



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 17/2018**
HEARING: **13 AUGUST 2018**
REASONS: **24 AUGUST 2018**

In the matter between:

SEBEELA, ROBERT	1 st Appellant
MORRIS, THAPELO AARON	2 nd Appellant
MANAKE, MOSES MOSHE	3 rd Appellant

and

THE STATE	Respondent
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Coram: Olivier ADJP et Pakati J

REASONS

Olivier ADJP:

[1.] Mr Robert Sebeela (first appellant), Mr Thapelo Aaron Morris (second appellant) and Mr Moses Moshe Manake (third appellant) stood trial in the Regional Court on charges of the theft of 128 kg copper cables, 43 kg aluminium and 1,035 kg dagga, alternatively having been found in possession of these stolen goods and being unable to give a satisfactory account of such possession (count 1) and the possession of 1,035kg dagga, in contravention of the provisions of **The Drugs and**

Drug Trafficking Act¹ (count 2). All three of them, represented by the attorney Mr Titus, pleaded not guilty to both charges. They offered no explanation of their pleas.

- [2.] In the subsequent trial the evidence of Colonel DJ De Waal, Mr S Loubser, Captain M I Kekana, Constable S C March, Warrant Officer A L Thaisi, Sergeant M J Shamane, Constable L K Mogoroane and Constable M P Fourie was presented on behalf of the prosecution. The first and second appellants both testified in their own defence, while the third appellant did not testify or present any evidence.

- [3.] All three appellants were eventually convicted on both counts². They were all three sentenced to 5 years imprisonment on the count of theft and 6 months imprisonment on the count of the unlawful possession of dagga, and it was ordered that the sentences be served concurrently. Having unsuccessfully applied for leave to appeal all three appellants were granted leave, on petition, to appeal against their convictions and sentences.

- [4.] At the hearing of the appeal, and after having heard argument, the convictions and sentences of all three appellants, as well as an order declaring them unfit to possess a firearm, were set aside. What follows are the reasons therefor.

- [5.] It is trite that a court of appeal will not readily interfere with the factual and credibility findings of a trial court³. It will, however, be done if such findings are clearly incorrect, and are not borne out by the record⁴. Findings in respect of facts, inferences and probabilities will be interfered with more readily than findings based on the general demeanour of witnesses⁵.

- [6.] Unless indicated otherwise what follows was either common cause or not seriously in dispute.

¹ 140 of 1992

² In the case of count 1 they were convicted on the main charge of theft

³ Compare **Kebana v S** [2010] 1 All SA 310 (SCA) para [12]

⁴ Compare **S v M** 2006 (1) SACR 135 (SCA) para [40]

⁵ Compare **S v Crossberg** 2008 (2) SACR 317 (SCA) para [149]

- [7.] The events that led to the three appellants being charged, took place during the evening and night of Sunday 9 May 2010 to Monday 10 May 2010 at or near Modder River and Ritchie, two towns situated very near each other, and not too far from Kimberley. At that stage the first appellant was a Warrant Officer in the South African Police Service, and he was was stationed at the police station in Modder River. He resided in a house in the nearby township of Ritchie.
- [8.] The second appellant was a student constable and was stationed at the same police station. He was on duty during the nightshift, which began early that Sunday evening and was supposed to end early the Monday morning.
- [9.] Other members who were supposed to be on the nightshift with the second appellant were Constables Mogoroane and Fourie and Warrant Officer Khantwane. Mogoroane and Fourie did report for duty, but Khantwane had earlier been booked off sick and did not report. March had been one of the members on duty during the dayshift and who was to be taken home when the nightshift members took over.
- [10.] Items that had been seized by the police as exhibits were kept in a so-called SAP13 store, and were supposed to be marked with tags containing particulars of the police station and of the cases concerned.
- [11.] One of the cells at the police station was used as an additional SAP13 store. It was the case of the prosecution that the stolen property described in count 1 was kept in this cell, which will hereinafter be referred to as the SAP13 store. The same key was used to unlock the doors of all the cells, including that of the SAP13 store.
- [12.] This key was among the items for which a station commander on duty was responsible, including things like firearms and vehicles. When one shift took over from another, the responsibility for these items was "*handed over*" to the person in charge of the members on duty in the next shift.

- [13.] Shortly before March was taken home, the first appellant visited the police station. He spoke to the second appellant and later left.
- [14.] Due to the fact that Khantwane was not there, and that complaints had to be attended to by two members, it was then agreed among Fourie, Mogoroane and the second appellant that, in the event of a complaint having to be attended to, Fourie and Mogoroane would attend to the complaint, and the second appellant would remain behind at the police station. It appears that they came to this arrangement because of the undesirability of leaving Fourie, a woman, by herself at the police station.
- [15.] At some stage the second appellant then informed Fourie and Mogoroane that there had been a complaint from 2229 Waterboer Street in Ritchie.
- [16.] The evidence of Mogoroane and Fourie was that, as they were leaving the premises of the police station, they saw the first appellant arriving at the police station in his vehicle. According to them the first appellant wanted to know where Khantwane was, and was informed by them that Khantwane was not there. They further testified that the first appellant then said that he was going to wait there with the second appellant until they returned.
- [17.] When Mogoroane and Fourie arrived at the address given to them by the second appellant, they found that everything was dark at the particular house and that nobody was visible there. They spoke to someone who apparently resided at 2227 Waterboer Street, and who mentioned that there had been a problem with people who had run through a yard.
- [18.] On their way back to the police station Fourie reported on the complaint, presumably to the second appellant and by radio. Upon their arrival at the police station Fourie asked the second appellant whether he had registered the complaint on the computer and had noted it in the occurrence book. He said that he had not, and it appears that he was reprimanded for that by Fourie.

