

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A68/2014

In the appeal between:-

MPHETHI MOROJELLE

1st Appellant

NEPHER MAHLATHINI

2nd Appellant

MARIO KHOZA

3rd Appellant

and

STATE

Respondent

CORAM:

KRUGER, J *et* MBHELE, AJ

JUDGMENT BY:

KRUGER, J

HEARD ON:

8 SEPTEMBER 2014

DELIVERED ON:

11 SEPTEMBER 2014

- [1] The three appellants were accused 1, 2 and 3 in the trial in the regional court, where there were five accused. To avoid confusion, the appellants are referred to as accused 1, 2 and 3. During the defence case accused 4 and 5 made admissions and were convicted on all counts and sentenced. Sipho Gift Sophile was accused number 6, against whom the state withdrew all charges before the trial and he was called as a section 204

witness. The charges were the following: Count 1: Robbery of a Toyota Hilux Double Cab Bakkie, a digital camera, a Nokia cell phone, an ID book and R3 000 cash. Count 2: possession of a semi-automatic firearm, 9mm Parabellum. Count 3: Possession of a 9 mm Short Calibre. Count 4: Possession of ammunition, 12 cartridges. Count 5: Possession of Ammunition, three 9 mm cartridges.

[2] Accused 1 made a plea explanation under Section 115 of the Criminal Procedure Act wherein he said that his employer in Lesotho instructed him to go and fetch a vehicle he had bought in South Africa and bring it to Lesotho. He had no knowledge that the vehicle was stolen. The regional magistrate rejected his evidence and convicted him of receiving stolen property and sentenced him to 10 years' imprisonment, 5 suspended for five years. Accused 2 and 3 were convicted on all counts as charged and each sentenced to 11 years' imprisonment (5 suspended for five years) on count 1. Counts 2, 3, 5 and 6 were taken together for purposes of sentence and each accused was sentenced to 8 years' imprisonment (4 suspended for five years). The trial magistrate refused the three accused leave to appeal, but leave was granted by the high court on petition.

[3] Six witnesses testified for the state, and the three accused testified in their defence. The state witness were (1) Kutoane Adam Ramahlonami (2) Sipho Gift Sophile, the former accused 6 who was called as a section 204 witness. Then four police witnesses: (3) Captain Nkadi (4) Constable Kapi (5) Constable Mpenvana (6) Captain Moleme (the investigating officer). The

first three police witnesses worked at the border post at the Maseru port of entry from South Africa into Lesotho.

- [4] The first problem with the magistrate's judgment is his reliance on the evidence of Sophile, the section 204 witness. From the record it appears that Sophile was never sworn in. He was never asked whether he had any objection to taking the oath. He was 26 years old. The magistrate treated him as a child witness. Section 163 of the Criminal Procedure Act, which makes provision for affirmation *in lieu* of taking the oath, provides for conscientious objections to the oath by the witness alone. Unless the witness indicates that he has objections to taking the oath, he must be sworn in. If the witness has not raised any objection to taking the oath, and is not sworn in but warned, it means that all the evidence of that witness must be ignored (**S v Ndlela** 1984 (1) SA 223 (N) at 225D-H). Both Mr Botha, for the state, and Mr van der Merwe, for the appellants, were in agreement that the evidence of Sophile had to be ignored.
- [5] The second problem with the magistrate's judgment is his apparent reliance on the admissions by accused 4 and 5 against accused 1, 2 and 3. Admissions by an accused are not admissible against a co-accused. Both counsel agreed on this point. The objections to receiving an admission made by A against B are set out fully in **The Commentary on the Criminal Procedure Act** by Du Toit *et al sub voce* section 219 pages 24-70D – 24-70F.

- [6] Once the evidence of Sophile and the admissions of accused 4 and 5 are struck out, all that remains against accused 1, 2 and 3 is the evidence of the complainant and the police officers at the border post and the evidence of the accused.
- [7] The complainant, Mr Ramohlonami testified that on 3 September 2009 he was in Virginia, driving home in his Toyota. Three persons approached him and asked for a lift to the farm Soutfontein. In court he pointed out accused 4 and 5. It is significant that he did not point out either accused 4 or 5 at the Identity Parade that was held eight days after the incident. There he pointed out accused 2 and 3 and a person who was not a suspect. He testified that he could only identify accused 4 and 5 of the first group. He then turned back to Virginia, where another person got in. He pointed out accused 2 in court as the person who got in at that stage. Accused 4 got out of the vehicle at some stage, walked to the driver's side, and instructed complainant to climb over the gears, accused 4 was going to drive. A person who was sitting behind the complainant pointed a firearm at the complainant. Complainant could not identify the person who pointed the firearm. Asked about accused 1, complainant said accused 1 was not present among the persons who got into the vehicle. This corroborates the evidence and case of accused 1 that he only got into the vehicle at a later stage. Asked about accused 3, the complainant first said he remembered clearly that he did not point out accused 3 at the Identity Parade. Yet he did point out accused 3 on the Identity Parade. The complainant went on to say he did not get a chance to look clearly at the person who was pointing a firearm at him, later he said "I did not

