**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO. AR397/2019**

In the matter between:

**KWANELE SBONELO MBONGWA** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 11h30 on 20 January 2021.

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**ORDER**

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**The following order is issued:**

(a) The appeal against the conviction is upheld.

(b) The conviction and sentence imposed on 7 December 2018 are hereby set aside.

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**JUDGMENT**

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**Chetty J (Koen J et Tsautse AJ concurring):**

[1] The appellant was indicted together with his co-accused Mr Nelson Monde Bhengu ('Mr Bhengu') on a count of theft of a motor vehicle in the regional court, KwaZulu-Natal, sitting at Ezakheni. Both were found guilty and sentenced on 7 December 2018. The appellant was sentenced to six years' imprisonment while Mr

Bhengu was sentenced to five years' imprisonment. The appellant applied for leave to appeal against his conviction only, which application was refused by the learned magistrate. After petitioning this court, leave to appeal against conviction was granted on 9 September 2019. The matter came before Seegobin and Mngadi JJ on 5 June 2020. The court, however, was unable to reach agreement as to the outcome of the appeal with the result that the matter was referred to a full court. By agreement of the parties this appeal has been dealt with pursuant to the provisions of s 19*(a)* of the Superior Courts Act 10 of 2013 without hearing oral evidence from the parties. The appeal is accordingly determined on the papers.

[2] The appellant and Mr Bhengu were legally represented at the trial and pleaded not guilty to the charge against them. While the appellant elected not to disclose the basis of his defence, Mr Bhengu admitted to being in possession of the vehicle in question, but contended that he had no knowledge that the vehicle had been stolen.

[3] The facts of the matter are relatively uncomplicated. The State led the evidence of Mr Warrasamy, the complainant in the matter, who confirmed that on the night of 30 October 2014 he visited a family member at hospital in Ladysmith. He parked his vehicle, an Isuzu double cab bakkie, registration number NKR 37694, in the hospital parking lot. Upon returning to where he had parked his vehicle, he found that the parking spot was now occupied by a different vehicle, a Hyundai, belonging to another visitor to the hospital.

[4] The complainant, having established that his vehicle had been stolen at approximately 18h25 that evening, being the time when the Hyundai had parked in the bay which his vehicle had occupied, contacted the police in Ladysmith. Later that evening he was informed that his vehicle had been found in Greytown. The complainant travelled to the police station the following day to identify his vehicle and found that his bank cards had been scattered on the floor in the vehicle, and that the front suspension and the ignition appeared to be damaged. He noticed that the entire dashboard and console of the vehicle had been removed, resulting in damages of approximately R57 000. After his initial evidence, the complainant was recalled following allegations that surfaced during the course of the trial that he had

been offered a monetary settlement by the appellant to drop the charges against him. This was disputed by the appellant. I find the evidence of the complainant to be unsatisfactory on this aspect, particularly if one has regard to his version that an offer of R30 000 had initially been made and rejected by him, only to be followed by a lower offer of R20 000. It seems highly improbable that after the rejection of the first offer, the appellant (or anyone acting on his behalf) would have offered a lesser amount the second time. In addition, despite the evidence of the complainant that this offer to withdraw the charges against the appellant was facilitated by the public prosecutor and the investigating officer, the State did not see it fit to pursue this evidence and put this version to the State witnesses.

[5] Mr Sudesh Maharaj, the owner of a security business operating in Greytown, testified that on the evening in question he was in the company of his colleague, Mr Zama, when they received information of a stolen vehicle heading towards Greytown. He received an update that the vehicle had proceeded down the main road in Greytown and pulled into a petrol station. Mr Maharaj and his colleague then approached the petrol station, parking their vehicle in front of the Isuzu. They alighted their vehicle with Mr Zama proceeding to the passenger side of the Isuzu,. where according to Mr Maharaj, the appellant was seated. The appellant got out of the Isuzu and stood alongside it, while Mr Maharaj pulled out Mr Bhengu who was in the driver's seat. According to Mr Maharaj the ignition in the vehicle was broken. Under cross-examination there was some dispute as to whether the appellant was found inside the vehicle or whether he was found close by, standing outside the vehicle. Mr Maharaj was adamant that the appellant was seated inside the vehicle at the time when he and Mr Zama approached it.

