IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: A566/2014
DATE: 17/3/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....
DATE SIGNATURE

In the matter between:

JABULANI MAVIMBELA Appellant

and

THE STATE Respondent

JUDGMENT

MOHLAMONYANE AJ:

[1] The Appellant was charged with and convicted of the crime of theft of a motor vehicle in the Regional Court for the Regional Division of Gauteng, held at Benoni on 25 April 2014. He was sentenced to an effective term of imprisonment of ten (10) years.

[2] The Appellant, who was accused no 1 in the Court *a quo*, was charged together with one Victor Thabang Mochela, who was accused no 2 in the Court *a quo*. Accused no 2 is unfortunately not before us on appeal.

[3] In the charge-sheet the State alleged that *"...upon or about 26/10/2010 and at or near BENONI... the accused did unlawfully and intentionally steal a motor vehicle with registration number NYP […] to wit VW CITI GOLF and that the said motor vehicle was recovered on 27/10/201 at ETWATWA..."*.

[4] Both Appellant and Accused No 2 pleaded not guilty to the charge. Appellant's basis of defence was a denial of all the allegations levelled against him. Accused No 2, in explaining the basis of his defence, stated that the motor vehicle alleged to have been stolen was found in the premises which he was renting. The motor vehicle was according to him brought there by Appellant who was in company of two other men. Among them he knew Appellant as Jabu. He stated further that they wanted that he as a mechanic, should fix the ignition system of the vehicle. He assessed the ignition system which he found to have been damaged. As it was at around 06h30, he requested them to leave the motor vehicle with him and to return later.

[5] In terms of section 220 of the Criminal Procedure Act, no 51 of 1977, it was placed on record that Accused No 2 admitted that

the vehicle was found in his possession, but that he did not know it was stolen.

THE STATE'S CASE:

[6] The State called the investigating officer Warrant Officer Sipho Mampane *("Mampane")* whose evidence was briefly as follows: He was attached to the Vehicle Identification Unit of the South African Police Service *("SAPS")* for at least seven (7) years. He stated that sometime in October 2010, he went to Benoni police station in the course of investigating the theft of the said motor vehicle. He booked out Accused No 2 who had informed him that the vehicle was brought to him (Accused No 2) by the Appellant. The investigating officer, together with Accused No 2, went to a place called Proper East, looking for Appellant. It was at around midnight when Accused No 2 pointed out Appellant's home. The latter could not be found, as he was, according to the Appellant's grandmother, no longer living there but with his girlfriend at another section of Proper East, which home she did not know. A young man, apparently the Appellant's younger brother, took them to his brother's girlfriend's home. The young man pointed a shack to them in which the Appellant was found sleeping. He was arrested by Mampane and taken to Benoni police station where he was detained.

[7] The second witness called was Michael Adam Banthan *("Banthan")*. He was in the employ of the Gauteng Traffic Police Department attached to the Community Safety Unit. Among his duties were the tracing and recovering of stolen and hijacked motor vehicles. On 27 October 2010 Banthan was on duty, he had reported for the 6h00 shift and was doing duty along the N12 freeway. His motor vehicle was fitted with a tracker system, which

activated whilst he was so on duty, giving a signal. It was at about 6h30 and the control room personnel informed him that it was a gold coloured Citi Golf motor vehicle which was giving a signal. He and his colleagues tracked the motor vehicle to Etwatwa, at house number 15368 at Maleka section. Upon arrival at that house, they approached the vehicle which was parked. Accused No 2 emerged from the house and he was arrested for possession of a suspected stolen motor vehicle. Upon being questioned as to why the vehicle was at his place, Accused No 2 mentioned to them that someone brought it there. Upon arrival of Banthan and his colleagues at Accused No 2's house, the members of SAPS and the Tracker officers arrived. The police then arrested Accused No 2.

[8] The owner/possessor of the motor vehicle, Mrs Patricia Ann Roux *("Roux")* testified to the effect that she lived at number 11 Surrey Street in Benoni. She stated that at around 22h00 she went to bed after parking the motor vehicle outside. At about 04h00, i.e. the morning of 27 October 2010 when she peeped through the window the motor vehicle was gone. She told the Court *a quo* that the motor vehicle was recovered a few hours after being stolen. She positively identified it after her son returned therewith from the police station.

COMMON CAUSE ISSUES:

[9] The following facts are common cause:

9.1 That the motor vehicle with registration letters and numbers NYP […], to wit a Volkswagen Citi Golf champagne gold in colour, was stolen.

9.2 That the said vehicle was stolen on the night of 26 October 2010, or the early hours of 27 October 2010.

9.3 That the motor vehicle was recovered at the home/house of Accused No 2.

9.4 That the said motor vehicle was recovered a few hours after it got stolen and was positively identified by Roux as her motor vehicle.

DISPUTED FACTS:

[10] The Appellant denies that he knew anything about the motor vehicle. According to him he does not even know Accused No 2, or where he lives. According to the investigating officer, Accused No 2 insisted that it was the Appellant (together with his friends) who brought the vehicle to him, to fix. It has to be noted that it is profoundly significant that Accused No 2 stated in examination-in-chief that he knew the Appellant for at least twenty (20) years. In cross-examination, Accused No 2 persisted that he knew the Appellant very well. This then leads me to the issue(s) to be decided.