see his face". From the complainant's evidence it is clear that he could not identify accused 3. When they got to a 4-way stop, they took his cell phone and phoned their friends. They drove off again and stopped at an old deserted building. All the others got out but accused 2 remained in the vehicle with the complainant. After a while the others came back and told the complainant to get out of the vehicle. They searched the complainant and took the money he had, about R3 000. Two persons remained with him, but he could not identify them. They also took his cell phone and a camera. Asked about the firearm that was pointed at him, the witness said it was a small firearm. In cross-examination the complainant admitted that at the Identification Parade the first person he pointed out was not a suspect in this case.

- [8] Captain Nkadi of the South African Police Service works at the Maseru Border post. On 3 September 2009 he was in front of the computer in the control room. He entered the registration number of the Toyota Hilux Bakkie, and the computer indicated that it was a stolen vehicle. Captain Nkadi went out and found accused 1 behind the steering wheel of the bakkie. He pulled accused 1 out of the bakkie. Accused 1 first said the vehicle belonged to Ernest, and when asked who Ernest was, accused 1 said it belonged to the five persons who were in the police vehicle. Sophile, the former accused 6, the section 204 witness, told Captain Nkadi that there were two firearms in the police vehicle. He found the two pistols and ammunition which are mentioned in counts 2-5. Constable Kapi also works at the Border post. He stopped the Toyota after Captain Nkadi told him to do so. Accused 1 was the driver, who was alone in the vehicle, and said it was Ernest's

vehicle. He said accused 1 then pointed out other people who were with him in the vehicle, who were accused 2, 3, 4 and 5. Constable Mpenvana then put those persons into the police van. They searched the police vehicle and found the two firearms under the spare wheel. Constable Mpenvana arrested accused 2-5 for not having passports. Accused 1 was arrested for being in possession of a stolen vehicle. Captain Moleme is the investigating officer and his testimony concerned only the sending off of the firearms and ammunition for ballistics evaluation.

[9] The evidence of accused 2 and 3 was to the following effect: They were in a vehicle with accused 4 and 5 they were going to Lesotho to buy dagga. They left from Virginia. All the accused, including the former accused 6, were in the vehicle, except accused 1. The vehicle stopped at Ficksburg, where accused 1 got in. Accused 2 and 3 got out before the vehicle got to the border post, and walked through, where they were apprehended because they did not have passports.

[10] Three issues need to be decided in this appeal. They are (1) the conviction of accused 1 of receiving stolen property, (2) the conviction of accused 2 and 3 of robbery, (3) the conviction of accused 2 and 3 of possession of firearms and ammunition.

(1) **The conviction of accused 1 of receiving stolen property.**

[11] An essential element of the offence of receiving stolen property is the *mens rea* of the accused. The accused must be shown to have known that the goods were stolen. The mental element of the crime is satisfied where the accused suspected that the goods

were stolen but nevertheless deliberately decided not to make enquiries. The test for intention is subjective (see the discussion in **South African Criminal Law and Procedure** by J R L Milton Volume II (3rd Edition) (1996) 669-670; Snyman, **Criminal Law** 5th Ed (2008) 523). The accused must be shown to have actually foreseen the real possibility that the goods were stolen, and nevertheless received them (Milton at 671). The only admissible evidence against accused 1 is his own evidence, which was in conformity with his plea explanation, namely that his employer in Lesotho told him that he had bought a vehicle in South Africa, and that accused 1 had to go and fetch it and bring it to Lesotho. There is no evidence to contradict this version of accused 1. Mr Botha, correctly, did not ask for a confirmation of the conviction of accused 1.

(2) **The conviction of accused 2 and 3 of robbery**

[12] Once the evidence of the accomplice and the admissions of accused 4 and 5 fall away and cannot be used against accused 2 and 3, all that remains is the evidence of the complainant and the evidence of accused 2 and 3 that they were in the vehicle from Virginia to Ficksburg, but never in the presence of the complainant.