[6] Thereafter Constable Moodley testified that he was on duty when he received information on the night in question of a stolen vehicle heading from Ladysmith to Greytown. He then received a further update that the vehicle had been apprehended at a Caltex petrol station in Durban Street, Greytown. On inspecting the vehicle, Constable Moodley testified that the ignition of the vehicle had a home-made device in it, instead of a normal key. In addition, he confirmed having found a bag in the vehicle containing 'housebreaking implements'. Constable Moodley confirmed that a 'coding key' as well as the tools which were found in the vehicle

were recorded in the SAP 13 register. Under cross-examination by the attorney acting for the appellant, it emerged for the first time that the appellant's version was that he was in Greytown on the day in question, and that he was on his way to Durban when he was arrested. Constable Moodley denied that the appellant made any mention of his plans to travel to Durban or that he intended getting a lift with the driver of the stolen vehicle. Constable Moodley was adamant that the appellant chose to remain silent despite being warned of his constitutional rights and refused to make a statement at the time of his arrest.

[7] Mr Nkosinathi Zuma, a security officer who was on patrol with the earlier witness, Mr Maharaj, on the night of 30 October 2014, testified that they had spotted a vehicle parked at the Caltex garage on Durban Street, Greytown. According to him, they found two male occupants inside the vehicle. Once the occupants alighted from the vehicle, they were handcuffed. The police thereafter arrived on the scene and the occupants, one of whom was the appellant, were taken to the police station. During the cross-examination of this witness, much time was spent on the condition of the interior of the vehicle, the extent of the damage, and whether the appellant had been found by the witness either inside or outside of the vehicle. Mr Zama was consistent in his version that the appellant was inside the vehicle at the time he arrived on the scene.

[8] There was some discrepancy in the evidence of this witness and that of his colleague, Mr Maharaj, and that of the police witnesses as to the extent of the damage inside the vehicle, and the particular nature of the improvised Allen-key which had been used to start the complainant's vehicle. The investigating officer, Sergeant Mynhardt, testified that neither of the occupants of the vehicle provided any explanation to her as to where the vehicle had been taken from. She further testified that if the appellant had mentioned his alibi, she would have followed up on it. Sergeant Mynhardt further stated that among the items lodged with the police in the SAP 13 register were two Black Nokia cell phones.

[9] Against this backdrop of the evidence by the State, the appellant elected to testify and informed the court that he lives in Hammersdale from where he travelled on 30 October 2014 to Greytown earlier that day in order to get a ride with Mr

Bhengu, as both the appellant and Mr Bhengu were to attend a ceremony at Ingoma. According to the appellant he had made plans earlier in the week that he would accompany Mr Bhengu to the ceremony, which was to be held over the weekend. He travelled from Hammersdale to Greytown using public transport. Upon arriving in Greytown between 17h00 and 18h00, the appellant contacted his cousin, Mr Soso Ngcobo. He testified that he had spent his time that evening with his cousin, who dropped him off at the Caltex garage at approximately 23h00 that evening. The appellant stated that he had been in communication with Mr Bhengu earlier that day, and during which discussion Mr Bhengu informed the appellant that he would be borrowing a vehicle from someone else as his vehicle was giving him some problems. As such, the appellant met up with Mr Bhengu later than had been initially arranged.

[10] The appellant testified that while he was standing in the precinct of the garage he received a call from Mr Bhengu who informed him that he was close by and that he was driving an Isuzu bakkie. On Mr Bhengu's arrival, the appellant and Mr Bhengu had a discussion relating to the filling of petrol in the vehicle. It is at that stage that a vehicle belonging to the security company arrived, with the two officers alighting from their vehicle, carrying firearms. According to the appellant he was apprehended without ever being inside the stolen vehicle. During the course of his evidence-in-chief the appellant stated that he had informed his previous attorney to obtain video footage from the garage where he was arrested, which would corroborate his version that he had never been inside the stolen vehicle. It is pertinent to point out that no attempts were made by the State to attempt to secure such footage, either at the time when the incident occurred or even shortly thereafter. It would be highly improbable that such footage would have been available at the time of the trial, as security cameras are often programmed to overwrite earlier footage after a few days. This is a shortcoming on the part of the State as there is no onus on the appellant to prove his innocence. Moreover, to the extent that the appellant's version had been put forward to the State witnesses in cross-examination that he had not been inside the stolen vehicle when it arrived at the garage, the State could have easily secured the attendance of the employees of the petrol station on duty at the time of the arrest of the appellant and Mr Bhengu.