THE ISSUE TO BE DECIDED:

[11] The only issue to be decided in this appeal is whether the Appellant was the one who stole the motor vehicle. There is no direct evidence of the theft of the motor vehicle. The question that immediately arises is whether the learned Magistrate erred and misdirected himself in finding that the Appellant's version is not reasonably probably true. I have taken cognisance of one of the grounds of appeal raised by the Appellant, i.e. that the

learned Magistrate has erred in convicting the Appellant on the evidence of a co-accused, who was alleged to have been an unreliable witness.

[12] It is significant to observe that Accused No 2, upon being asked by the investigating officer as to who gave him the vehicle, he, without hesitation, mentioned that it was Jabulani Mavimbela (Appellant).

[13] It was argued on behalf of the Appellant (in heads of argument) and before us that the only evidence that placed the Appellant at the scene of crime was that of Accused No 2. The further submission was that the Appellant gave the police a reasonable explanation, *"... at the first opportunity..."*. The question is: what explanation, if any, did the Appellant give? From the record all what he could proffer was that he knew nothing. That was, in my view, tantamount to giving no explanation at all. The submission is, in my opinion, flawed. It was argued further that Accused No 2 had a motive to implicate the Appellant. What motive if any? At the first opportunity, he revealed the name of the person who had brought the vehicle to him. He was consistent throughout in that regard. According to the Appellant, he knew Accused No 2 by sight, they meet in streets and has had no fight with him. He further contends that he does not know why Accused No 2 would *"choose"* him. He did inquire from him when they were both incarcerated and Accused No 2 alleged he had been assaulted by the police, that is why he *"chose"* the Appellant. It was argued by counsel for the State that the issue of assault was an afterthought because it was never raised with the investigating officer in cross-examination. I agree with that proposition. Upon being confronted with the Appellant's version that he (Appellant) did not know Accused No 2, it elicited the following:

"...he knows that by the way that I know him and he also knows me ... and he knows we are in trouble because of this matter...".

[14] In S v Mavinini, 2009 (1) SACR 523 (SCA) at 528, par. 13 Cameron JA (as he then was, with Kgomo AJA and Mhlantla AJA concurring) stated as follows:

> *"The general requirement that a witness must be confronted with damaging imputations is not a formal or technical rule. It is a precept of fairness. That means it must be applied with caution in a criminal trial: if, despite the absence of challenge, doubt arises about the plausibility of incriminating evidence, the accused should benefit".*

[15] I align myself with the view expressed by Cameron JA in the Mavinini case quoted above. It would have been unfair, on the part of the learned Magistrate towards the Investigating Officer to have accepted that the investigating officer had assaulted Accused No 2 without the latter or his lawyer having taken it up with him for a response.

[16] In Madonsela v S (Case no A463/2011) [2012] ZAGPJHC67 (19 April 2012) Van Oosten J, on the doctrine of recent possession, stated, in paragraph 5 thus:

> *"In Shabalala v S **[1999] ALL SA 583** (N) 587/8, 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 **2009 (1) SACR 523** (SCA) Cameron JA, writing for the court, held that the appellant's possession of the stolen vehicle less than 24 hours after the robbery, taken together with his "elusive conduct", overwhelmingly suggested criminal involvement in the robbery.*

> *In S v Matola **1997 (1) SACR 321** (BPD) 323I-324g, 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 number plates of the stolen car had been found on the appellant's property, were held to sufficiently prove that the appellant had played a role in the theft".*

[17] In Zwane and Another v The State (426/13) [2013] ZASCA 165 (27 November 2013) Matjiedt JA, writing for the SCA, in paragraph 11 stated as follows:

> *"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 (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)".*

[18] In my view, the vehicle which was found in possession of Accused No 2 was found within far less than 24 hours after it got stolen. An inference could be drawn that Accused No 2 and Appellant had a role to play in the theft.

[19] In the result, based on the findings I have already made above, I find that the Appellant was connected to the theft of the motor vehicle.

CONCLUSION:

[20] I accordingly have no doubt that the learned Magistrate was correct in accepting the State's version and rejecting that of the Appellant. He did not err and misdirect himself by finding that the State had proved its case beyond reasonable doubt.

SENTENCE:

[21] I disagree with the learned Magistrate in imposing a term of imprisonment of ten (10) years on each of the accused. In my mind the sentence is startlingly inappropriate. The sentence ought to be interfered with. In terms of section 103 (1) of the Firearms Control Act, No 60 of 2000, both Appellant and Accused No 2 were declared unfit to possess firearms.

[22] In the result I make the following order:

22.1 The Appellant's appeal against conviction is dismissed.

22.2 The Appellant's appeal against sentence is upheld.

22.3 The sentence of ten (10) years' imprisonment is set aside and replaced with the following:

"Accused No 1 is sentenced to five (5) years' imprisonment".

22.4 The conviction of the Appellant's co-accused, Victor Thabang Mochela is reviewed and confirmed.

22.5 The sentence of ten (10) years' imprisonment imposed on Victor Thabang Mochela is reviewed and set aside and replaced with the following:

"Accused No 2 is sentenced to 5 years' imprisonment".

22.6 The declaration against Appellant by the Court *a quo* to be unfit to possess a firearm is confirmed.

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MD MOHLAMONYANE

[Acting Judge of the High Court of

South Africa,

Gauteng Division, Pretoria]

I concur.

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M. H.E. ISMAIL

[Judge of the High Court of

South Africa,

Gauteng Division, Pretoria]