAJE AJ

JUDGMENT

DJAJE AJ:

- [1] This is an appeal against a conviction on the charge of robbery with aggravating circumstances as intended in s1 of Criminal Procedure Act 51 of 1977, read with the provisions of s51(2) of the Criminal Law Amendment Act 105 of 1997. The appellant appeared before the Regional Court sitting at Lehurutshe and was convicted and sentenced to ten (10) years imprisonment.
- [2] The facts of this case can be summarised as follows. The complainant in this case, Mr Manganye testified that on 14 September 2012 he was in Soshanguve driving a rented Toyota Corolla. He stopped at a certain house where he waited outside the gate for his wife. Whilst waiting he was accosted by two unknown men. One of the assailants went to the passenger's side and the other one was on his side. He was pointed with a firearm and ordered to get out of the motor vehicle. The two men drove off with the motor vehicle and his wallet. A number of items inside the motor vehicle were also taken including his laptop. He was unable to identify any of his assailants.
- [3] Mr Greyling who is employed at Budget Car Rental testified that he identified the vehicle on recovery as the one rented by the complainant prior to the incident of the robbery on 14 September 2012.
- [4] Warrant Officer Du Plessis testified that he was investigating crimes where stolen motor vehicles were taken out of South Africa at various border posts into neighbouring countries. During his investigations, the appellant was identified as one of the people involved in taking vehicles across the border and coming back on foot. As a result the appellant was blacklisted at all border posts and his photographs posted there as well. On 17 September 2012, Du Plessis was called to the Skilpadhek border post at Lehurutshe area leading into Botswana where the appellant was found in possession of the vehicle in question. The appellant explained to him that one Adam gave him the vehicle to take to Botswana and he was just a driver. He could not provide any of Adam's details or his whereabouts. The appellant was in possession of a document called "Arrival/Departure form" indicating that he was in transit to Bulawayo. Upon inspection of the said motor vehicle, Du Plessis found that it is the one reported stolen three days previously in Shoshanguve. The appellant was also in possession of a registration certificate indicating that the vehicle belongs to one Molamudi. On the basis of the unsatisfactory explanation given by the appellant, he was arrested.
- [5] The appellant's version was that he received the vehicle from Charles in Pretoria who requested him to take it to Botswana and he agreed. He was not aware that the vehicle is stolen; he only knew that it belongs to Charles' nephew in Botswana.

- [6] In convicting the appellant, the Regional Magistrate relied on circumstantial evidence and applied the doctrine of recent possession. This can be seen from the following passage in his

judgment:

“The accused was found in possession of a vehicle. It is possible that a vehicle could easily pass hands, but that is not the only aspect that the court must consider. The court must consider the totality of the facts which would include the false explanation given by the accused for his possession. The accused has given a false explanation in relation to his possession, the vehicle was found in his possession only three days after it was robbed from the complainant. So the only reasonable inference the court can come to concerning all the facts, is that the accused must have been one of the original perpetrators. There is no other reasonable inference to be drawn from all the facts.”

- [7] It was submitted on behalf of the appellant that the court a quo failed to consider that in a period of three days, a vehicle is able to change hands rapidly. In support of this submission reference was made to the decision of *S v Madonsela* 2012 (2) SACR 456 (GSJ) at 458 E. Further argument on behalf of the appellant was that there is more than one inference which may be drawn from the explanation given by the appellant, being that it is plausible that the appellant was indeed requested by one Charles to take the vehicle to Botswana.
- [8] The respondent contended that even though the vehicle was found with the appellant three days after the robbery, it is still sufficient to invoke the doctrine of recent possession based on the explanation given by the appellant to Officer Du Plessis which was contrary to the one he gave in court. The respondent submitted that the appellant in court testified that he was requested by one Charles to transport the vehicle to Botswana whereas Du Plessis testified that the appellant explained to him that he received the vehicle from one Adam. It is further contended that the evidence of the appellant crossing different borders with vehicles and coming back without them was undisputed and cannot be ignored.
- [9] The issue to be decided in this appeal is whether the appellant was properly convicted of robbery with aggravating circumstances based on the doctrine of recent possession. Further that, with the given facts, can it be said that the only inference to be drawn is that the appellant was one of the original perpetrators.
- [10] It is trite law that an inference can be drawn that a person who is found in possession of recently stolen property, is the thief or one of the thieves and that such inference can be drawn where the nature of the goods stolen and the time lapse between the theft and the discovery of the goods in that person's possession lead to such a conclusion. See: *S v Skweyiya* [1984] ZASCA 96; 1984 (4) SA 712 (A) at 715 C-D and *S v Mavinini* 2009 (1) SACR 523 (SCA) par 6.

