

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No : 57/2013

In the matter between:-

THE STATE

Applicant

and

JOSHUA MOHLOMI PII

Respondent

HEARD ON:

22 NOVEMBER 2013

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

5 DECEMBER 2013

- [1] This is an application by the State as applicant for leave to appeal in accordance with the provisions of s 319 of the Criminal Procedure Act, 51 of 1977.
- [2] Phalatsi AJ presided over the criminal trial, but his acting stint came to an end at the end of the third term and consequently the Acting Judge President of this division referred the application for leave to appeal to me for consideration. Two accused, accused 1, a certain Reit, and accused 2, the respondent in this application, but who will be referred to herein as in the trial court, stood arraigned before Phalatsi AJ who delivered judgment on 20 September 2013. Accused 1 was convicted of (i) housebreaking with the

intention to rob and robbery with aggravating circumstances, (ii) murder and (iii) assault with intent to do grievous bodily harm. Accused 2 was acquitted on all charges.

[3] Adv A.M. Ferreira of the Office of the Director of Public Prosecutions in Bloemfontein appeared for the State in the criminal trial as well as in this application. Adv L. Tshabalala of the Bloemfontein Justice Centre appeared for accused 2 in the criminal trial as well as in this application for leave to appeal.

[4] The State's application for leave to appeal reads as follows:

“Dat die Applikant verlof toegestaan word om te appelleer teen die uitspraak van Sy Edele Waarnemende Regter Phalatsi gelewer op 20 September 2013 na die Hoogste Hof van Appèl op sekere regsvrae wat die (sic) tydens die verhoor ontstaan het, te wete:

Dat Sy Edele Waarnemende Regter fouteer het in sy aanwending van die leerstuk van onlangse besit; en

Dat bovermelde en addisionele regsvrae geformuleer sal word en tydens gemelde aansoek aan die Verhoorhof voorgehou word ten einde die Verhoorhof in staat te stel om gemelde vrae te formuleer vir oorweging deur die Hoogste Hof van Appèl.”

[5] When the application was called Mr Tshabalala indicated that he did not have any objection to the reservation of the formulated question of law. For ease of reference the question of law the State wants the court to reserve as it

appears from the notice of application is translated as follows:

“That the Honourable Acting Judge erred in his application of the doctrine of recent position.”

- [6] I accept that the intention was to phrase the aforesaid in the form of a question so that it reads:

“Did the Acting Judge err in his application of the doctrine of recent possession?”

- [7] When the application was heard Ms Ferreira raised two further alleged questions of law to be reserved, to wit:

“(1) Het die Regter die heersende reg korrek toegepas deur te bevind dat respondent vrygespreek moet word op alle aanklagte deurdat hy nie in besit van die motorvoertuig gevind is nie?

Die Regter moes die afleiding vanweë die leerstuk van onlangse besit gemaak het dat respondent saam met beskuldigde 1 betrokke was by die pleging van die misdrywe.

(2) Het die Regter fouteer deur te bevind dat daar geen omstandighedsgetuienis was wat die skuld van die respondent bewys het bo redelike twyfel nie?”

- [8] When I perused the judgment and prepared for the hearing of the application for leave to appeal, it struck me that the question that the State wanted the court to reserve might not have a practical effect on accused 2 or might not be sufficient to serve the interest of justice. I believed that something more was required and that certain further

questions of law should be reserved for consideration. Therefore I was of the view that the State's request was meritorious.

- [9] Mr Tshabalala was taken by surprise by the State's approach and indicated that he did not have a copy of the judgment of Phalatsi AJ and that he needed time to consider the issue. Upon my enquiries it appeared that if the matter had to be postponed counsel would only be available during the course of next year. It was then agreed that Mr Tshabalala would place his viewpoint on record and that it be recorded by me accordingly. He objected to the two further questions as he was of the view that these were not questions of law, but related to factual issues and that the State did not have the right to appeal to the Supreme Court of Appeal in that regard as it is not entitled to have a disguised question of fact reserved.

See: **Attorney-General, Transvaal v Kader** 1991 (4) SA 727 (A) at 739D – 740J.

- [10] An application for leave to appeal requires the court to consider whether there is a reasonable prospect that another court will come to a different conclusion regarding the facts and/or the law. The principles generally applicable to applications for leave to appeal apply *mutatis mutandis* to applications in terms of s 319, albeit that s 319 applies to mistakes of law only.

[11] Section 319(1) reads as follows:

“If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve the question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.”

[12] Kruger A, **Hiemstra’s Criminal Procedure**, loose-leaf edition at 31-34, refers to the difficulty in correctly identifying whether a question is one of fact, or law, or a combined question of fact and law with reference to **Magmoed v Janse van Rensburg and Others** 1990 (2) SACR 476 (C) and 1993 (1) SACR 67 (A).