This would have resolved, by direct evidence, whether the version of the appellant could be rejected as being false beyond reasonable doubt.

[11] The defence of the appellant is essentially that he was not in Ladysmith at the time when the vehicle of the complainant had been stolen and that he had only met Mr Bhengu in Greytown, in accordance with a prior arrangement made between the two. The appellant's version is corroborated by the evidence of Mr Bhengu who stated that he only 'found' the appellant at the garage in Greytown shortly before their apprehension by the security officers. Mr Bhengu further testified that the appellant was never inside the vehicle at any time.

[12] The prosecution appeared to be content that the evidence against the appellant of the disclosure of his alibi at the trial only and the disputed evidence as to whether or not he was inside the vehicle at the time of his apprehension, was sufficient for a conviction. While it would generally be the case that a person arrested for an offence, together with another, would immediately proclaim his innocence and inform the police that he has an alibi which should be investigated, if the alibi were found to be true, he would be exonerated without having to spend any further time as an inmate awaiting trial, as was the case with the appellant. As stated in *R v Hlongwane* 1959 (3) SA 337 (A), 340H, '[t]he legal position with regard to an alibi is that there is no *onus* on an accused to establish it, and if it might reasonably be true, he must be acquitted.'

[13] It is common cause that the appellant did not pursue this avenue, and as the investigating officer testified, made no mention of an alibi at the time of his arrest or even while he was in custody awaiting trial. While this may cast some doubt as to the veracity of his alibi, this alone is not a basis to reject the version of the appellant as being false. His evidence that he was to meet Mr Bhengu in Greytown is not contradicted by any evidence from the State. It is consistent with the evidence of Mr Bhengu, as well as the evidence that both the appellant and Mr Bhengu were in frequent communication by cell phone on the night of their arrest.

[14] It is pertinent to point out that while the phones of both the appellant and Mr Bhengu were confiscated and recorded as exhibits by the police, no attempt had

been made from the time of the confiscation, to have recorded calls from the cell phones analysed to ascertain whether there was indeed communication between the appellant and Mr Bhengu, as they allege. If so, this would strongly suggest that the appellant was not physically present at the time of the theft of the vehicle, and indeed only met his co-accused at the petrol station in Greytown. It could also have exonerated the appellant as being party to the chain of persons involved in the planning of the theft and disposal of the vehicle. The prosecution appeared to simply ignore this aspect of vital evidence despite ample opportunity to verify it, even after the trail began and during the numerous adjournments which punctuated the trial.

[15] In *S v Liebenberg* 2005 (2) SACR 355 (SCA), paras 14-15, the court set out the position relating to alibi evidence as follows:

'[14] The approach adopted by the trial court to the alibi evidence was completely wrong. Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false. In *S v Sithole and Others* 1999 (1) SACR 585 (W) the test applicable to criminal trials was restated in the following terms at 590*g* - *i*:

"There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

See also *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

[15] Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this Court more than 50 years ago in *R v Biya* 1952 (4) SA 514 (A). At 521C - D Greenberg JA said:
"If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime."'

[16] Mr Sbuniso Ngcobo (also known as Soso) testified on behalf of his cousin, the appellant, confirming that he had met the appellant between 17h00 and 18h00 on the afternoon of 30 October 2014 in Greytown. He stated that he was aware of the appellant's plans to travel with a friend to attend an unveiling ceremony in Ingoma. After having a meal with the appellant at his home, Mr Ngcobo then dropped the appellant off at a petrol station in Greytown between 22h00 and 23h00 that evening. He did not see the 'friend' that the appellant was due to meet at the garage. The high-water mark of the State's interrogation of this witness was his failure to inform the police after the appellant's arrest that the appellant had been in his company in Greytown earlier in the day, essentially vouching for his alibi.

