Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES /NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGHT COURT KIMBERLEY)

Case number:**CA& 28/13**
Date heard:**27/02/2017**
Date delivered:**17/03/2017**

In the matter of:

STOFFEL PIETERSON APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

SNYDERS, AJ

1. The appellant appeared in the Jan Kempdorp Magistrate's Court on a charge of housebreaking with the intent to steal and theft. It was alledged that the appellant stole a grass side cutter to the value of R3 000.00 on 28 February 2012, being the property or in the lawful possession of Ganspan Primary School.

2. He pleaded not guilty and gave no plea explanation. He was convicted of housebreaking with the intent to steal and theft and sentenced to 18 months direct imprisonment.

3. The appellant applied for leave to appeal against his conviction and sentence. The court *a quo* granted the application. The appellant has however abandoned the appeal against the sentence and only stands before court on his appeal against his conviction.

4. The prosecution presented evidence of A Mohagi, being an employee of Ganspan Primary School. He discovered the burglary and reported same to the principal. Upon arrival by the police the following day, he accompanied them to the home of DJ Jacobs, as Mohagi indicated that stolen goods could at times be found at the home of Jacobs. Upon their arrival at Jacob's house, one of the police officials, Constable Mashuti feared that said Jacobs would not allow him access to the premises. He then told Jacobs that he had the appellant in custody for stealing the grass side cutter. Jacobs then confirmed that the appellant brought the item to his home at night to cut his grass. Upon Jacobs declining the offer, the appellant left the side cutter at his house as he was too tired to carry it home.

5. Mohagi did not know who broke into the storeroom and stole the grass side cutter. He testified that after the appellant was arrested, he asked the principal for forgiveness. It is common cause that Jacobs was found in possession of the stolen item as described above.

6. It is further common cause that Mashuti lied to Jacobs about having the appellant in custody, leading to the seizure of the grass side cutter. Mashuti further testified that after he arrested the appellant, he admitted the theft to Mashuti and requested Mashuti to apologise to the principal on his behalf.

7. The principal, Mr Nel also testified and comfirmed that the grass side cutter was stolen out of the storeroom and that the value thereof was R3 000.00. The principal testified that Mashuti returned to the school with the appellant in the vehicle but did not testify about any apology.

8. The appellant testified and denied breaking into the school and stealing the grass side cutter. He denied having admitted the offence to Mashuti and denied apologising to the principal directly or through Mashuti. The appellant denied the testimony of Jacobs as well.

9. In his judgment the Magistrate repeated the evidence of the state witnesses and the appellant and found that the state witnesses had no reason to lie and that the contradictions were immaterial. Thereafter, the Magistrate concluded that the state proved its case beyond reasonable doubt against the appellant.

10. It is trite that a court of appeal will not readily interfere with the factual and credibility findings of a trial court. It will, however, do so when they are clearly wrong, and especially where they are not exclusively based on the demeanour of the witness, but rather on the evidence which appears on record. See in this regard *Minister of*

Safety and Security and Others v Craig and Others NNO[1] This view is supported in the unreported judgment in this division in the matter of *Gert De Bruin v The State*[2].

11. The Magistrate's reasoning in unequivocally accepting the evidence of Jacobs and Mashuti is not clear. There is no critical analysis of their testimony and no evaluation is provided in determining that their contradictions are immaterial.

12. The Magistrate misdirected himself in failing to make a credibility finding of the state witnesses in spite of the following contradictions:

12.1 Mohagi indicated that Jacobs initially refused entry, whilst this is denied by Jacobs;

12.2 Jacobs indicated to Mohagi that he hired the appellant to cut the grass, but later testified that he already had someone who cut his grass;

12.3 Mohagi testified that Jacobs fetched the weed eater to give to the police, whilst Jacobs indicated that the police entered and seized the item;

12.4 Mohagi stated what the stolen item was in Jacobs' bedroom, whilst Jacobs indicated it was in the outside storeroom.

13. The principal testified, and the court readily accepted, that Jacobs was known as a person who was often in a possession of stolen items. The Magistrate goes as far as to indicate that Jacobs should also have been prosecuted. Yet, the

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[1] *2011(1) SACR 469 [SCA]* at para 58.
[2] Case number CA&R 135/2014 (Olivier J).

Magsitrate fails to apply a cautionary rule in evaluating Jacob's evidence as an accomplice witness. Jacobs has a clear motive to hide his unlawful ventures and is presented with an opportunity by Mashuti to place the blame elsewhere.