[13] The decision to reserve a question of law should have a practical effect on the accused and not merely be of academic value.

See: **Magmoed**, *loc cit*, 1990 (2) SACR 476 (C) at 478g.

It is also accepted that if the record of the proceedings does not disclose the question of law to be raised, it cannot be said that the question has arisen on the trial as should be the case.

See: **S v Mulayo** 1962 (2) SA 522 (A) at 527A-B.

If a question of law is reserved, certainty must exist in regard to all the facts to which the question relates. The factual findings on which the point of law is dependent must be recorded.

See: **Director of Public Prosecutions Natal v Magidela and Another** 2000 (1) SACR 458 (SCA) at 462i;
S v Basson 2003 (2) SACR 373 (SCA) paras [6], [7] and [8] at 384h – 386d.

I quote the following from the heading in **Basson** at 378d-f:

“The State has no right of appeal in terms of the Act against incorrect factual findings by a trial court. The State can appeal only if the trial Court gave a wrong decision due to a mistake of law.... It follows that a question of law arises only when the facts upon which the trial Court based its judgment could have another legal consequence than that which the trial Court had found. For these reasons

- (a) there must be certainty regarding the legal issue being raised and the facts upon which the trial Judge based his or her finding, and
- (b) when a question of law is reserved it has to set out clearly, not only which legal issue is raised, but also the facts upon which the trial Court based its finding.”

[14] If the State wishes to appeal against an acquittal on the ground that a mistake of law was made, a question of law will be reserved only if there is a reasonable prospect that the accused would have been convicted had that mistake of law

not been made – **S v Basson**, *supra*, paras [10] and [11] at 386 and 387 as translated in the summary at 378i – 379b.

[15] *In casu* the following was common cause at the trial, save as indicated in paragraphs 15.7 and 15.8:

15.1 Mr and Mrs Bazzard were attacked in their townhouse by two assailants about midnight of 28/29 January 2013.

15.2 Mr Bazzard was stabbed several times with a knife and died as a result of the wounds inflicted upon him. His wife was attacked with a different knife and suffered superficial wounds only. Several items were removed from their home, including a Standard Bank bank card, as well as the couples' Mercedes Benz motor vehicle.

15.3 Soon after the attack a cash withdrawal of R1 000.00 was made from Mrs Bazzard's Standard Bank account by making use of an Absa ATM at 01h14 on 29 January 2013.

15.4 Just before 03h00 that same morning the Mercedes Benz stopped at the Golf Course Filling Station on the N8 outside Bloemfontein where fuel was taken in. The vehicle and the driver thereof in particular were video-taped by means of video cameras and the video footage was presented as evidence. A facial expert

testified that according to the video footage accused 2 was the driver of the vehicle at that point in time.

15.5 Accused 1 made a detailed plea explanation, placing himself and accused 2 on the scene in the townhouse of the Bazzards during the night of 28/29 January 2013. He pleaded not guilty to the charges as put to him, but pleaded guilty to housebreaking with the intent to steal and theft, which plea was not accepted by the State.

15.6 Accused 1 was arrested in the vicinity of Pepler Court in Bloemfontein in the early hours of 29 January 2013 whereafter he took the police officers to accused 2's house where he was found and arrested.

15.7 At accused 2's house an Allen key was found, which accused 1 testified was in accused 2's possession when they arrived at the Bazzard's townhouse. According to accused 1 he took the Allen key from accused 2 and opened the security gate therewith. This version was not accepted by the trial court who found that accused 1 adapted his version to correspond with the State's version.

15.8 Accused 1 to a large extent confirmed the version set out in his plea explanation in his evidence in court, but the trial court was not prepared to accept his version insofar as he implicated accused 2 as being his co-

perpetrator who also attended to the scene in the Bazzard's townhouse. The court found that there was "nothing" to support accused 1's version. On the basis that the court was confronted with two mutually destructive versions, i.e. of accused 1 on the one hand and of accused 2 on the other, it was not prepared to make any findings adverse to accused 2.

[16] The trial court was not prepared to apply the doctrine of recent possession, because accused 2 was not found in possession of the Mercedes Benz vehicle of the Bazzards. Its attitude was that although accused 2 was in the vehicle at some stage, even the driver thereof, it did not mean that he had been at the crime scene as well. The court found that the only way in which it could have been assisted by the doctrine of recent possession was if accused 2 was found in actual possession of the motor vehicle, but insofar as he was not so found in possession that doctrine could not be applied. I shall deal with this finding *infra*.

[17] The doctrine of recent possession of stolen property was discussed in **S v Parrow** 1973 (1) SA 603 (AD) at 604B-D. In terms hereof an accused may be convicted of theft if he is found in possession of recently stolen property and fails to give an innocent explanation which might reasonably be true. The court continued as follows:

"Hence, even if, after the closing of the cases for the State and the defence, it is inferentially probable that the accused stole the

property, he must be acquitted unless the only reasonable inference is that he did so; for the law demands proof beyond reasonable doubt.”