[11] It is common cause that the appellant was found in possession of the stolen vehicle three days after the robbery at the Skilpadhek border post in the process of crossing into Botswana. The evidence tendered is that this was the vehicle that was robbed on the evening of 14 September 2012 at Soshanguve in the Pretoria area and found on 17 September 2012 at Skilpadhek border post in the Lehurutshe area.

[12] The lapse of time is not the only consideration to be made in dealing with the doctrine of recent possession. It was stated as follows in the case of *S v Parrow* 1973 (1) SA 603 (A) at 604 B-D:

“On proof of possession by the accused of recently stolen property, the Court may (not must) convict him of theft in the absence of an innocent explanation which might reasonably be true. This is an epigrammatic way of saying that the Court should think its way through the totality of the facts of each particular case, and must acquit the accused unless it can infer, as the only reasonably

inference, that he stole the property.”

[13] Upon his arrest, the appellant gave an explanation that he was just a driver of the vehicle, transporting it to Botswana, delivering it to Charles’ nephew. However Du Plessiss testified that the appellant told him the vehicle belonged to one Adam. No further

details of Adam or Charles were given to the police to verify. On inspection of the vehicle there was a document indicating that the vehicle is registered in the name of Molamudi. It was not clarified by the appellant whether this Molamudi is the same person as Charles or Adam. On inspecting the vehicle the police discovered another document indicating that the appellant was on his way to Bulawayo in Zimbabwe and not Botswana as he had explained. The finding by the Regional Magistrate that the explanation given by the appellant was false cannot be faulted as there are a lot of material discrepancies in his explanation.

[14] In the matter of *Zwane and Another v The State* (426/13) [2013] ZASCA 165 (27 November 2013) at par 12 the SCA elaborated further on this issue of false explanation by the accused/appellant and stated that:

*“It is trite that, while the false evidence or false denial of an accused person is of importance in relation to the drawing of conclusions and a finding of guilt, caution must be exercised not to elevate it to a compelling inference that, because an accused person is a liar, he or she is in all probability guilty, since false testimony or a false statement does not always attract the most adverse inference of guilt (see *S v Mtsweni* 1985 (1) SA 590 (A) at 593 H – 594 A). In *Skweyiya* the appellant gave not one, but two false explanations for the presence of stolen goods in the trunk of the motor vehicle he was driving when he was stopped by the police. This, the court held that a false explanation is a relevant consideration, but is not conclusive of guilt (at 716 A-C). In my view the false explanation proffered by the first appellant, absent any other incriminating evidence (my own emphasis), is not adequate proof of his complicity in the robbery.”*

[15] It is important to look at the evidence in its totality to assess whether the guilt of the appellant has been established beyond

reasonable doubt. The Supreme Court of Appeal in *Naude and Another v S* 2011 (2) ALLSA 517 at par 29 followed with approval and affirmed *S v Van der Mayden* 1999 (1) SACR 447 (W) at 449j-450b where the following was stated:

29 “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 is 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”.

Importantly, in that case Nugent J warned against separating evidence into compartments and to examine either the defence or State case in isolation. 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 SACR 317 (SCA) at 349f-I and 354b-g.

[16] In addition to the of the false explanation given by the appellant there is the unchallenged evidence of Du Plessis that the appellant was blacklisted for transporting vehicles across the borders of South Africa into neighbouring countries and his photos were as a result posted at all border posts which is how he was apprehended in this case. In the matter of *Osman and Another v Attorney-General, Transvaal* [1998] ZACC 14; 1998 (2) SACR 493 (CC) Madala J (as he then was) remarked as follows in relation to unchallenged evidence that:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk.” This evidence is crucial and cannot just be ignored.

[17] The complainant could not identify the perpetrators of the robbery as a result there was no direct evidence implicating the appellant except for circumstantial evidence. Circumstantial evidence should not be approached on a piece-meal basis and must be subjected to a consideration of whether it excludes the reasonable possibility that the explanation given by the appellant is true. The evidence needs to be considered holistically taking into account that the inference sought to be drawn must be consistent with all the proved facts and secondly, the proved facts should be such that they exclude every other reasonable inference save from the one sought to be drawn.

[18] Taking into account the distance between the place where the robbery took place and where the motor vehicle was found, the false explanation given by the Appellant and his failure to rebut evidence which ordinarily he would be expected to rebut, the conspectus of all the evidence leads to the inescapable inference that the appellant was one of the original perpetrators of the offence of robbery with aggravating circumstances. Therefore, I am of the view that the appeal against conviction should fail.