14. This is opportunistic of Jacobs and his explanation for why the grass side cutter is at his residence is improbable. The witness does not enquire why the appellant wishes to cut his grass at night and accepts possession of an item based on the appellant's fatigue to carry the stolen item home. The appellant lives approximately 500 m from the witness. The magistrate failed to take this evidence into account and thus misdirected himself.

15. The cautionary rule applicable to accomplice witnesses is set out in *S v Masuku*[3] the Judge held as follows:

"Accordingly, to satisfy the cautionary rule, if corraboration is sought it must be corroboration directly implicating the accused in the commission of the offence. Such corroboration may, however, be found in the evidence of another accomplice provided that the latter is a reliable witness. Where there is no such corroboration, there must be some other assurance that the evidence of the accomplice is reliable".

16. Corraboration for Jacobs' testimony must thus be sought. It may be found in the apology made by, or on behalf of, the appellant to the principal. Mohagi's testimony

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[3] *1969 (2) SA 375 (N) at 375-377*

that this apology was made by the appellant to the principal stands uncontested. Mohagi testified that the appellant personally apologised to the principal. This is an important contradiction to Mashuti's testimony. Mashuti testified that the appellant requested him to apologise to the principal on his behalf. During testimony, the principal does not mention any apology by the appellant or on behalf of the appellant. Mashuti being a constable, does not meet the requirements set out in action 217(1)(a) of the Criminal Procedure Act, Act of 1997. Mashute is a non-commisioned officer and thus not a Justice of the Peace. The confession and apology by the appellant to Mashute is thus inadmissable. There is thus no satisfactory corraboration for Jacobs' testimony taking into account the contradictions between Mohagi and Mashuti, the inadmissibility of Mashuti's evidence and the evidence by Mashuti on aspects that were not in his statement.

17. The Magistrate failed to evaluate the appellant's testimony regarding consistency, credibility findings and contradictions. The Magistrate made no finding that the appellant's testimony was not reasonably possible.

18. No principles are applied by the Magistrate regarding circumstantial evidence and the evaluation thereof.

19. The Magistrate misdirected himself in not addressing the principle of recent possession. If an accused is found in possession of recently stolen goods and is unable to give an account which can reasonably be true, the court is entitled to infer that such accused stole the goods or received them knowing them to be stolen. Evidence that an accused was in possession of goods shortly after they

were stolen is admissible but places no onus on such accused to explain his or her possession of them. In other words, the court is not bound to draw an inference of guilt from the possession of the stolen goods but may do so if the inference is justified (*R v Nxumalo 1939 AD 580 at 587*). In *S v Parrow*[4] *at 604 E* it was stressed that the burden of proof remains on the state throughout and that the so-called "doctrine" of recent possession is simply an observation using common sense concerning the proof of facts by inference. In *S v Skweyiya*[5] the Appellate Division again stressed that it is no "doctrine" but simply a manner of reasoning by means of inference. The court pointed out that the nature of the goods is an important factor in the reasoning, especially regarding the question of whether the possession of the accused is "recent". In this matter, the storeroom was locked in the afternoon and the housbreaking and theft occured thereafter. The police only arrived the following day. The question is then when the appellant was at Jacobs' house with the stolen item and Jacobs' testimony is unsatisfactory in this regard. No finding on this principle can then be made against the appellant.

20. *S v Mokela*[6] indicates the importance of reasons for judicial decisions. The Magistrate clearly misdirected himself in failing to provide reasons for his finding.

21. The question arises whether the Magistrate may have misdirected himself in presiding over the trial as he had presided over the earlier bail application. The appellant's previous conviction of housebreaking with the intent to steal and theft[7] became known to the Magistrate. As I am of the view that the conviction should

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[4] *1973 (1) SA 603 (A)*
[5] *1984 (4) SA 712 (A) at 715C–G*
[6] *2012 (1) SACR 431 (SCA)* at para 12
[7] Record p 4

be set aside, I will not delve too deeply into this issue aside to note that it is undesirable for a Magistrate who presided over the bail application to preside over the trial, as perceived bias is sufficient to disqualify a Magistrate from hearing a matter that he was previously involved in.[8]

22. In the premise, I make the following order:

THE APPEAL SUCCEEDS AND THE CONVICTION AND SENTENCE ARE SET ASIDE.

J.A SNDYERS
ACTING JUDGE

I concur

C.J OLIVIER
JUDGE

On behalf of Appellant:	Mr A Van Tonder (Legal Aid)
On behalf of Respondent:	Adv JJD Rosenberg (DPP)

[8] S v Booysen 2016 (1) SACR 521 (ECG) para 16