

SOUTH AFRICA / JUDGMENT

Sijadu v S (CA&R 84/2013) [2013] ZAECGHC 116 (30 January 2013)

[2013] ZAECGHC 116

COURT

Eastern Cape High Court, Grahamstown

BEFORE

B C Hartle, B Majiki

CASE / FILE NUMBER

CA&R 84/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO:CA&R 84/2013

DATE:

30 JANUARY 2013

NOT

REPORTABLE

In

the matter between

TITO

SIJADU.....Appellant

versus

THE

STATE.....Respondent

APPEAL

JUDGMENT

HARTLE J

1. The appellant was convicted by the regional court sitting in Port Elizabeth together with one other person of the crime of theft of a motor vehicle, each of them having been sentenced to six years imprisonment. The appellant (the second accused in the trial court) appeals with the leave of this court on petition against his conviction.
2. The owner of the motor vehicle, Sunette Strydom, testified that her vehicle, a white Mazda Midge, had been stolen from her mother's

home on 25 February 2006 in Jeffrey's Bay from where she had parked it in their yard behind the gate at 01h30 that morning. All the doors were locked. Both sets of keys were in her possession and the vehicle had a gear lock on it. At 6h00 her mother discovered that the vehicle was missing. A few hours later she was informed by the police that it had been found in Port Elizabeth. She was advised that there was damage to the starter and the right front door lock as well as one of the tyres which had had a blow out. Her vehicle was fixed in Port Elizabeth by her insurers before it was returned to her.

3. At 06h00 on 25 February 2006 Warrant Officer Joubert came on duty at the flying squad in Port Elizabeth. He received information from colleagues of the previous shift that there had been several vehicles stolen in the Jeffrey's Bay area on the night before. The complainant's vehicle was amongst these. He and his partner, Warrant Officer Shearing, proceeded on the N2 towards the Greenbushes off ramp where they lay in wait for the complainant's motor vehicle. It came into sight being driven from the direction of Jeffrey's Bay. When the driver (the appellant's co-accused) saw their marked police vehicle, he suddenly swerved back on to the N2, almost overturning in the process. A high speed chase ensued over a considerable distance. The police vehicle had its blue lights and siren on. They came alongside the vehicle which they suspected was the complainant's although they noticed that its registration plates did not accord with the particulars given by the Jeffrey's Bay police. However Billabong stickers on the back of the vehicle provided assurance that it emanated from that area and they were otherwise satisfied from the description which had been furnished of it that they were on the right track. They tried to force the vehicle off the road in order to bring it to a standstill.
4. Warrant Officer Joubert noticed that the vehicle fluctuated between high and low speed with a puff of smoke in between these changes. He later discovered the reason for this. When they eventually managed to pull the vehicle over - but not before he first took aim with his rifle at the front wheel of the vehicle as if he were about to fire a shot, he noticed that the vehicle was still fitted with the gear lock. As a result it could only travel in second and fourth gear. The vehicle was also still in idle mode when they pulled it over and the ignition key was absent. The driver had a lock breaking device in his hand which warrant officer Joubert instructed him to put down on the floor.

5. On the gear lever itself the police officer noticed several marks or damage which were telltale signs that it had been cut away or sawed to free up the gears. He thereupon noticed a hacksaw on the back seat of the vehicle (which the complainant later telephonically

confirmed was not hers). A glance at the licence disc of the vehicle confirmed this to be the complainant's.

6. After the necessary formalities following upon the accuseds' arrest the vehicle was towed to the safeguarding unit in Greenbushes

and the very tangible incriminating exhibits, i.e. the lock breaker, hacksaw and false number plates were entered into the SAPS 13 register at the Kabega Park Police Station.

7. Warrant Officer Joubert's testimony was confirmed in all respects by Warrant Officer Shearing who was the only other witness

called on behalf of the state. The appellant was arrested by the latter. The information elicited from both accused following their arrest was that they stayed at the same address in Motherwell, but upon follow up neither were known there. The witness had also discovered a cell phone, although he was unable to recall at the time of his testimony whether he had obtained it from the driver or the appellant. It had been ringing the entire time during his interview with the two accused and then at some stage a Short Message Service ("SMS") came through on the phone to the effect that the buyer for the vehicle was waiting in Mthatha.

8. He had been reminded about the cell phone find upon perusing the C-section of the docket in preparation for his testimony at the trial, an extract of which was handed in as an exhibit. According to the entry the accused had given their addresses at 3..... and 3..... G..... Street, N....., Motherwell respectively. These addresses had turned out to be false and that this was a reason to deny bail. The last sentence of the entry reads as follows:

"Driver got SMS that buyer was waiting for car in Mthatha."