- [19.] The evidence was furthermore that De Waal, the Provision Commander of the Organised Crime Unit of the South African Police Services in the Northern Cape, had received information that had led to a number of police members going to the Modder River area in a number of vehicles. When already there, he received further information that eventually led them to the house where the first appellant resided. At the house, in the kitchen, the police found bags containing copper cables and aluminium. In one of the bedrooms the first appellant was confronted with a plastic bag containing dagga.
- [20.] The first and third appellants were arrested there. According to De Waal a lady and two other men were also found at the house. According to Loubser only three people were found at the house, namely the first and third appellants and a lady. Kekana's evidence was that four people were in custody when he arrived at the police station, namely the first and second appellants and "*another two unknown people*", one of whom was a lady. In his evidence the first appellant made mention of only one Motshweri as having also been arrested at the house, and this was never disputed. Kekana did not know the third appellant and the latter would therefore probably have been the other male that Kekana had found in custody. The version of the first appellant about the number of people found and arrested at the house would therefore appear to be consistent with Kekana's evidence in this regard.
- [21.] It therefore appears that at the very least one other person was at the house when the police arrived, and in what follows that person will be referred to as Motshweri.
- [22.] Outside the house, in the yard, copper or aluminium was also found in the boot of the first appellant's vehicle.
- [23.] The second appellant was arrested at the police station.

[24.] Kekana, who was at the time the Station Commander at the particular police station, was summoned and informed of the events and of the arrests of, *inter alia*, the first and second appellants. Kekana found the first and second appellants in the back of a police vehicle. It is in dispute what exactly the nature of the conversation was, if any, between Kekana and the first and second appellants.

FIRST APPELLANT

[25.] In the judgment the Regional Magistrate placed store on the fact that the first appellant did not, with the second visit testified about by Mogoroane and Fourie, remain at the police station as he had according to them said he would. The evidence of the first appellant was led about a visit by him to the police station that had according to him taken place between 18:00 and 19:00 that Sunday evening. He did not, in his evidence-in-chief, make mention of another visit by him to the police station on that day, and he was also not asked whether he had gone there more than once. This issue was also never taken up with him in cross-examination. More specifically the first appellant was never asked to explain why he had left the police station in the circumstances described by Mogoroane and Fourie.

[26.] The first appellant had been off duty from Wednesday that week, and had been away from his house for a couple of days from Thursday until he returned to Ritchie on Sunday 9 May 2010. He had been supposed to resume his duties at the police station that Monday morning.

[27.] It appears that the third appellant had earlier been a colleague of the first appellant in Johannesburg, where the third appellant had at that stage been a police reservist. It was the undisputed evidence of the first appellant that the third appellant had been visiting a girlfriend in Kimberley when the third appellant called the first appellant and asked to stay at his house in Ritchie from about the middle of that week, until he could return to Johannesburg.

- [28.] According to the first appellant the third appellant and Motshweri were at his house when he left there that Sunday evening to visit the police station. He testified that he returned home and that at a later stage, around 21:00, the three of them left the house when Motshweri asked to be taken to a shop. According to the first appellant they drove to the shop in his vehicle, and at the shop Motshweri told him about items that Motshweri had seen next to the road on their way to the shop. On their way back home Motshweri pointed out to the first appellant the place where the items were, concealed behind bushes, some 5 to 6 meters from the road. The first appellant's evidence was that it would not have been possible to see the items from inside a vehicle passing by at a high speed.
- [29.] The first appellant's evidence was that they then stopped and found 4 or 5 bags, which were open and in which he could see copper and iron.
- [30.] He testified that he suspected the items to be stolen property, mainly because of the fact that they were hidden. He did not at that stage, however, realise that they were actually items from the SAP13 store. According to him he first realised this when he was later told, at the police station and after his arrest, that the police had found so-called SAP13 tags when they had emptied the bags in the kitchen of his house.
- [31.] According to the first appellant he then decided to load the items in his vehicle, and to take it to the police station the next morning, when he was supposed to resume his duties. He testified that the three of them then loaded the bags into his vehicle, and that at the house they offloaded the bags, as the boot of his vehicle could not close with the bags in it.
- [32.] The evidence of the first appellant was furthermore that they then watched television, for about 2 to 3 hours, when they suddenly saw the lights of vehicles outside the house. The three of them went outside, where he was then grabbed by police officers.

- [33.] He testified further that, *“after some time”*, he was taken back inside the house by police officials, and into the kitchen. There he saw that the contents of the bags had been strewn *“all over the floor”* and that the kitchen was generally in disarray.
- [34.] According to the first appellant Mr Loubser, who had at the time been a Warrant Officer in the South African Police Services Organised Crime Unit in Kimberley, then approached him and asked him whether he stayed at that house, which he confirmed. His evidence was furthermore that Loubser then requested his permission to search the house and took him to the first bedroom. When they got there he found that room also to be in total disarray. According to the first appellant Loubser then showed him the plastic bag with dagga in it, and asked him whose it was. He testified that he told Loubser that he did not know whose plastic bag it was, and that he had not been home for a few days. First appellant furthermore testified that Loubser then asked him who had been sleeping in that room, and that he had answered that he did not know.
- [35.] The first appellant’s evidence was furthermore that he was then taken to his own bedroom, which was also in the same mess. There Loubser took his service firearm and his briefcase.
- [36.] According to the first appellant he was then taken back to the kitchen by Loubser, where Loubser asked him whose property the copper and aluminium from the bags were and where he got it from. He testified that he told Loubser that it was *“nobody’s stuff”* and that he had found it *“from the street”*.

Was it proved that the property had been stolen from the Modder River SAP13 store and, if so, that it had been stolen during the evening and night from 9 to 10 May?

- [37.] Mr Van Tonder argued very convincingly that it was not proved beyond a reasonable doubt that the items listed in count 1 were from specifically the

Modder River police station's SAP13 store. He pointed out, *inter alia*, that the reference on the so-called tag which De Waal pointed out in photo's 20 and 21 of the photo bundle differed from the reference which had been entered into the SAP13 register.

- [38.] The position is exacerbated by the fact that no steps were taken, immediately after the discovery of the goods at the house, to compare those items with available records like the occurrence book.

- [39.] In an apparent attempt to suggest that the items had indeed been stolen from the SAP13 store that particular night, De Waal testified about "*fresh*" tyre tracks and footprints that were observed in the vicinity of the cells at the police station. It does not appear from the record whether attempts were made to compare the tracks with the tyres on the vehicle of the first appellant, or to compare the footprints with his.

- [40.] As will be seen below there was no evidence at all that the plastic bag with dagga was ever in any way identified as having been an item in the SAP13 store.

- [41.] I will in what follows, mainly in the discussion of the appeal of the second appellant, point out other problems in the identification of the items.

Explanation for possession of copper and aluminium

- [42.] When considering the probability of the first appellant's explanation for being found in possession of the goods, it would in my view have been relevant whether the first appellant had, when he had on his version first seen the goods, not only suspected that they had been stolen, but had also in fact suspected that the goods had been stolen from the SAP13 store. Had the first appellant at that stage realised that the goods were in fact from the SAP13 store at the very same police station where he was working, he would in my view have been hard pressed to explain why he would not immediately have raised the alarm; in my

view more so than would have been the position had he in fact merely suspected the goods of being “*ordinary*” stolen goods.

[43.] There was, however, no evidence at all that the first appellant had realised or even suspected this when on his version making the crucial decision not to take the items to the police station and to report the discovery immediately, and no finding to this effect was made. In fact, it was the evidence of the first appellant that he only became aware of the fact that the items were from the SAP13 store after he had been arrested and taken to the police station, when “*they took out the tags*” and when he was told by the police that the tags were found when the contents of the bags were thrown out in the house.

[44.] The prosecutor also did not present evidence to the effect that the copper and iron referred to by the first appellant had been in the same or similar bags in the SAP13 store, or about whether the bags had been open or sealed while still in the SAP13 store.

[45.] The fact that the goods had been taken into the house, and not left in the vehicle, was explained by the first appellant, who said that the boot of his vehicle could not be closed with the items in it. In cross-examination Loubser conceded that the first appellant’s version that they were apprehended outside the house and taken back inside the house after some time, and that the police had by then already turned the kitchen into the state described by the first appellant, was correct. According to Loubser he had only arrived there a little bit later. De Waal had clearly not been personally involved in those events and no other evidence was presented to contradict the first appellant’s version as far as those events, and their sequence, were concerned.

[46.] The difference between the versions of Loubser and the first appellant is about what his response was when he was taken back to the kitchen and was confronted with the contents of the bags, which were lying scattered over the kitchen floor. I have already dealt with the first appellant’s version of these

events. His version was put to Loubser in cross-examination. Loubser denied it and maintained that the first appellant did not answer him when he asked him where he had found the “*stuff*”, presumably referring to the copper and the aluminium that were according to the first appellant in the bags and that at that stage was lying on the kitchen floor.

- [47.] In the cross-examination of Loubser it was put to him that “*It is the version of accused 1 and no. 3 that they found those items indeed along the road as accused 1 told you⁶ and accused 1 says that he was supposed to resume, start again working the next day and he was going to take it first thing in the morning to the police station*”. Loubser’s response to this is significant:

“Your Worship, it was strange to me, those articles that belong to the SAP13, that they were found next to the road during that time of the evening. I did not ask him why he did wait to go to his employment the following day, why did he not call the police or to take the items in. The police are 24 hours on duty.”

- [48.] This answer is completely irreconcilable with Loubser’s denial that the first appellant had said anything about finding the items next to the road. It in fact corroborates the version of the first appellant in this regard, and it confirms that it had right from the outset been first appellant’s version that the bags had been picked up next to the road.

- [49.] The Regional Magistrate’s finding that, *inter alia*, the first appellant had admitted that the second appellant “*had the SAP13 store key at all material times*”, in the sense of physical and exclusive possession, was simply wrong. The first appellant had admitted nothing of the kind and had made it very clear that everybody on duty had access to the key.

Motshweri

- [50.] The further question is why Motshweri was not also charged, and was not called as a witness by the prosecutor, or even by the Regional Magistrate. Motshweri

⁶ My emphasis.

would, even on the evidence presented by the prosecution, have been able to say whether the items had indeed been picked up next to the road.

- [51.] The third appellant appears to have been charged purely on the basis of having been at the house when the items were found there. Why was Motshweri, who appears to have been in the same position, not also charged?
- [52.] The fact that Motshweri was conspicuously absent, either as an accused or as a witness, is a source of concern. I am not satisfied that, in these circumstances, the reasonable possibility was excluded that Motshweri had directed the first appellant's attention to the presence of the goods where they lay concealed. On the first appellant's version Motshweri would have had to explain why Motshweri did not, immediately upon noticing the goods on the way to the shop, immediately alert the first appellant thereof? And how would Motshweri have been able to see from inside a vehicle that was moving at a normal speed where the items lay? These are the kind of questions that could have been put to Motshweri, had he been called as a witness.

Dagga

- [53.] No evidence was presented of where the plastic bag with dagga was found. The first appellant and Loubser were agreed that the first appellant was confronted with it in the so-called first bedroom, which had by then also been turned into disarray by the police. The evidence that the particular bedroom was not the first appellant's, was not challenged.
- [54.] The evidence of Loubser and of the first appellant differs only on what the first appellant's response was when asked about whose dagga it was. According to Loubser the first appellant said that it belonged to two males, whose names Loubser could apparently not remember. I have already dealt with the evidence of the first appellant in this regard⁷, which was to the effect that he had told Loubser that he did not know whose dagga it was. Taking into account that there

⁷ Para [34] *supra*.

is no indication that the dagga was found in the first appellant's bedroom, and furthermore that he had left Motshweri and the third appellant in the house while he was away, it makes sense that the first appellant would not have known whose dagga it was. It could have belonged to either Motshweri or the third appellant, or to somebody else who had brought the dagga into the house while Motshweri and the third appellant were staying there alone.

[55.] It was not disputed that the first appellant had been away from his house from the Thursday until that Sunday, and it appears reasonably possible that he would indeed not necessarily have known in what bedroom the third appellant, and even Motshweri, had slept. It was the undisputed evidence of the first appellant that Motshweri and the third appellant stayed in the house while he was away.

[56.] Even on Loubser's version the first appellant's response regarding the dagga in the plastic bag would, however, have been exculpatory in nature and not in any way incriminating as far as the first appellant was concerned.

[57.] There is no evidence that would suggest that the first appellant had known, or that he would have known, of the presence of the dagga in his house⁸.

[58.] The evidence regarding the dagga was also unsatisfactory in other respects:

58.1 The prosecutor did not present evidence of the actual discovery of the dagga. Loubser only said that he had found dagga in the house. He did not say, and was not asked, where exactly it was found. There was also no evidence that the first or third appellant was present when the dagga was allegedly found. It appears that there were several other police members present in the house at that stage, apart from Loubser and De Waal.

58.2 Kekana claimed to have seen dagga on the back of a police vehicle after the raid, together with the other stolen goods. His evidence in this regard was

⁸ Even if it is assumed, for the moment, that the dagga had in fact been found inside the house.

extremely poor. Whereas he initially referred to only one bag of dagga observed by him there, he later said that there were two bags.

58.3 Kekana initially testified that the dagga was in a 50 kilogram bag, and later that it was in a 50 gram bag. The appellants were, however, charged with the possession of 1,035 kilogram dagga. This weight is also visible in photograph 17, as is the plastic bag referred to by the first appellant. This is simply impossible to reconcile with either of these versions of Kekana.

58.4 There was no evidence at all that the dagga was amongst the exhibits from the SAP13 store. No marking or SAP13 tag is visible in photograph 17. On the prosecution's own version the dagga was apparently also not found with the copper and aluminium in the kitchen. The conviction on count 1 is therefore clearly wrong as far as the dagga is concerned.

Apology

[59.] The evidence of Kekana was presented that the appellants had said that "*they*" (In other words both of them) were sorry when he found them sitting in the back of a police van. He at first did not explain what would have led them to saying this. Later he said that he had merely greeted them before they said that they were sorry.

[60.] Both the first and second appellants denied having in any way apologised to Kekana.

[61.] At a later stage Kekana changed his version by saying that he did not know which one of the two of them had actually made that utterance, or whether they may have done so simultaneously. He refused, however, to concede that on his new version it was possible that only one of the two of them may have uttered the words.

- [62.] The evidence of Kekana in this regard was of poor quality. It is also significant that he had not mentioned anything about an apology by either the first or second appellant in his written statement. In my view the alleged apology had not been proven beyond reasonable doubt and should not have been taken into account as part of the evidence against the first appellant.
- [63.] It also needs to be pointed out that the first appellant's evidence on the exchange between Kekana, on the one hand, and himself and the second appellant, on the other hand, left no room for them having apologised to Kekana, and that the prosecutor failed to cross-examine the first appellant on this issue.

Contents of reports

- [64.] The Regional Magistrate allowed the prosecutor to cross-examine the first appellant extensively on the contents of the reports received by the police, and on the basis that the contents of the reports were evidence. The transcription of the first appellant's evidence is replete with examples of this.
- [65.] The Regional Magistrate found that the time periods turned out to fall within the tip-offs and showed that it was not bogus. Clearly the Regional Magistrate found that the contents of the reports were borne out and substantiated by the subsequent events. In doing so the Regional Magistrate went further than just to have regard to the evidence that reports had been made, but in fact had regard to the contents of those reports.
- [66.] Mr Titus had right at the outset made it clear that the "*hearsay*" evidence of the reports would only be acceptable insofar as it would be presented "*for the sake of having the full picture before the Court*", "*but not as the truth of it*". The position as regards evidence of the contents of a report made by a person who is

not called to testify was confirmed in **Maharaj and Others v Mandag Centre of Investigative Journalism NPC and Others**⁹

“Pretorius J correctly recognised that the various newspaper articles annexed to the founding affidavit were relied on, not to prove the truth of their content, but to demonstrate that the information was already in the public domain. In The Public Protector v Mail & Guardian Ltd and Others Nugent JA explained:

‘Courts will generally not rely upon reported statement by persons who do not give evidence (hearsay) for the truth of their contents. Because that is not acceptable evidence upon which the court will rely for factual findings such statements are not admissible in trial proceedings and are liable to be struck out from affidavits in application proceedings. But there are cases in which the relevance of the statement lies in the fact that it was made, irrespective of the truth of the statement. In those cases the statement is not hearsay and is admissible to prove the fact that it was made. In this case many such reported statements, mainly in documents, have been placed before us. What is relevant to this case is that the document exists or that the statement was made and for that purpose those documents and statements are admissible evidence.’

This is an important nuance that appears not to have been appreciated by the appellants.”

[67.] When Mr Titus objected to the questioning of the first appellant on the basis of the contents of the reports, and motivated the objection, the objection was summarily “*overruled*”, without any reasons being given for the ruling¹⁰.

[68.] At a later stage Mr Titus again raised the objection. The Regional Magistrate then remarked that Mr Titus was “*anticipating the end of the question of the*

⁹ 2018 (1) SA 471 (SCA) (2018 (1) SACR 253 (SCA)) para [16]

¹⁰ Either then or in the judgment.

Prosecutor, when it has not yet been finalised”, and the Regional Magistrate effectively again dismissed the objection by saying “Let’s not anticipate what the Prosecutor expects or wants. Let’s first listen to him”. This response of the Regional Magistrate is, with respect, difficult to understand. The whole purpose of such an objection is to prevent unfair cross-examination, and from what the prosecutor had then again put to the first appellant, it was as clear as daylight that the first appellant was once again being confronted with the contents of the reports and of the information, on the basis of it being correct.

[69.] Thereafter the prosecutor was allowed to persist with that line of questioning. At one stage the first appellant was asked by the prosecutor to explain how it had happened that the very same goods about which there had been a tip-off, were found at his house. He then speculated that it may have been put there for him to pick up and to be arrested. When he requested permission to explain this theory, elicited by the prosecutor himself, the prosecutor was allowed to prevent him from doing so by saying *“No, I am not going to allow you”*.

[70.] In my view the *“nuance”* referred to in the **Maharaj** case was not appreciated by the Regional Magistrate in allowing this line of questioning and in rejecting the evidence of the first appellant¹¹. It is also evident from the following remarks in the judgment in respect of the evidence of, respectively, the first and the second appellants:

“He (first appellant) did not know whether it was a coincidence that officers Loubser and De Waal got information that the items will be removed from the Police Station ..., but he later admitted again it was a coincidence”.

¹¹ And also that of the second appellant, to whose convictions I will revert in due course.

“He (second appellant) could not answer if all as said happened by the State was a coincidence”

Cross-examination

[71.] There are, unfortunately, also a number of other examples of the prosecutor being allowed to subject the first appellant to unfair cross-examination:-

71.1 The prosecutor was allowed to put the first appellant, as a fact, that the items had been removed from the SAP13 store that particular night, as if it had been proved, while there was no direct evidence to this effect. The first appellant had by then already made it clear that, as far as he was concerned, it was unknown exactly when the items were stolen from the SAP13 store.

71.2 The prosecutor was allowed to make the incorrect statement to the first appellant that the first appellant had earlier testified that he would have known if these specific items had been stolen before that night. The earlier question to the first appellant had actually been whether he would in the past, due to his position as Station Commander, have known if there was a “*complaint*” that items, in general, had been stolen from the SAP13 store, and it was to that question that he answered affirmatively.

71.3 When Mr Titus objected to cross-examination about who would have had access to the SAP13 store, on the basis that the first appellant had, contrary to what was being put to him by the prosecutor, already answered that question, the Regional Magistrate made no ruling and simply allowed the prosecutor to carry on. It is very clear from the record that the first appellant had indeed by then already answered that question and that his attitude was that any official who had access to the

key could have removed the copper and aluminium from the SAP13 store, and not only one who had physical possession of the key.

71.4 The prosecutor was allowed to cross-examine the first appellant at length about his evidence that, before Loubser's arrival, other police had already accessed the house. Loubser's evidence was indeed that the Riot Squad was at the house when he arrived there. He also testified that many police officials "*burst into the house*" to search it and that he was unable to say "*what every different people (sic) was doing at that specific moment*". The first appellant's evidence that he found the kitchen and the first two bedrooms in disarray when he was taken there by Loubser, has to be seen in this light.

[72.] The prosecutor appears to have been openly hostile towards the first appellant. He frequently interrupted the first appellant and made sarcastic remarks, and the Regional Magistrate allowed this. When the Regional magistrate at one stage intervened and said "*Just a minute. You're not going to laugh at the witness Mr Thetele*", the prosecutor was allowed to get away with the answer "*I am not laughing Your Worship*".

[73.] When the prosecutor had not put any question to the first appellant, and had made a remark that did not call for an answer, the Regional Magistrate interpreted the first appellant's silence as a failure to answer and was quick to place this on record.

[74.] In another instance the first appellant answered a question, but the record reflects that the answer was never interpreted.

[75.] The first appellant's perception of the attitude of the prosecutor and of the presiding officer appears *inter alia* from the following remarks:

*"No the problem is that you want me to give you answers that will benefit you"*¹²

"... the Court wants me to answer questions as you want to believe that that is the truth"

Credibility

[76.] The finding of the Regional Magistrate that the first appellant was an untrustworthy witness who had failed to answer simple questions, must be considered in the context of all of this.

[77.] A further finding of the Regional Magistrate to the effect that *inter alia* the first appellant had failed to answer *"even direct questions that needed either a yes or a no response"*, is not borne out by the record. There are numerous examples of long and complicated questions and statements which the first appellant was confronted with, and which must have been difficult to understand, let alone to deal with in the manner suggested by the Regional Magistrate. This is borne out by the fact that the Regional Magistrate at one stage said to the prosecutor: *"Mr Thetele, try not to – without trying to dictate how you ask your questions. Try not to argue and give a long question in the process."*

Police operation

[78.] There other aspects that are also of concern:

78.1 The evidence of De Waal and Loubser was that the first report was to the effect that the Modder River police station was going to be the target of a robbery, as opposed to just a theft, and in other words that the members at the police station were going to be subjected to violence in some or other form. Yet the members of the task force, which included members of the so-called riot squad, were instructed to remain out of sight. No steps were

¹² After the Regional Magistrate had clearly allowed the prosecutor to persist with a question to which Mr Titus had objected, without even making a ruling on the objection.

taken to warn the members on duty at the police station about the possibility of a robbery. Kekana, who was the Station Commander, was apparently also not informed of the threat and of the intended actions of the task force in this regard.

78.2 According to De Waal this report was received sometime between 19:00 and 21:00 that evening and on all indications the members of the task force then immediately left Kimberley for Modder River, which is only a short drive away, and took up their positions. It can safely be assumed that they would have positioned themselves so that they could observe the police station, or at the very least the immediate vicinity thereof. On the evidence of Mogoroane he and Fourie only arrived at the police station around 21:30¹³. It must therefore have been some time after 21:30 that Mogoroane and Fourie left for Waterboer Street and that the theft, on the version of the prosecution, took place. Why then was no evidence presented about what the members of the task force had observed while waiting there up until 00:30 the next morning, when the second report (to the effect that the goods had already been removed from the SAP13 store and were at the house of the first appellant) was received? Evidence of the arrival and departure (if at all) of vehicles at the police station during that period, and before the second report, would have been extremely relevant.

Conclusion

[79.] To sum up the position regarding count 1, and regarding the presence of the copper and aluminium in the first appellant's house:

79.1 It has to be accepted that the first appellant had immediately, when confronted about the goods in the kitchen, furnished an explanation for the

¹³ Their shift had been supposed to start at 19:00, but they attended the scene of an accident which was reported on their way to the police station for their shift.

presence of those goods. He stuck to that version and his evidence in this regard was in my view not shaken in cross-examination.

79.2 Motshweri would obviously have been able to refute or substantiate the version of the first appellant. He or she was arrested with the first and third appellants, but not prosecuted. The prosecution never disclosed the reason for this, or for the absence of Motshweri as a witness. The Regional Magistrate also never enquired about this and seems not to have realised the importance of Motshweri's evidence in the absence of any other direct evidence that the first appellant had been involved in the theft.

79.3 The prosecution chose not to disclose the source of the reports that were allegedly made to De Waal and not to call the person as a witness. The fact that the prosecutor was nevertheless allowed to confront the first appellant with the contents of the reports, and the fact that the Regional Magistrate clearly considered the version of the first appellant in the light of the contents of the reports, amounted to irregularities that taint the evidence as a whole against the first appellant.

79.4 Even if it is to be assumed, for the moment, that the copper and aluminium found at the first appellant's house had been removed from the SAP13 store the particular night, the only reasonable inference would in my view not be that the first appellant had done so. If he had done so when he went to the police station for a second time, as contended by Mogoroane and Fourie¹⁴, one would have expected the members of the task force to have seen his white Nissan Almera vehicle arriving and departing and that evidence to this effect would then have been presented. The absence of evidence of a comparison of the tyre tracks in the vicinity of the cells with the tyres on that vehicle, raises the question whether such a comparison was not done because the police knew very well that the first appellant's

¹⁴ I will revert to this issue below.

vehicle was not near the cells that evening, or whether a comparison was indeed done and the result was negative. A third possible explanation for the absence of evidence in this regard would obviously be shoddy work by the police and/or the prosecutor. This was not cleared up in evidence, neither was the possible presence of an unidentified person or persons in black clothing around the police station that particular night, an issue to which I will revert.

[80.] The Regional Magistrate seems to have found, in the alternative, that the first appellant would on his own version nevertheless be guilty of theft, on the basis that he had realised that the goods had been stolen by someone and that theft is a continuing crime. On the first appellant's version this could not, with respect, be correct, because on his version he would not have had the intention of furthering or participating in the uncompleted theft¹⁵.

[81.] As far as count 2 is concerned there is no evidence at all that links the first appellant to the dagga in the plastic bag, which on the prosecution's own evidence was found in his absence in a bedroom not occupied by himself and in a house in which two other persons had at that stage been staying.

SECOND APPELLANT

[82.] The prosecution case was premised on a plot between, at the very least, the first appellant and the second appellant. To this end the following evidence was presented:

82.1 March testified that, when the first appellant left after his first visit to the police station, he greeted the second appellant by saying words to the effect "*see you later*". This evidence was clearly presented to prove that the first and second appellants had at some time agreed that they would see one another again later that specific evening.

¹⁵ See **Criminal Law**, Snyman, 5th Edition, p 509

82.2 The evidence Mogoroane and Fourie about the absence of a complainant at 2229 Waterboer Street was clearly presented to make out a case to the effect that there had in fact been no such complaint and that the second appellant had by means of this false information sent Mogoroane and Fourie away, which had left him behind as the only police member at the police station for that period, which had on all indications lasted between 30 and 45 minutes.

82.3 During the time that Constables Mogoroane and Fourie were away the second appellant had access to the SAP13 store by means of the key left under his control. The evidence was that the key had always been kept in a safe and under the control of whoever was acting as station commander during the nightshift.

Conspiracy

[83.] As regards March's evidence that the first appellant, when leaving after his first visit to the police station, had said to the second appellant that he would meet or see him "*later*", and the insinuation that the first and second appellants had in fact at that stage agreed to meet up later in order to steal from the SAP13 store, it is of significance that this evidence contradicted her police statement, according to which the words had been uttered by the second appellant, and not by the first appellant.

[84.] It was put to March that the version of the first and second appellants was that the first appellant had spoken to the second appellant and had merely said "*see you*". On the evidence the second appellant would however not at that stage have had any way of knowing that he was going to be alone at the police station when the first appellant returned and in the circumstances, and whether or not the greeting was to the effect that the two appellants would see one another

again “*later*”, the inference that they were actually agreeing to meet later that same evening in order to steal from the SAP13 store could not be drawn as the only reasonable inference.

False complaint

- [85.] If the first and second appellants’ plan had been to get Mogoroane and Fourie out of the way through a false report, so that they could then access the SAP13 store, what was their plan with Khantwane? On the prosecution’s own evidence the first appellant clearly did not know that Khantwane was not going to be on duty that night, and there is no evidence that the second appellant knew about this before reporting for duty. As already mentioned the evidence was that two members had to attend complaints. There was no evidence that, had Khantwane been there, the second appellant would have been one of the duty members to stay behind at the police station, let alone in control of the keys. How did the plan of the first and second appellants provide for the presence of Khantwane?
- [86.] The evidence of Mogoroane was that, upon their arrival at 2229 Waterboer Street, it was “*dark at that shack*”, that they “*hooted in front of the yard*” and that “*it seemed as if there was no one*”. It is clear from this that they did not knock on the door of the dwelling. The possibility was therefore not ruled out that someone may indeed have been in the dwelling and could have confirmed the call to the police station.
- [87.] According to Mogoroane a lady “*from the address of 2227*” then informed them that children had been running through “*her*” yard, in other words the premises at 2227 Waterboer Street, but denied having called the police station about it.
- [88.] The evidence of this person was never presented and Mogoroane’s evidence that she had denied having called in a complaint, remained inadmissible hearsay evidence.

- [89.] Mogoroane's evidence in this regard was in any event contradicted by that of Fourie. She testified that the lady from 2227 Waterboer Street had reported to them that the people had in fact been running through the yard of 2229 Waterboer Street. Fourie testified further that the lady had been under the impression that the owners of 2229 Waterboer Street may have called in the complaint about that.
- [90.] It is in my view too much of a coincidence that the second appellant would suck from his thumb the address 2229 Waterboer Street and that, when Mogoroane and Fourie then arrive there, it appears that there had in fact been an incident, which may have led to a complaint, at that very same address.
- [91.] Fourie conceded that someone may indeed have called from 2229 Waterboer Street, or that it could even have been a prank call.
- [92.] It is so that the second appellant testified that Fourie had been present with him at the police station when the particular call came in and that she denied this. Fourie conceded, however, that the call may have come in when she went to the bathroom at one stage. It must also be remembered that Fourie testified long after the events. It is difficult to believe that she would after almost 5 years still have been able to remember whether the second appellant had in her presence answered a call. Fourie conceded that she would not be able to remember how many calls had been answered by colleagues when she was on duty. Could her evidence really be said to have excluded the reasonable possibility of a call having come in while she was present?
- [93.] Fourie was not even accurate on the time that she had come on duty. She knew nothing about having first attended an accident and arriving at the police station later than they were supposed to, as testified by Mogoroane. She also could not remember Mogoroane telling her and the second appellant that Khantwane was booked off-sick, as Mogoroane testified.

- [94.] In the judgment the Regional Magistrate dealt only with what Mogoroane had testified as regards the conversation with the lady from 2227 Waterboer Street, and found that his version of that conversation had been confirmed by Fourie. There is no indication, in the judgment, that the abovementioned discrepancies were considered.
- [95.] The prosecutor was allowed to put to the second appellant that the evidence had been that Fourie had accused him of sending them out on a false complaint. This was never the evidence of either Fourie or Mogoroane.
- [96.] The second appellant testified that he had noted the complaint in the so-called complaint book, but had forgotten to enter it into the occurrence book. It is so that it was never put to any of the state witnesses that the second appellant had noted the complaint in a complaint book, but on the other hand this evidence was then never challenged in cross-examination.

SAP 13 Register

- [97.] Loubser said that nobody could produce the SAP13 register when they arrived at the police station. He did not say that he asked the second appellant for the register, and that it was the second appellant who could not produce it. He merely said that "*they*" could not find it.
- [98.] The evidence about the missing register was clearly presented to create the suspicion that the first and second appellants, or at least the second appellant, had hidden or destroyed the register when realising that the theft of the exhibits had been discovered.
- [99.] However, there was no evidence that the second appellant would have known that before actually being confronted at the police station.
- [100.] When Thaisi testified the prosecutor produced a copy of an entry made into the SAP13 register on a date prior to these events. How was this possible at the time

of the trial, if that register had disappeared that particular night? This was never cleared up.

[101.] The Regional Magistrate rejected the possibility that it may have slipped the second appellant's mind to enter the complaint into the occurrence book and referred to the "*coincidence*" that, when the SAP13 register was sought from the second appellant, it was allegedly missing. As already pointed out, there was no evidence that specifically the second appellant was asked to produce the register.

[102.] The finding that the SAP13 register "*was never found*" is also questionable. The evidence of Mr Loubser was that it was still missing when he stopped being the investigating officer. What about thereafter, and where did the certified copy come from?

Time of theft

[103.] The basis of the prosecution case was that the goods found at the house had been stolen during the course of that particular night, during the period when the second appellant was alone at the police station. Was it proved beyond reasonable doubt that the goods were still in the SAP13 store at the time when Mogoroane and Fourie left the police station?

[104.] I have already alluded to the absence of evidence about any attempted comparison of the tyre tracks and the footprints with the tyres on the first appellant's vehicle and his shoes. The question is also why there was no attempt to substantiate the opinion that those tracks and footprints were "*fresh*". De Waal could also not say whether people may have been placed in those cells during that period, which may in any event have explained the fresh tyre tracks and footprints.

[105.] The evidence of Kekana was that it was his duty to check the contents of the SAP13 store monthly. He could, however, not say what the date of his last inspection before the discovery of the theft was. His evidence was hopelessly

vague on what was there at the time of his last inspection and on what should have been there at the time of the theft. When he was asked whether the stolen goods had still been in the store at the time of his last inspection he answered “Ja, I would say that, ...” and he was clearly speculating.

- [106.] The evidence of the SAP13 clerk, who was directly responsible for the daily administration of the SAP13 store, was for some reason not led.
- [107.] In an attempt to prove that at least some of the copper cables found in the house must have been in the SAP13 store that particular evening, merely on the basis that they had only been placed there shortly before then, evidence was presented regarding the seizure of five full and one half bag of copper cables that had been seized and booked into the SAP13 store and about the appearance of some of the copper cables from the house.
- [108.] Kekana testified that he had been involved in the initial seizure and booking of these copper cables, which according to him had taken place only two to three days prior to the events of 9 to 10 May. He said that, when he saw the copper cables that had been found at the first appellant’s house, he recognised the particular cables by their “*half burnt*” appearance.
- [109.] The evidence of Shamane was that copper cables had been seized on 26 April 2010; and therefore not only two to three days prior to the events of 9 to 10 May, as testified by Kekana. Shamane also testified that it was indeed Thaisi who had made the entry in the SAP 13 register on that very same day, in other words on 26 April. Shamane made no mention of the cables having appeared “*half burnt*”.
- [110.] The evidence of Thaisi was, however, that the copper cables had been seized as long ago as on 6 April 2010, which obviously contradicted the evidence of both Kekana and Shamane. A certified copy of an extract from the SAP13 register with the relevant entry was, as already mentioned, then handed in by the prosecutor as exhibit “B”. In cross-examination Thaisi was confronted with the fact that,

according to the extract from the register, the entry regarding the seizure of these cables had been made on 26 April 2010. When confronted with this, Thaisi remained adamant that the copper cables had been seized on 6 April 2010. He was also adamant that the entry was not in his handwriting, although he had earlier testified that he had *“booked (the copper cables) in in the SAP13”*. The evidence was that such an entry was supposed to be made immediately when goods were seized and placed in the SAP13 store. Thaisi also said nothing about the particular cables having appeared *“half burnt”*.

[111.] I have already alluded to the evidence that the SAP13 register was missing when the second appellant was arrested. There is no evidence that another SAP13 register had for some reason been opened after 26 April 2010, but before the night of these events. The question is then either where and when the *“missing”* register was found or where the document that was handed in as exhibit “B” really came from.

[112.] The Regional Magistrate, while referring to Kekana’s evidence that *“of the items were booked in two or three days earlier”* (presumably referring to the copper cables), made no mention of the abovementioned inconsistencies.

Key to SAP13 store

[113.] The question mark over the contents of the SAP13 store at the time when Mogoroane and Fourie left, and when the first appellant according to them arrived to stay with the second appellant, becomes even more troublesome when regard is had to the evidence as far as the key to the SAP13 cell is concerned.

[114.] Although Kekana and Fourie created the impression that the key was always in a safe, it appears that it was not always the position. Mogoroane testified that it was sometimes just kept in a drawer.