ORDER

[19] Consequently, the following order is made:

1. The appeal against conviction is dismissed.

T J DJAJE

ACTING JUDGE OF THE HIGH COURT

I agree

D I MATLAPENG

DISSENTING

JUDGMENT

GUTTA J.

A. GROUNDS FOR APPEAL

[1] The appellant raised the following grounds:

“1. In convicting the Appellant the Court erred in making the following findings:

1.1 The only reasonable inference the court can come to concerning all the facts, is that the accused must have been one of the original perpetrators and that there is no other reasonable inference to be drawn from all the

facts.

1.2 The State proved beyond reasonable doubt that the accused was one of the perpetrators who robbed the vehicle from the complainant.

1.3 The accused has given a false explanation in relation to his possession of the vehicle.

1.4 That the version of the Appellant that he obtained the vehicle from one Charles was a fabrication and did not take into consideration that according to the testimony of Warrant Officer Du Plessis Appellant upon his arrest informed him that the person from whom he obtained the vehicle (Adam) was from Malawi which is the evidence of Appellant under cross-examination that the said Charles was from Malawi.

2. In convicting the Appellant the Court erred in failing to:

2.1 Consider that in the present day and age stolen vehicles do change hands with amazing speed and disingenuousness.

2.2 Consider that in a period of 3(three) days a vehicle is able to change hands rapidly.

2.3 Take into account that none of the other items robbed from the complainant were found either in possession of the appellant or in the vehicle in question.

2.4 Take into account that the registration papers of the vehicle showed that it was registered in the names of one L.P. Molamudi and not the Appellant.

3. In convicting the Appellant the Court further erred in the following respects:

3.1 In making a finding that the Appellant's version is not reasonably possibly true and rejecting his version as false.

3.2 In placing too much emphasis on the fact that the Appellant allegedly gave the name of the person from whom he obtained the vehicle as Adam but in Court mentioned the name Charles."

B. THE ISSUE

[2] The only issue for determination is whether the Court a quo correctly convicted the appellant for robbery with aggravating circumstances based on circumstantial evidence and on the doctrine of recent possession.

C. EVALUATION

[3] The Magistrate, in evaluating the evidence, correctly found that there were "no discrepancies or any criticism that can be levelled" at the evidence of Mr Du Plessis. He was found to be a single witness, his evidence was treated with caution and his evidence was clear and satisfactory in all material respects.

[4] The Court a quo was also correct in rejecting the version of the appellant of how he came to be in possession of the vehicle. He gave Mr Du Plessis the explanation that one Adam, a Malawian, told him to take the vehicle to Botswana and he was just the driver, while the appellant in Court gave a conflicting version that he received the vehicle from one Charles, who requested that he take the vehicle to his nephew in Botswana, and the vehicle belonged to Charles's nephew. The appellant testified that Charles gave him documents to travel to Botswana, including an affidavit but failed to produce the documents in Court.

[5] There were two exhibits presented to the Court, which were found in the vehicle, namely, Exhibit "A" is the arrival or departure form which was to be used at the border post on the Botswana side. The vehicle with registration number [.....] appeared on the document, together the appellant's name, also written in this document in the space provided for an address was "in transit to Bulawayo, Zimbabwe". Exhibit "A" is contrary to his oral evidence that he was delivering the vehicle to Charles' brother in Botswana. Exhibit "B" was a copy of the motor vehicle's registration certificate bearing the name or title holder of L.P. Monamudi, and the vehicle's registration number was [.....].

[6] The appellant was not a credible witness and the Court a quo was correct, when considering the evidence in totality, to reject his version as false and to find that the appellant's version was not reasonably possibly true.

- [7] Although the appellant's version is improbable, the onus still rests on the State to prove beyond reasonable doubt that the appellant committed robbery with aggravating circumstances. See *S v Phallo & Others* 1999 (2) SACR 558 (SCA) at paragraph [10].
- [8] The Court a quo found that as the appellant gave "a false explanation in respect of his possession of the vehicle", and the vehicle was found in his possession only three days after it was robbed from the complainant, that the only reasonable inference is that the appellant must have been one of the original perpetrators and that "there was no other reasonable inference to be drawn from all the facts". Hence, the State's case was based on circumstantial evidence as there was no direct evidence to link the appellant to the robbery. The conviction was based solely on the fact that the appellant was found in possession of the vehicle three days after the robbery and because the appellant gave a false explanation of how he came to be in possession.

Time lapse

- [9] In the unreported case of *Zwane & Another v The State* (426/13)
- [2013] ZASCA 165 (27 November 2013) at paragraph [11], the Supreme Court of Appeal ("SCA") said the following about the doctrine of recent possession:
- "[11] The inference that a person found to be in possession of recently stolen property is the thief or one of the thieves (or, in this instance, one of the robbers) can only be drawn as the only reasonable inference where the nature of the goods stolen and the time lapse between the theft (or robbery) and the discovery of the goods in that person's possession lend themselves to such a finding (see S v Parrow 1973 (1) SA 603 (A) at 604B-E; S v Skweyiya [1984] ZASCA 96; 1984 (4) SA 712 (A) at 715 C-D; S v Mavinini 2009 (1) SACR 523 (SCA) para 6). The crucial question would be whether the items concerned are of the type which can easily and quickly be disposed of, in which event anything beyond a relatively short time lapse cannot be said to be recently stolen (see Skweyiya at 715E)."*

(Own emphasis)

- [10] Hence, when applying the doctrine of recent possession to a charge of robbery, it is important to consider the nature of the goods involved. The 'goods' in casu is a motor vehicle, which can be easily and rapidly disposed of. For the sake of clarity, a motor vehicle is capable of exchanging hands literally within minutes, and hours.
- [11] As was found in the matter of *S v Madonsela* 2012 (2) SACR 456 (GSJ) at 458E, where the Court held that "in this day and age, stolen vehicles exchange hands with amazing speed and disingenuousness".
- [12] The lapse of time between the robbery and the recovery of the vehicle is three days. In that period, the vehicle could have exchanged hands and could easily have been disposed of. Furthermore, the fact that Exhibit "B", being the vehicle's registration papers, was in the

name of one Monamudi, cannot be overlooked. Mr Greyling testified that the motor vehicle belonged to Budget Rent a Car and the complainant, Mr Manganye, testified that the said vehicle was robbed from him. Hence, Exhibit “B” is falsified. There was no evidence presented of who Monamudi is and why his name appears in the registration papers. One cannot rule out the possibility that the vehicle exchanged hands before it was passed to the appellant to convey across the border. Furthermore, it is common cause that none of the items robbed from the complainant was found in the vehicle or in the appellant’s possession.

- [13] Vehicle theft is rife in South Africa, with many stolen vehicles being sold and taken across the South African borders. It is for this reason, not surprisingly, that Mr Du Plessis identified a syndicate responsible for taking stolen vehicles across the border and blacklisted certain people. Mr Du Pressis identified the appellant as one of the people who took vehicles across the border and blacklisted him. The only inference that can be drawn from this is that the appellant conveys vehicles suspected to be stolen across the border and not that he was one of the perpetrators of the robbery.
- [14] In the circumstances, the learned Magistrate erred by relying on the three day time lapse in support of his finding of recent possession.

False Explanation

- [15] Turning to the issue of the false explanation given by the appellant, the SCA in *Zwane & Another v The State* supra, held at paragraph [12]:

“[12] It is trite that, while the false evidence or false denial of an accused person is of importance in relation to the drawing of conclusions and a finding of guilt, caution must be exercised not to elevate it to a compelling inference that, because an accused person is a liar, he or she is in all probability guilty, since false testimony or a false statement does not always attract the most adverse inference of guilt (see S v Mtsweni 1985 (1) SA 590 (A) at 593H). . .”

- [16] Hence, the Court a quo erred by relying on the appellant’s false explanation, coupled with the fact that the appellant was found in possession of the vehicle three days after the robbery, to make the adverse inference of guilt. There is no other incriminating evidence to support the said inference. Accordingly, I am of the view that the appellant was wrongfully convicted of robbery with aggravating circumstances.

Section 36 of the General Law Amendment Act

- [17] The question that remains is whether the appellant could be convicted of a lesser charge.
- [18] Although the State did not discharge its onus in respect of robbery with aggravating circumstances, the evidence supports a conviction in terms of section 36 of the General Law Amendment Act 62 of 1955, which in terms of section 260(f) of the Criminal Procedure Act 105 of 1977 (“CPA”) is a competent verdict on a charge of robbery.

D.

CONCLUSION

[19] In the circumstances, I am of the view that the conviction should be set aside and substituted with a conviction of contravention of section 36 of the General Law Amendment Act.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 12 SEPTEMBER 2014

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: 06 NOVEMBER 2014

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