9. Under cross examination both appellant and his co-accused had denied the high speed chase or that they had been pulled over in the dramatic manner as testified to by Warrant Officer Joubert. It was also suggested that accused no. 1 had informed the police that the vehicle belonged to one Gcobani Zama. It was put to the witnesses that the police had taken the driver to the home of this person at 1..... V..... Street in K..... Warrant Officer Joubert refuted this especially on account of the fact that the person who resides at the address given was notoriously known to him as a car thief.
10. Not challenged at all by the appellant and his co-accused was the evidence relating to the find of the incriminating lock breaker and the saw. Similarly, nay a word was said during the cross examination of the state witnesses about the compromising manner in which the police said they found the vehicle being driven without a key and haltingly in second and fourth gear because of the gear lock still being in place.

11. The appellant's testimony largely accorded with that of his co-accused. They are friends and were living together. Early in the morning of 25 February 2006 he was requested by his co-accused to assist one Gcobani Zama to change a tyre of a motor vehicle. Zama had come seeking the assistance of accused no. 1. They all proceeded to this vehicle near Greenbushes, having been transported there by Zama in his taxi. There they changed the tyre but Zama left earlier saying that he was rushing to the taxi rank. He had instructed his co-accused to meet him later again at the taxi rank with the vehicle. On their way there they were stopped by the police and arrested. They denied for the first time in their evidence in chief seeing the saw or the lock breaker. Accused no. 1 denied too that a gear lock was fitted. On the contrary, he asserted that it would have been impossible for him to drive the vehicle if this was the case. The appellant said that he did not see a gear lock. Further both denied that the vehicle was being driven at a high speed and that there was a chase between the driver and the arresting officers. Both claimed to have no knowledge that the motor vehicle was stolen. Accused no. 1 had emphasized that he used the key to drive the motor vehicle, an aspect that the appellant was not too clear in respect of. Both denied that there was a text message that came through on either of their cell phones to the effect that a customer was already waiting in Mthatha. Although they agreed that they were originally from the Mthatha area (the appellant being from T..... near Mthatha), they were adamant that they had lived together at the address given in V..... Street, M.....
12. Applying the doctrine of recent possession – it being common cause that the appellant and his co-accused were found in possession of the complainant's motor vehicle less than five hours after the owner had last parked it, the magistrate satisfied herself that it could safely be inferred that they were the persons that stole the motor vehicle from her premises.
13. Upon appeal before us it was submitted by Mr. Xozwa, who appeared for the appellant, that the court a quo had incorrectly convicted the appellant relying on the doctrine. In this regard it was submitted that not only is the vehicle an article which could easily pass from hand to hand, but that the lapse of time since the complainant had last seen her vehicle was not so significantly short as to exclude as a reasonable possibility its passing on already from the hands of the original thief. In this regard the relevant circumstances did not present as the only reasonable inference the conclusion that the appellant was one of the participants in the theft neither did they exclude the reasonable possibility that the appellant and his co-accused might have obtained the goods found in his possession from the original thief or from a receiver. The appellant (and his co-accused for that matter) had in this instance given an explanation which was reasonable and could not be said to have been beyond any reasonable doubt false, so it was submitted on his behalf.
14. The doctrine of recent possession is based on an inference being drawn that the possessor of recently stolen property stole the property. It may be relied on where he cannot give an innocent explanation of his possession and the inference that he stole the property is the only reasonable inference that can be drawn from such possession.

15. The doctrine is to the effect that if three requirements are satisfied the court may (not must) infer that the accused person

stole the goods which were found in his possession. As such the doctrine is simply a common sense observation on the proof of

facts

by inference.¹ The three requirements are: (1) that the goods were stolen (which was common cause in this instance); (2) that the goods were recently stolen; and (3) that the accused person has failed to give an innocent explanation.

16. Notwithstanding the supposed assistance afforded to the state by the doctrine, the onus of proving that an accused person is guilty of theft nonetheless remains on the prosecution throughout. Proof that stolen goods were found in an accused's possession never shifts to him the onus of proving his innocence. If he fails satisfactorily to explain his possession, he may still be entitled to an acquittal because the court is not satisfied, looking at all the evidence, that his guilt has been proved. A fortiori if the accused person gives an innocent account of his possession which may reasonably be true, he must be acquitted even though the court is inclined to disbelieve his account, for it is the prosecution and not the accused person which bears the onus.

17. In *S v V 2* the Supreme Court of Appeal remarked upon the test as follows:

"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

18. No hard and fast rules can be laid down as to how recently the theft must have occurred. Everything depends on the circumstances,

particularly the nature of the goods. The force of the word "reasonably" is really to stress that time is of the essence in considering whether the possession of stolen goods is still suspicious. In *Madonsela v S, Van Oosten J* correctly remarked

that in the present day and age stolen vehicles do change hands "with amazing speed and disingenuousness".³

19. It is common cause that the appellant was a passenger in the vehicle less than five hours after the owner had last parked it safely in her yard behind a gate in Jeffrey's Bay. Can this be regarded as "recent possession" in all the circumstances in the matter? In *Shabalala v S 4* possession of the stolen vehicle on the day of the robbery or the day thereafter was accepted

as sufficient for the doctrine of recent possession to apply. In *S v Mavinini*⁵ the court held that the appellant's possession of the stolen vehicle less than twenty four after a robbery taken together with the "elusive conduct" overwhelmingly suggested criminal involvement in the robbery. In *S v Motale*⁶ possession of the stolen vehicle a month after the theft together with the further facts, that the stolen vehicle had been registered

in the appellant's name with false registration numbers and that the original numbers of the stolen vehicle had been found on the appellant's property, were held to sufficiently prove that the appellant had played a role in the theft.

20. Whilst leaving aside the not too remote possibility taken on its own that the vehicle might have changed hands from the original thief in the five hour interlude, the question must be answered in the affirmative however once regard is had to the totality of the facts.
21. The court a quo accepted, correctly so in my view, that the state's evidence was without blemish. Indeed it was not suggested at all by Mr Xozwa that the magistrate had misdirected himself in accepting the state's version as being reliable.
22. The appellant's defence in this instance was a denial of knowledge that the vehicle was stolen. The innocent construction

placed by the appellant and his co-accused upon their possession of it was that they themselves had been misled by Zama and that there was nothing untoward about their possession of the vehicle at the particular time of the arrest. But this denial is awkward and improbable against the facts found proven, some of which were completely ignored during the cross examination of the state

witnesses. The effect of their testimony ultimately was that the state witnesses fabricated a case that they were involved in a high speed chase; that they had found in the motor vehicle a lock breaker and hacksaw; and that the original number plates had been replaced with false ones. On the contrary the driver insisted that the vehicle had been operated with an ignition key, the appellant being notably vague in this regard. Although the state did not lead any expert evidence concerning the alleged "sms

" that the accused were dealing with a stolen vehicle, the unchallenged evidence, by the time the state closed its case, was that

incriminating exhibits had been found in the motor vehicle and entered into the SAP exhibits register, which fact alone overwhelmingly puts paid to the appellant and his co-accused's version concerning the circumstances under which they say the vehicle was pulled over. The possibility of their innocent possession entirely loses its force against the backdrop of the totality of the

facts accepted by the magistrate, which I have no reason to reject. The appellant was a passenger in a motor vehicle driven without a key to the ignition and with a gear lock still fitted to the motor vehicle. In the driver's possession was a lock breaking device and in the motor vehicle was a hacksaw which had ostensibly been used to try and free the gears. The vehicle could only be

driven in the second and fourth gears. Upon sight of the presence of a marked police vehicle the driver almost overturned the Midge in his haste to make a getaway and thereupon sought to create distance from it in a speed chase which ensued over a considerable expanse before it would be forced to come to a standstill. The vehicle was also found to be fitted with false number plates. All of this overwhelmingly suggests knowledge of, or complicity with, the theft by the appellant.

23. In addition the accepted evidence revealed the absence of any real explanation given by the appellant and his co-accused concerning the possession. It is improbable, as testified to by Warrant Officer Joubert, that if the name Zama had been furnished to him he would not have visited the address furnished by the accused with the vehicle theft in tow since this person was a notorious vehicle thief.
24. I am therefore satisfied that there was no misdirection on the part of the magistrate in finding on the basis of the doctrine of recent possession that the appellant participated in the theft of the vehicle. This inference was safely drawn in all the circumstances of the matter. The appellant's version was entirely unacceptable and properly rejected in my view as being demonstrably false.
25. In the premises there is no merit in the appeal and it is accordingly dismissed

B C HARTLE

JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED:

B MAJIKI

DATE OF APPEAL : 13 November 2013

DATE OF JUDGMENT: 30 January 2013

Appearances:

For the appellant: Mr Xozwa, Justice Centre, Grahamstown.

For the respondent: Mr Mgenge, Director of Public Prosecutions, Grahamstown.

1S v Parrow 1973

(1) SA 603 (A) at 604 B-E.

2 2000

(1) SACR 453 (SCA) at 455 a – c.

3[2012] JOL29104 (GSJ).

4 [1999] 4 All SA 583 N.

52009

(1) SACR 523 (SCA).

6 1997

(1) SACR 321 (B) 323 i – 324 g.

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