

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

28/01/2015

Case Number: A388/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO.
(2)	OF INTEREST TO OTHER JUDGES: YES / NO.
(3)	REVISED.
28/01/2015	
DATE	SIGNATURE

In the matter between:

SELLO ABRAN MUSINI

APPELLANT

and

THE STATE

RESPONDENT

Coram: Prinsloo J et Hughes J

JUDGMENT

Delivered on: 26 January 2015

Heard on: 28 January 2015

HUGHES J

[1] The appellant was charged with two counts of robbery with aggravating circumstances and one count of attempted murder. He pleaded not guilty to all three counts and elected to remain silent. The court *a quo* found that there was insufficient evidence upon which he could be found guilty of the counts charged. However, the court did find the appellant guilty of the competent verdict on count 2, robbery with

aggravation circumstances. He was instead convicted of section 36 of the General Amendment Act 62 of 1955 (the Act) "*being in possession of stolen property but unable to give a proper explanation*". He was sentenced to three years imprisonment.

[2] For the duration of the entire court proceedings, the appellant was legally represented. On 6 November 2014 the appellant was granted leave to appeal the conviction and sentence.

[3] Briefly, the incident took place on 2 March 2012 at the home of the complainant, Refiloe Johanna Seroba. Whilst she and her mother, Lulu Josephine Seroba, were at home six men armed with firearms, entered and removed four cellphones and R800.00 cash. Both mother and daughter were unable to identify the assailants.

[4] The appellant's representative, Mr Mogashoa, argued that the trial court erred when it found that the state had proved beyond a reasonable doubt that the appellant was guilty of possession of suspected stolen property without a reasonable explanation. He argued that the court misdirected itself by finding that the explanation advanced by the appellant to the investigating officer was an attempt to mislead the investigating officer.

[5] In my view, the argument advanced of the elements of the offence especially that of "possession", as required by section 36 of the Act, is of importance. This to my mind was not proven by the state as it is not sufficient that the appellant had previously possessed the cellphone. I deal with this aspect later in the judgment.

[6] Mr Mogashoa argued that for the offence to be confirmed the state had to establish whether the appellant had personal and direct control of the cellphone.

[7] Mr Pruis, for the state, submitted that the argument presented by the appellant's counsel was incorrect. He submitted that the reasons for the magistrate's conviction must be looked at in totality. This would then incorporate the magistrate's view that the appellant had mental possession of the cellphone.

[8] Mr Pruis persisted that the appellant had given away the cellphone to attain sexual favours, borrowing it to, Maria Lekalakala. She was apprehended for the cellphone. Mr Pruis submitted that though the appellant did not have it physically *“he was still mentally in possession of control over that particular cellphone”*. Mr Pruis referred to the judgment of the magistrate and the relevant extracts appear at page 73 lines 22 (the above extract) and page 74 lines 1-10, for easy reference I set out the later passage below:

“However when it comes to the competent verdicts we applies for Section 260 the court must take into consideration Section 36 possession of stolen property without a proper explanation. The accused knew very well that it was stolen. That it was not operating that is one reason I gave it away so easily for sexual favors [sic favours] and that is why he also said that I already passed the stage of proposal I said let you borrow it in another words you are still in control of that particular cellphone. So not physically he was still mentally in possession of control over that particular cellphone and that constitutes the elements of the crime of Section 36”

[9] Section 36 of the General Law Amendment Act 62 of 1955 reads as follows:
“Any person who is found in possession of goods, other than stock or produce as defined in s1 of the Stock Theft Act...57 of 1959, 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.”

[10] It is trite that the elements of the offence are: (i) *was found in possession* (ii) *goods* (iii) *reasonable suspicion* (iv) *satisfactory account* (v) *mens rea*. In **S v Ismail 1958 (1) SA 206 (A) at 209** it was held that the element ‘*was found to be in possession*’ translates to the appellant being in possession of the item and not after the appellant has ceased to be in possession. As regards the time when the appellant must be ‘*found to be in possession*’ this must either be when the goods are found or when he is asked for an explanation. See **R v Ndou 1959 (1) SA 504 (T) at 505** and **R v Hassen 1956 (4) 41 (N)**. In both cases there was evidence that the accused had brought the goods to the place (which was not under his control) where

they were found, and in both cases he was absent when the goods were found. The goods were then removed by the police. Thus the accused was not in possession either when the goods were found or when he was asked for an explanation, for in the latter situation the goods were in the possession of the police.

[11] Mention was made by the magistrate of the appellant having had mental possession of the cellphone. In considering this aspect it is prudent that the mental element known as *animus* needs to be explained. *Animus* is the intention of the possessor, which is the intention with which one exercises control over the article. In the case at hand, it is clear that the appellant was not in physical possession of the cellphone as he had given it to Ms Lekalakala. From the evidence it is also apparent that Ms Lekalakala's, stated that the appellant gave her the cellphone in order to communicate with him. Of interest is the fact that she went to an Indian shop to have the security code decoded as the cellphone was not functioning. This was done on her own accord and not on the instructions of the appellant. From her evidence she communicated with the appellant via the same cellphone from March to November 2012, when the cellphone was eventually confiscated by the police.

[12] When I consider all the evidence as set out above together with the relevant law applicable, I am of the view that there was a misdirection on the part of the magistrate when he concluded that the appellant was guilty of section 36 of the Act. I am of the view that in the case against the appellant the element of possession was not present at the time that the cellphone was found neither was it present at the time that the appellant was asked to provide an explanation.

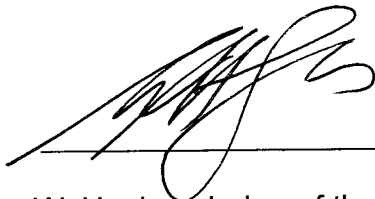
[13] In the circumstances the state has failed to prove the competent verdict, being in possession of property suspected to have been stolen and unable to give a satisfactory explanation. The conviction is thus set aside.

[14] In the result the following order is made:

[14.1] The appeal against the conviction is upheld.

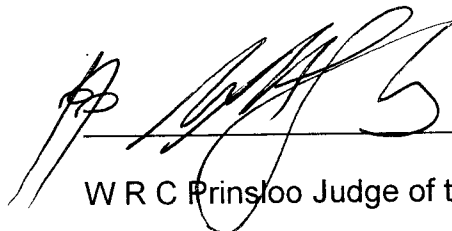
[14.2] The conviction is set aside.

[14.3] The registrar is directed to request the Correctional Services Department to immediately release the appellant.



W. Hughes Judge of the High Court

I Agree



W R C Prinsloo Judge of the High Court

Attorney for the Appellant:

PRETORIA JUSTICE CENTRE

2nd Floor FNB Building

Church Square

PRETORIA

Tel: 012 401 92000

Ref:

Attorney for the Respondent:

THE DIRECTOR PUBLIC PROSECUTIONS

PRETORIA

Tel: 012 351 6700

Ref: