358

S. v. NAIDOO.

(APPELLATE DIVISION.)

1969. *November* 3. RUMPFF, J.A., WESSELS, J.A., and RABIE, A.J.A.

Criminal law.—Theft.—Unlawful possession of stolen goods.—Suspicion before goods found.—Effect.—Sec. 36 *of Act* 62 *of* 1955.

If a suspicion that certain goods are stolen, based on garnered information exists before the goods are found and the suspicion continues to exist when the goods are found in the possession of the suspect then the suspicion exists simultaneously with the possession of the goods and satisfies section 36 of Act 62 of 1955.

Appeal from a decision in the Transvaal Provincial Division (LUDORFF, J., and FRANKLIN, A.J.). The facts appear from the judgment of RUMPFF, J.A.

D. Soggott, for the appellant: "....."

H. F. Redpath, for the State.

358 F

(The appeal was dismissed and the following reasons were handed down later.)

RUMPFF, J.A.: The appellant in this case was found guilty by a regional magistrate of Johannesburg of a contravention of sec. 36 of Act 62 of 1955, and was sentenced to two years' imprisonment. The magistrate found that the appellant was found in possession of eight new tape recorders, that a reasonable suspicion existed that the tape recorders were stolen and that appellant did not give sufficient account of such possession. On appeal to the Transvaal Provincial Division the conviction with regard to the possession of one tape recorder was not chal-

359

lenged, but it was submitted that the conviction with regard to the possession of seven of the sets must be regarded as being wrong and that the sentence ought to be reduced. The Provincial Division did not decide on the validity or not of the conviction with regard to the possession of seven tape recorders, but briefly concluded that if it is assumed that the apellant would not be guilty with regard to the possession of seven tape recorders, but would be guilty with regard to the possession of only one tape recorder, the sentence is nevertheless or such a nature that the Court would not interfere. For these reasons the appeal was dismissed. Leave to appeal to this Court was granted summarily and without stating any reasons. The procedure followed by the Provincial Division in not giving a decision on the merits, is obviously undesirable and must be condemned. This obviously also gave rise to the granting of leave to

appeal without having given proper consideration to the question whether the appellant had any prospect of success.

In this Court the argument was repeated that the conviction by the magistrate with regard to the possession of seven tape recorders was wrong and that the sentence must be reduced accordingly.

After hearing counsel for the appellant the appeal was dismissed and it was added that the reasons why the appeal was dismissed would be handed down later to the Registrar. The reasons appear below.

It appears from the facts that a certain van der Walt was employed by a well-known firm in Johannesburg and that he, *inter alia,* sold tape recorders in the course of his duties. On 23rd May, 1967, someone phoned him and made enquiries concerning the price and operation of a Nagra tape recorder. This brand, according to the evidence, is imported from Switzerland and is only used for professional purposes. Later that day the person phoned again and afterwards for the third time. On this third occasion the person furnished an address and van der Walt and a Detective-sergeant Jooste went to the address that evening. They met the appellant at his house and he declared that he was the person who had phoned. Detective-sergeant Jooste pretended to be an employee of the firm where van der Walt was employed. Appellant offered a tape recorder for sale which he showed to van der Walt and Jooste. Van der Walt demonstrated the machine and Sergeant Jooste pretended that he wanted to purchase the set. After a discussion appellant agreed that he could buy the tape recorder, and possibly other sets as well. The appellant said to Jooste that the other sets were with his partner. He also said that he would be able to sell ten tape recorders at R2,400. It was arranged later that Jooste would bring the money on the 25th at 5 p.m., and that the appellant would have the tape recorders at his house. Van der Walt and Jooste and other detectives who were to keep watch, went to appellant's house. Appellant arrived in a motor-car and asked Jooste whether he had brought the money. Appellant showed Jooste a number of Nagra tape recorders which were in the boot of the motor-car. After van der Walt, Jooste and the appellant went into the house, van der Walt was sent outside to give a sign. Appellant wanted to leave by the front door, but was stopped by a Captain Cilliers. Appellant at first denied everything but afterwards unlocked a wardrobe from which the original tape recorder was taken and he also gave the key of the boot wherein seven tape recorders were found. Appellant said that

360 A

the person from whom he obtained the sets was a certain Vic de Villiers, and that he would point the house out where de Villiers lived. All efforts to find the house, and all efforts by the police to trace the alleged de Villiers, were in vain. It appears from the evidence that a case containing Nagra tape recorders, ordered by the South African Broadcasting Corporation from Switzerland, was stolen on 22nd May, 1967, from a delivery van and that the numbers on the sets found with the appellant,

correspond to the numbers on the invoices received from the sender in Switzerland. It appears that Jooste, who participated in the investigation in connection with the theft of the tape recorders, had a suspicion that the set to which appellant referred when he tried to make an appointment, might be a stolen one. Van der Walt as well had a suspicion that the Nagra tape recorder to which appellant referred over the telephone, might be a stolen machine. Jooste's suspicion also applied to the other sets mentioned by appellant on their first visit to the latter. During his trial the appellant gave no evidence.

Sec. 36 of Act 62 of 1955 reads as follows:

"Any person who is found in possession of any goods, other than stock or produce as defined in sec. 13 of the Stock Theft Act, 1923 (Act No. 26 of 1923), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

In *R.* v. *Ismail and Another,* 1958 (1) S.A. 206 (A.D.), this Court decided that it is a requisite for a contravention of this section that a suspicion that the goods are stolen must exist when the goods are in the possession of the suspect. If a suspicion comes into existence at a time when the suspect has ceased to be in possession, the erstwhile possession does not concern this section. Counsel for the appellant relied on the decision in the *Ismail* case and contended that because a suspicion concerning the seven tape recorders had already come into existence before they were found in the boot, the section was not satisfied. This argument, in my view, does not hold water.

The *Ismail* case dealt with the question concerning the position when a suspicion comes into existence after the suspect had been in possession of the goods. In his judgment, FAGAN, C.J., said, *inter alia,* at p. 209: "....."

360 H

Neither in the *Ismail*—nor in the *May* case was it necessary to deal with the question concerning the position if a suspicion comes into existence before the goods are found with the suspect. The answer to this question seems to be simple. It is of no importance whether any suspicion, even a reasonable suspicion, came into existence before the goods were found. The section does not deal with the origin of the sus-

361

picion, but with the existence of the suspicion when the suspect is found in possession. If a suspicion that certain goods are stolen, based on garnered information, exists before the goods are found and the suspicion continues when the goods are found in the possession of the suspect, then the suspicion exists simultaneously with the possession of the goods and satisfies the section.

If the contention, submitted on behalf of the appellant, must be accepted, it would make the section highly ineffective and limit it in a way which could never have been intended by the Legislature. I do not

entirely understand why it was conceded that the conviction with regard to the first tape recorder is correct, because the suspicion concerning the first set as well as the other seven, came into existence before the sets were found.

Furthermore it was contended that the section refers to the finding of the goods in possession of the suspect and not to the case of a person who is deliberately solicited by the finder to bring the goods to the latter. Therefore the State did not prove, so it was contended, that the appellant was "found" in possession as intended by the Legislature. This argument holds no water either. Van der Walt and Jooste did not put the appellant in possession of the seven tape recorders against his will or unwittingly, although Jooste offered, by way of a trap, to buy the tape recorders. Appellant took or accepted possession knowingly and voluntarily, with the aim of selling the tape recorders to Jooste He was therefore in possession as intended by the section.

WESSELS, J.A., and RABIE, A.J.A., concurred.

Appellant's Attorneys: *Israel, Sackstein and Simon,* Bloemfontein.