[17] In its judgment, the court a quo placed much emphasis on the enquiry as to whether the appellant was inside or outside of the stolen vehicle at the time when he was apprehended by the security officers. The court, despite the conflicting evidence before it, accepted the version of the two security officers that the appellant was found inside the stolen vehicle at the time he was apprehended. I agree with the submission of Mr *Barnard* on behalf of the appellant that whether or not the appellant was found inside the vehicle at the petrol station is immaterial to the issue of his guilt. There is no evidence on record to indicate that the appellant was inside the vehicle as it made its way into Greytown and when it arrived at the petrol station. If the vehicle had initially been observed by officers other than those who apprehended the appellant and Mr Bhengu, these witnesses ought to have testified. This dispute could have been resolved by the State obtaining video footage from the petrol station of events on the night in question. They failed to do

so. They also failed to call any of the attendants at the garage on duty that night. No finger prints were lifted off the stolen vehicle to ascertain whether the appellant was ever inside.

[18] I agree with the appellant's counsel that even if the appellant were found to be seated inside the stolen vehicle when the security officers arrived at the scene, this alone does not lead to the only inference that the appellant must have been complicit in the theft of the vehicle. The appellant's version is that he had no idea that the vehicle was stolen. In addition, he was aware that Mr Bhengu was using a different vehicle as his car had broken down. None of this evidence could be gainsaid by the witnesses called by the State. Something more was required from the State to prove that the appellant knew that the vehicle was stolen and that he had associated himself with the theft of the vehicle by Mr Bhengu. On that basis, he could have been found guilty of possession. However, not only is there no evidence to prove the appellant was involved in the theft of the vehicle; there is also no evidence to sustain a guilty finding on a competent verdict of possession of stolen property.

[19] As regards the alibi defence raised by the appellant, the magistrate accepted the evidence of Mr Ngcobo that the appellant was with him earlier in the day and that Mr Ngcobo dropped the appellant off at the petrol station later that evening. Mr Ngcobo's evidence was not shaken under cross-examination and his evidence confirms that of the appellant in all material respects as it pertains to his alibi. The court recorded further that it could '*not find that accused 1's family member was lying when he testified. He was not lying because he told the truth*.' In *Tshiki v S* [2020] ZASCA 92, para 48 the court held the following:

'. . . once it is found that on the face thereof an alibi defence cannot be rejected as false, something more is required to prove that the alibi is false. This then pertinently raises the question whether in the context of the facts of this case the appellant's alibi can properly and safely be rejected as false beyond reasonable doubt.'

[20] Notwithstanding the acceptance of Mr Ngcobo's evidence which would have been sufficient to exonerate the appellant, the trial court went further to conclude that Mr Ngcobo would have had no knowledge of the appellant's '*part of the chain of theft of this vehicle'*. What exactly is the appellant's '*part in the chain of theft*'? If

the court accepted the evidence of Mr Ngcobo, it would suffice that the appellant could not have been in Ladysmith at the time that the vehicle was stolen. His alibi should therefore have been accepted.[1] The only remaining evidence that would implicate the appellant is that he was inside the vehicle when he was apprehended. As stated earlier, this does not prove theft, nor knowledge that the vehicle in which Mr Bhengu arrived, was stolen. I am unable to find any basis in fact or in law for the trial court to have concluded that the appellant was part of, and involved in '*the planning, removal and disposal*' of the stolen vehicle. This is not borne out of the evidence and there is nothing on record that justifies this conclusion, as it pertains to the appellant. Suspicion alone is not a basis for surpassing the test of criminal liability.

[21] According, the following order is issued:

a. The appeal against the conviction is upheld.

b. The conviction and sentence imposed on 7 December 2018 are hereby set aside.

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**Chetty J**

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[1] The alibi defence can only be rejected if the evidence is overwhelming. If it is not overwhelming and the court is faced with two conflicting versions, the benefit is then for the accused - *S v Van Eck en 'n ander* 1996 (1) SACR 130 (A) which states the following in the English headnote:
'The Court firstly discussed the legal position concerning the assessment of alibi defences and held that the appellants' evidence of their alibis could only be rejected if the State's evidence against them was overwhelming. If this were not the case the court would merely have two versions before it which stood in conflict with one another and the appellants would accordingly have to receive the benefit of the doubt. In the instant case the magistrate had not referred at all in his judgment to the quality of the appellants' evidence or the impression which they had made on him. The Court held that the only reasonable inference was therefore that there was no or little criticism of the appellants' versions. As the magistrate had found that the evidence against the appellants was overwhelming the Court analysed this finding and came to the conclusion that the State's evidence could not be regarded as overwhelming. It followed accordingly that the appellants' defence had to succeed. The convictions and sentences were set aside.'

APPEARANCES

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