

✓ 19/3/2018

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case No. A42/2017

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED
	DATE: 19/3/2018
	SIGNATURE: <i>[Signature]</i>

In the matter between:

MANDLA MATSALO

1ST APPELLANT

JOHANNES MEBEKA

2ND APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MILLAR AJ

1. This is an appeal by the appellants against conviction and sentence. Leave to appeal was granted on petition to this court on 27 February 2017. The appellants' heads of argument were filed late and an application for condonation was brought at the commencement of the hearing of this appeal.
2. The appellants were charged and subsequently convicted in the Regional Court of Ekurhuleni East, Springs on 23 August 2016 on the sole count of theft of a motor vehicle and they were each sentenced to seven years imprisonment. They were also charged in the alternative with contravening section 36 of the General Law Amendment Act 62 of 1955, being in possession of stolen property and *"wrongfully and unlawfully unable to give a satisfactory account of such possession"*.
3. The respondent called three witnesses – the complainant, the arresting officer and the investigating officer. Theirs was the only evidence led at the trial. Neither of the appellants testified although they made admissions and gave an explanation of plea given in terms of sections 220 and 115(2)(b) of the Criminal Procedure Act 51 of 1977 respectively. The convictions and sentences were premised solely on the evidence presented by the respondent.
4. The facts giving rise to the conviction and sentence are briefly as follows. The appellants had been found to be in possession of a VW Golf motor vehicle ("the vehicle") on 10 April 2016, which had been stolen two days before from the home

of the complainant. The vehicle had been parked outside, overnight in a fenced yard. Besides the vehicle, a computer, cash, the spare wheel and jack, all of which were in the vehicle had also been stolen. The complainant testified that the value of the vehicle was R 15 000,00, the value of the laptop R3 500,00 and R7 000,00 was the amount of the cash stolen.

5. The vehicle was uninsured but had a tracker, which had activated two days after the theft and this is what had led the police to the appellants.
6. The appellants were found at a Sasol garage in the Springs area. The vehicle was being towed, having run out of fuel.
7. The appellants when asked by the police how they had come into possession of the vehicle informed them that the first appellant had bought the vehicle from a person called Vusi Makhubela for R15 000,00 and had paid him a deposit of R5 000,00. The balance was to be paid once Vusi Makhubela ("Vusi") furnished the first appellant with the papers for the vehicle.
8. Although the complainant had testified that the ignition of the vehicle had been visibly tampered with and that it had two ignition switches when he had gone to collect the it on 11 April 2016, none of the other state witnesses who had seen the vehicle corroborated this.
9. The evidence of the investigating officer was that:

"..Ja, the day the complainant brought the vehicle I went to investigate the condition of the ignition, then on my arrival on the vehicle I found the ignition still intact."

and

"No, as I am saying, it was intact and then I asked the complainant which key you are using and he said no, I am using the key that I have got in the pound with the vehicle."

10. The evidence for the respondent was to the effect that the ignition did not appear to have been tampered with and that the key for the vehicle had been impounded along with it. The only damage that was corroborated was that the petrol cap was missing.
11. Evidence was led that the police had investigated what the appellants had told them and through an unnamed informer confirmed the existence of a person by the name of Vusi who sold stolen vehicles in the area where the vehicle was stolen. Attempts by the investigating officer to trace him had been unsuccessful as he had not returned to his residence since the night of the theft.
12. There was no evidence that the appellants were the persons who stole the vehicle from the home of the complainant. The elapse of two days between the theft and

the recovery of the vehicle, without the computer, cash, spare wheel and jack is sufficient to distance the appellants from the theft itself.¹

13. In regard to the alternative charge of being in possession of stolen property and *"wrongfully and unlawfully unable to give a satisfactory account of such possession"*, the learned Magistrate relied on the evidence of the complainant which he stated to be:

"Court could not find any reason why he would lie before court and say cables were removed from the original ignition to the other ignition"

14. The Magistrate did not rely on the fact that the vehicle had two ignitions when the complainant fetched it from the pound as this evidence by the complainant was neither supported nor corroborated by that of the investigating officer and on the face of it, the appellants, being furnished with the key, are unlikely to have had any reason to suspect that Vusi was neither the owner nor entitled to sell the vehicle to them. The evidence of the investigating officer corroborated the existence of Vusi although he could not be found.
15. The price for which the vehicle was alleged to have been purchased, from Vusi (being the market value) together with the furnishing of the key, militates against a finding that the appellants knew or ought reasonably to have known that the vehicle was stolen.

¹ S v Madonsela 2012 (2) SACR 456 at 458 E-G

16. The test to be applied in the present matter is stated in Burchell's South African Criminal Law & Procedure² as follows:

"The prosecution has the burden of proving, beyond reasonable doubt, that the accused perpetrated the requisite unlawful conduct. The prosecution bears the burden of proving unlawful conduct beyond reasonable doubt. No burden of proof rests on the accused to establish a defence. It is enough that the accused 'raises' a defence. This the accused can do in explanation of plea.

If, however, the prosecution proves a prima facie case against the accused, then if the accused exercises his or her right to remain silent and does not testify then the accused takes the risk that, in the light of all the evidence led, a court might find the prosecution to have established its case."

17. The appellants 'raised' their defence in the plea explanation that was put before the court and this was dealt with in the evidence that was led by the respondent.
18. Did the respondent establish a *prima facie* case? For the respondent to have established such a case, there must be "evidence calling for an answer".³
19. There was no evidence whatsoever linking the appellants to the theft of the vehicle from the property of the complainant. Furthermore, from the respondent's own

² Volume 1: General principles of Criminal Law Fourth Edition.

³ S v Boesak 2001 (1) SACR 1 CC at paragraph 24.

evidence it appears that the appellants had a reasonable explanation for possession of the vehicle.

20. Since the respondent bore the onus to prove the guilt of the appellants beyond a reasonable doubt, I find that for the reasons set out above, it failed to do so on either the main charge or the alternative charge. The appellants having been improperly convicted, there is no need to address sentence.

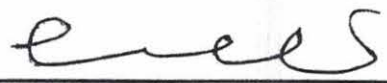
21. In the result, I propose the following order:

21.1 The late filing of the heads of argument on behalf of the Appellants are condoned.

21.2 The appeal against conviction and sentence for both the First and Second appellants are upheld.

21.3 The conviction and sentence in respect of the First and Second Appellant are set aside.

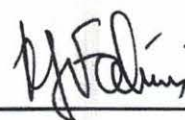
21.4 The First and Second Appellants are to be released from custody with immediate effect.



A MILLAR
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE, AND IT IS SO ORDERED

A handwritten signature in black ink, appearing to read 'H. Fabricius', is written above a horizontal line.

**H. FABRICIUS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 19 MARCH 2018

JUDGMENT DELIVERED ON: 19 MARCH 2018

COUNSEL FOR THE APPELLANTS: ADV. AC KLOPPER

INSTRUCTED BY: MKHABELA ATTORNEYS

COUNSEL FOR THE RESPONDENT: ADV. FW VAN DER MERWE

INSTRUCTED BY: THE STATE ATTORNEY