



THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

JUDGMENT

In the matter:

Case No: 398/09

S A METAL & MACHINERY CO (PTY) LTD

Appellant

and

THE STATE

Respondent

Neutral citation: ***SA Metal & Machinery Co (Pty) Ltd v S (398/09) [2010] ZASCA 81 (28 May 2010)***

Coram: NAVSA, VAN HEERDEN et BOSIELO JJA

Heard: **10 MAY 2010**

Delivered: **28 MAY 2010**

Summary: Criminal law – Corporate accused – whether the conviction of the corporate accused based on the conduct of employees other than those expressly mentioned in the charge-sheet is correct – whether the State has proved beyond reasonable doubt that the appellant lacked reasonable cause for the belief as required by s 37(1)(b) of the General Law Amendment Act 62 of 1955 – whether evidential burden of raising a reasonable doubt in relation to reasonable cause discharged by accused.

ORDER

On appeal from: South Gauteng High Court (Satchwell J et Coppin AJ sitting as a court of appeal).

1 The appeal is upheld and para 71 of the judgment of the court below is set aside in its entirety and substituted as follows:

'The appeal of the second appellant, S A Metal & Machinery Co (Pty) Ltd, against conviction is upheld and the conviction and related sentence are set aside.'

JUDGMENT

BOSIELO JA (Navsa et Van Heerden JJA concurring).

[1] The appellant, SA Metal & Machinery (Pty) Ltd, was charged in the Regional Court, Kempton Park, in terms of s 332 of the Criminal Procedure Act 51 of 1977 (the CPA) together with Mr Allan de Klerk ('De Klerk'), one of its employees, with theft of:

- (i) approximately 2 900 kg of copper cathodes;¹
- (ii) approximately 8 100 kg of Telkom copper wire;
- (iii) approximately 17 995 kg of Eskom-marked conductor.

¹ A copper cathode is a large copper plate usually weighing more than 100 kg and having a copper purity content of approximately 99 per cent. Zambia is one of the world's leading manufacturers and exporters of copper cathodes. It appears that cathodes from different Zambian mines have a distinctive appearance related to the particular mine's manufacturing process. It also appears that the top of a stack of sheets is identified by the particular mine with specific markings. Copper cathodes appear to be a sought after commodity on the London Metals Exchange.

They were also both charged with a contravention of s 37(1)² of the General Law Amendment Act 62 of 1955 (the Act) in respect of the same items. It was alleged that they had unlawfully acquired or received into their possession stolen goods from another person or other persons. In terms of s 332(2) of the CPA Mr Graham Barnett was cited as the representative of the appellant.

[2] At the end of the trial, both the appellant and De Klerk were acquitted on the counts related to the theft of items (ii) and (iii) referred to above. They were also acquitted on the count of theft of the copper cathodes. They were, however, both convicted of a contravention of s 37(1) of the Act in relation to the copper cathodes. The appellant was sentenced to a fine of R100 000, half of which was suspended for five years, whilst De Klerk was sentenced to a fine of R10 000 or two years' imprisonment. On appeal to the South Gauteng High Court (Satchwell J, Coppin AJ concurring), De Klerk's conviction and related sentence were set aside. The appellant's appeal against conviction was dismissed. The sentence imposed by the Regional Court was, however, set aside and was substituted with a fine of R80 000, half of which was suspended for five years. The present appeal, with the leave of this court, is against the decision of the South Gauteng High Court dismissing the appellant's appeal against conviction.

² Section 37(1) of the Act provides:

'(a) Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in s 1 of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.

(b) In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause.'

[3] Before us the issue was whether the court below, having held that De Klerk rightly believed that the cathodes in question were sold to the appellant by Meadon Scrap, whose property it was or who had sold them with the requisite authority, correctly concluded that the appellant did not hold the same belief.

[4] An exposition of the salient facts is necessary. The appellant is one of South Africa's leading scrap metal merchants. It conducts operations in Elandsfontein, Gauteng and in Cape Town, the latter location being its headquarters. At all material times, De Klerk was employed as a manager at Elandsfontein. In the course of its daily business activities, the appellant purchases and receives scrap metals from a range of registered scrap metal dealers. The appellant does not purchase scrap metal off the street.

[5] It is common cause that approximately five weeks before the incident on which the conviction was based, a truck carrying 65 tons of copper cathodes was hijacked in Gauteng whilst it was in the process of delivering its load from Zambia to a purchaser. The police, acting on information supplied by an informant, called on De Klerk at the appellant's Elandsfontein premises to find out whether he had any knowledge of the hijacked goods. De Klerk told them that he had been approached by a scrap metal dealer who had offered him 15 tons of cathodes. He had heard rumours about the hijacking and had rejected the offer. There is a dispute about whether De Klerk had told a policeman that he had persuaded his employer not to purchase stolen goods.

[6] It is clear from the evidence of witnesses who have extensive experience in the scrap metal industry that, although copper cathodes sometimes find their way into the open market, for example, by way of a police auction or the sale of surplus stock, such occurrences are the exception rather than the rule.

[7] The uncontested evidence of Barnett and De Klerk was that on a number of occasions they had, on behalf of the appellant, purchased copper cathodes from certain registered dealers, without incident. In one instance they were able to demonstrate that the copper cathodes they had purchased had been sourced from a police auction in Zambia. It is not per se unlawful to purchase or possess copper cathodes. Some of the dealers from which they purchased these cathodes were importers of scrap metal.

[8] During or about April 2003, De Klerk, who conducts purchases and administers sales mostly telephonically from an office above ground level at the appellant's Elandsfontein premises, was advised by his yard foreman, Mr Hans Visser ('Visser'), that the latter had received copper cathodes from a scrap dealer registered with the appellant, namely, Meadon Scrap. Because there was a container already loading copper for export, De Klerk telephoned Mr Mark Sellier ('Sellier'), who was responsible for foreign sales and who was stationed at head office, to enquire whether he could load the cathodes into the container. He received an answer in the affirmative. Consequently, De Klerk instructed Visser to load the cathodes into that container.

[9] Visser was primarily responsible for receiving, inspecting and sorting the scrap metal purchased from registered dealers. De Klerk had confidence in Visser as the two had worked together successfully for many years. De Klerk did not personally inspect the cathodes and did not link them to the enquiry by the police more than a month earlier. It is uncontested that the appellant and Meadon Scrap conduct many business transactions with each other on an ongoing basis.

[10] It is common cause that containers bearing the cathodes in question were intercepted and impounded by the police at Durban harbour and that those cathodes were part of the consignment hijacked in Gauteng, referred to earlier.

[11] The court below took into account that s 37(1) of the Act required the State to prove that an accused was found in possession of goods which were acquired otherwise than at a public sale and that the goods had been stolen. In seeking a conviction the State had relied upon the evidential provision in s 37(1) (b) of the Act. Satchwell J rightly stated that this evidential provision only operated in the absence of evidence to the contrary which raises a reasonable doubt. The learned judge rightly rejected the evidence of an employee of the appellant, Mr Ngobeni, who had testified that he had witnessed a number of cathodes hidden within the appellant's Elandsfontein premises. His evidence was contradictory and unreliable.

[12] Satchwell J had regard to De Klerk's evidence, in terms of which he had placed himself in possession of the cathodes. She took into account that Visser's report to De Klerk was unchallenged. The learned judge considered, in favour of

De Klerk that he had, on a previous occasion, rejected an offer of cathodes from a doubtful source. She concluded that the evidential burden of raising a reasonable doubt in relation to reasonable cause had been discharged and consequently set aside his conviction and related sentence.³

[13] In respect of the case against the appellant the court below rejected the submission on its behalf, that since the State's case against the appellant was dependant upon the actions of De Klerk and since he was innocent, so too should be the appellant. The court below had regard to s 332 of the CPA which provides that any act performed by a servant of a corporate body in the exercise of his or her powers shall be deemed to have been performed by the corporate body. The court reasoned that the appellant had taken possession of the cathodes even before De Klerk was informed of their presence and that they must have been unloaded, weighed and sorted before Visser made his report. Satchwell J stated that although Visser's report to De Klerk is hearsay it did lead to his state of mind and he could thereby resist liability. The learned judge reasoned that the appellant could not similarly rely on what was told to De Klerk by Visser, who was not a witness. She concluded that since no other employee at the Elandsfontein premises had testified about the receipt of the cathodes the appellant had not produced any evidence that challenged the statutory presumption referred to above and consequently dismissed the appeal by the appellant.

³ Although the owner of Meadon Scrap had denied selling the cathodes to the appellant it should be borne in mind that he was himself facing prosecution in relation to other matters and it is unsafe to accept his evidence in this regard. Also, he conceded in cross-examination that he had five dealerships trading as Meadon Scrap and that he would not necessarily know of each and every delivery that went in and out of his business.

[14] The problem is that in seeking to hold the appellant liable the State, in the charge sheet, expressly and exclusively relied on the actions of De Klerk and Mr Barnett. It is common cause that Mr Barnett was not involved in the transaction and at material times was stationed in Cape Town.

[15] Before us, in order to overcome this problem, the State sought an amendment to the charge sheet to include employees of the appellant other than De Klerk. The respondent relied on section 86 of the CPA which provides as follows:-

(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any given time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.'

[16] *The State* had identified De Klerk as *the* employee or director of the appellant on whose conduct it relied for holding the appellant liable. At no stage, before or during the trial, was there any indication that the net was being cast wider. The appellant tailored its defence accordingly. To allow an amendment at this stage would cause very real prejudice, and would be subversive of the notion

of a fair trial as embodied in section 35(3)(a) and (i) of the Constitution. The amendment is consequently refused, see *R v Metal Salvage Co (Pty) Ltd & others* 1953 (4) SA 257 (C) at p 265C-H and *Musa J Moloi & others v Minister for Justice and Constitutional Development & others* (as yet unreported) (CCT 78/09) [2010] ZACC 2 (4 February 2010) paras 10–20.

[17] Having rightly concluded that it could not be said that De Klerk did not have reasonable cause to believe that he could lawfully purchase the copper cathodes in issue and further that the entity which sold them was either the owner or had had lawful authority to sell or dispose of them, the learned judge erred in convicting the appellant.

[18] In the result, the appeal is upheld and para 71 of the judgment of the court below is set aside in its entirety and substituted as follows:

‘The appeal of the second appellant, SA Metal & Machinery Co (Pty) Ltd, against conviction is upheld and the conviction and related sentence are set aside.’

L O BOSIELO
JUDGE OF APPEAL

APPEARANCES:

For appellant: O L Rodgers SC

Instructed by: Snitchers Attorneys
c/o Earle Friedman Attorney, Johannesburg
Lovius Block, Bloemfontein.

For respondent: F Mohamed

Instructed by: Director of Public Prosecutions, Johannesburg
Director of Public Prosecutions, Bloemfontein.