- [115.] As already mentioned only one key was used to unlock all the cells, including the SAP13 store. Every police official who used the key to access the cells would therefore have had access to the SAP13 store.
- [116.] The evidence of March that control of the key was handed over to the second appellant was contradicted by the evidence of Mogoroane, who said that it was handed over to Fourie. Fourie confirmed this, but said that it was left in the charge office when she and Mogoroane went to attend to the complaint.
- [117.] It was not proved that the key was found in the physical possession of the second appellant when the police arrived, or in fact about where the key was at that stage. De Waal did in his evidence in chief say that *“the key was in the possession of (the second appellant)”*, but in cross-examination he adapted his version and said that *“(The second appellant) was in control of that key. If it was in his pocket or it was on his desk or in the safe as it is supposed to be, I cannot remember that specifically”*.
- [118.] The second appellant in his evidence admitted to having been in sole possession of the key while Mogoroane and Fourie was out, but it is clear that his version actually was that control of the *“whole police station”* was left to him in the absence of Fourie and Mogoroane. He was never asked about where exactly the key had been during that period, and particularly after he and March had apparently taken a suspect to the cells.
- [119.] The Regional Magistrate found that the second appellant had the key and therefore knew or must have known what had happened to the goods from the SAP13 store. There is no indication that the abovementioned aspects were ever considered by the Regional Magistrate.

Unexplained presence of unidentified person/s at police station

- [120.] Both Mogoroane and Fourie testified about a visit by two police officials at the police station after they had returned from 2229 Waterboer Street. Mogoroane

said that the one was known to him as Captain Leshaba. Fourie described them as Captain Ntshabane and a colonel whom she did not know, but who was according to her not De Waal.

[121.] According to them the officials wanted to know whether they had not noticed someone dressed in black at the police station earlier.

[122.] There was no evidence that either of the first or second appellants had been dressed in black that night, which raises the question who it then was that had, according to information that the officials apparently had, been around or in the vicinity of the police station, and therefore also of the SAP13 store, that night.

[123.] No attempts were made to establish exactly who these officials were and to find out from them what had led to their enquiry.

Apology

[124.] I have already dealt with Kekana's evidence of an apology that had allegedly been verbalised to him when he saw the first and second appellants in custody in the back of a police vehicle.

[125.] Even if it was true that someone had said that he was sorry, Kekana was clearly not sure who it was. His obvious attempt to adapt his version to get around this was in vain.

[126.] The second appellant denied having spoken to Kekana while in the police vehicle, and his denial was never challenged in cross-examination.

[127.] Loubser testified that, when he confronted the second appellant at the police station, he said that he knew nothing about the theft. The Regional Magistrate put a slightly different colour to Loubser's evidence in this regard, and described it as having been to the effect that the second appellant had said that "*he knew nothing or could not explain what had happened*". Be that as it may, both

versions are difficult to reconcile with the second appellant shortly thereafter intending to admit guilt to Kekana.

- [128.] What is also strange, and impossible to reconcile with the version of the prosecution, is the undisputed evidence of the second appellant that, when confronted at the police station, obviously after the raid at the house and immediately before his arrest, the police officials enquired about him by his name. On the versions of Loubser and De Waal they would not have had reason to know that the second appellant, by name, was on duty that night, let alone that he had at one stage been left in charge of the police station.

Second visit to police station by first appellant

- [129.] The second appellant's evidence was that he knew nothing of a second visit by the first appellant to the police station that night.
- [130.] The first appellant's evidence was also not led about a second visit. Possibly this could be held against the first appellant, but certainly not against the second appellant, because the evidence of Fourie and Mogoroane did not go so far as to say that the first appellant had indeed on that occasion gone inside the police station and to the second appellant. Their evidence was that they had come across the first appellant outside the police station as they were leaving.
- [131.] The fact that the first appellant was no longer at the police station when Mogoroane and Fourie returned, could therefore also not be seen as incriminating the second appellant.

Contents of reports

- [132.] As I have already said the Regional Magistrate clearly relied on the contents of the reports to De Waal in deciding to reject the evidence of not only the first appellant, but also that of the second appellant. My remarks in this regard above apply with equal force in the case of the second appellant.

- [133.] Insofar as De Waal and Loubser were allowed to say anything more than that reports had been received, and that those reports had led police to Modder River and eventually to the house of the first appellant, that part of their evidence constituted hearsay evidence, because the informant did not testify.

Credibility

- [134.] The Regional Magistrate found that the first and second appellants were unable to answer “*even direct logical questions*” and that the first and second appellants had contradicted themselves, that they had given unnecessary explanations, and that they had evaded direct questions. No reference was, however, made to specific examples of this in their evidence.
- [135.] The Regional Magistrate rejected the version of the first and second appellants as “*illogical, improbable*”, “*far-fetched*” and “*not reasonably possibly true*”. I have already alluded to aspects of their versions and of the evidence in this regard which the Regional Magistrate failed to deal with in the judgment and which have on all indications not been considered properly.

Count 2

- [136.] It does not appear from the judgment on what basis the second appellant was convicted on count 2. He was never in possession of the dagga allegedly found at the house where the first appellant lived. There was simply no evidence on the basis of which the second appellant could have been convicted on count 2.

THIRD APPELLANT

- [137.] The third appellant did not testify or present any evidence on his behalf. As already mentioned, Loubser conceded that both the first and the third appellants

had been apprehended outside the house. Was there a shred of independent evidence to link the third appellant to the stolen copper and aluminium or the dagga?

[138.] There was no evidence, other than the first appellant's rejected evidence, that the third appellant had in fact stayed there.

[139.] There was also no evidence that the third appellant had at any stage made incriminating utterances or admissions.

[140.] There was no evidence that the third appellant knew the second appellant, or that he would in any way have been able to access the SAP13 store.

[141.] Insofar as the contents of the reports, and the truth thereof, played any role in the conviction of the third appellant, that would also have been wrong.

[142.] The judgment of the Regional Magistrate contains not a single reason for convicting the third appellant on any of the counts.

CONCLUSION

[143.] In the circumstances the convictions of all three appellants on both counts fell to be set aside, which of course resulted in the sentences and the order in terms of the **Firearms Control Act** also being set aside.

C J OLIVIER

ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur.

B M PAKATI

JUDGE
NORTHERN CAPE DIVISION

For the 1st and 3rd appellants:

Mr A Van Tonder (Legal Aid South Africa, Kimberley)

For the 2nd appellant :

Mr Mr M A Fletcher (Fletcher's Attorneys, Kimberley)

For the respondent:

Adv A Stellenberg (Office of Director of Public Prosecutions, Kimberley)