[13] Mr Botha contended that the three persons the complainant picked up must have been accused 4, 5 and 3. He says this because accused 4 and 5 admit in their admissions in court that they boarded the complainant's vehicle. Accused 3 was arrested at the border post, and admitted that he was in the vehicle. Mr Botha said the complainant's evidence was clear that there were

three persons in his vehicle, he was the fourth. Mr Botha stresses that it is not in dispute that accused 2 and 3 were arrested at the border post, and that they had been in the Toyota Hilux vehicle which had been robbed from the complainant. Mr van der Merwe, on the other hand, points out that Virginia is far from the border post, and that all depends on the identification of the complainant.

- [14] The identification evidence of the complainant is not satisfactory. He pointed out accused 2 and 3 at the Identity Parade, and not accused 4 and 5, yet in court he pointed out accused 4, 5 and 2. He said he could not be certain of accused 3. But he had seen accused 2 (and probably accused 3) two days after the incident at the Virginia police cells when he went to look for his phone. If one accepts, as Mr Botha asks us to do, that the first two persons in the vehicle were accused 4 and 5, according to their admissions, then we would be using the admissions of accused 4 and 5 against accused 2 and 3, something we cannot do. The question is whether the admissible evidence proves beyond reasonable doubt that accused 2 and 3 were in the vehicle when it was robbed from the complainant. They admit that they were in the vehicle at the stage when it arrived in Ficksburg and they got out. They do not admit that they were in the vehicle at any time when the complainant was in it. The complainant's evidence about the identification of accused 2 and 3 is not good. There is uncontested evidence by accused 2 that the complainant saw him at the police cells in Virginia two days after the incident, being about six days before the Identification Parade. In court the complainant could not identify accused number 3, although he

had done so on the Identity Parade. Further, the first person he pointed out on the Identity Parade was a person who is not a suspect. He pointed out accused 4 and 5 in court, although he had not pointed them out on the Identity Parade even though all the accused were there.

[15] The evidence of the identification of accused 2 and 3 is not sufficient to sustain the convictions.

(3) **The possession of the firearms and ammunition**

[16] The accused were charged and convicted of possessing two firearms and two sets of ammunition. There is no evidence as to which accused handled which firearm at which stage. The fact that the firearms and ammunition were found in the police vehicle that took the accused to the police station does not assist the state, because it does not show who possessed the firearms. In **S v Nkosi** 1998 (1) SACR 284 (W) reference is made to an unreported judgment of Swart J in **Molemane and Others v S** where the court accepted the inference that a group of robbers had the intention to possess weapons jointly. In **Nkosi** the majority judgment disapproved **Molemane**. The reasoning accepted by the majority in **Nkosi**, and endorsed by the Supreme Court of Appeal in **S v Mbuli** 2003 (1) SACR 97 (SCA) pars [71]-[72] was explained as follows (**Nkosi** at 288e – f): what robbers normally contemplate is that each gun-holder would use his gun as he thought desirable and necessary. The gun-holder would always retain physical possession of the gun and he would not intend to yield up his right to possess the gun and to use it as he deemed fit. Marais J expressed the view that generally, or at

least often, the gun-holder would not intend to cede one iota of his right to control the gun to the group (at 288f-g). At the very least, it is a reasonably possible inference, on the facts of this case, that the guns were held by two persons, or perhaps even one, and that person or persons did not intend to yield control to the group. Possession is a concept which has a physical and mental element. Both must be established. The state must prove that the accused physically possessed the firearm and had the mental intention to possess it. In this case that has not been proven. Not in respect of one of the accused has it been established that that accused had the physical control and mental intent to possess any particular one or both of the firearms. As a last resort Mr Botha asked us to alter the convictions to one of being accessories after the fact of possession because they lied about the firearms. There is no room for such a finding. It is not clear that the accused lied about anything. The firearms could theoretically have been in the police vehicle before the accused got into it, taking into account only the evidence admissible against the accused. The convictions of counts 2-5 must be set aside.

ORDER

1. The appeals of the three appellants against all their convictions and sentences succeed.
2. The convictions and sentences of all three appellants are set aside.

A. KRUGER, J

I agree.

N.M MBHELE, AJ

On behalf of appellants

Mr P. van der Merwe

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of the respondent:

Adv JP du P Botha

Instructed by:

Director Public Prosecutions

BLOEMFONTEIN