Proof that stolen goods were found in an accused’s possession never shifts the onus to him of proving his innocence, even if he fails to satisfactorily explain his possession. He may still be entitled to an acquittal if the court, having considered all the evidence in its totality, is not satisfied that his guilt has been proven. The doctrine is simply a common-sense observation on the proof of facts by inference. Three requirements have to be met before the doctrine can be considered, i.e. that (i) the item was stolen; (ii) the item was recently stolen; (iii) the accused has failed to give an innocent explanation.

See in general: Milton, **The South African Criminal Law Procedure**, vol 2, p 636 – 638.

- [18] In **S v Skweyiya** 1984 (4) SA 712 (A) at 715 the Court found that the nature of the stolen item is an important element in determining what is recent. Certain stolen items may easily and quickly be disposed of by thieves in which case “anything beyond a relatively short period will usually not be recent.” In a recent SCA judgment delivered a few days ago and as yet unreported it confirmed the **Parrow** and **Skweyiya** judgments.

See: Zwane and another v The State (426/13) [2013] ZASCA 165 (27 November 2013).

[19] In S v Mavinini 2009 (1) SACR 523 (SCA) the trial court found that the State witness positively identified the appellant as the driver of the robbed Audi vehicle which vehicle sped away and eluded the police pursuit. The vehicle was found deserted a week later. The trial court found that as appellant was driving the vehicle less than 24 hours after commission of the robbery his possession was so closely connected to the robbery that in the absence of any explanation he must have been one of the robbers. This finding was not attacked on appeal as the identity only of the driver was in dispute. The SCA accepted the trial court's finding on identity and dismissed the appeal. The essence of this judgment is that the person in respect of whom the doctrine is sought to be applied does not have to be found in actual possession and thus caught red-handed. It applies even if the person is seen in possession of the stolen item soon after the crime, but gets rid thereof thereafter and before being apprehended red-handed. It remains a matter of proof.

[20] *In casu* the relevant issue is whether accused 2 was found in possession of the robbed Mercedes Benz. Phalatsi AJ found that he was never found in possession and therefore the doctrine of recent possession did not even come into play. The question to be considered is whether "found in possession" literally means to be trapped red-handed and found in actual possession of the stolen item by a police

officer or any other person that qualifies in this regard. It appears that the doctrine can be applied in the following scenario to mention one example: while running away from the police, the suspect, during the chase throws the stolen item away whereupon he is apprehended and the stolen item immediately recovered. *In casu* accused 2 was not found in actual possession of the Mercedes Benz motor vehicle by the police or any other person in the literal sense of the phrase, but the trial court accepted the video footage to the effect that he was at a stage in possession of this vehicle and the driver thereof within two to three hours from the time that the vehicle had been robbed. Accused 2's explanation, whilst admitting that the person in the video looked like him, but that it might be his identical twin brother who he failed to call to testify on his behalf, was rejected by the trial court. Having considered the application and bearing in mind the arguments as well as Mr Tshabalala's concession, I am of the view that there is a reasonable possibility that the Supreme Court of Appeal might find that the question of law raised in the notice of application for leave to appeal be found to be good.

- [21] I am also mindful of the fact that even if accused 2 was found in possession of the stolen Mercedes Benz, this in itself does not mean that the accused ought to be convicted of the charges on which he was acquitted, even if he did not give a reasonable explanation of his possession.

See: **S v Jantjies** 1999 (1) SACR 32 (C) at 36 and 37;

Parrow, *loc cit*.

[22] The two further alleged questions of law raised by the State, referred to above, are more problematic to adjudicate. Trial courts often draw inferences from proven facts and not all these inferences can be regarded as questions of law. Ackermann J *et al* stated in **S v Basson** 2004 (1) SACR 285 (CC) at 308d para [49], that if the inferential process is directed at determining a fact (often referred to as a secondary fact) no question of law arises, but on the other hand, challenges to findings which are in reality conclusions of law have been held to raise issues of law for purposes of s 319.

[23] In **Magmoed**, *loc cit*, at 94a - d Corbett CJ dealt with this matter as follows:

“It is a genuine question of law (a) whether the evidence against an accused was such that there was a case to go to the jury or that there were grounds upon which the jury could legally convict the accused of the crime charged; or (b) whether the proven facts bring the conduct of the accused within the ambit of the crime charged...., category (b) involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of the crime. This is clearly a question of law.”

Based on the quoted authorities I am of the view that the second and third questions raised by the State, adapted by me, are questions of law which can be reserved in terms of s

319. The aim of the second question is to obtain a finding to the effect that if the Supreme Court of Appeal finds that the doctrine of recent possession was incorrectly applied, it should follow that the proven facts brought accused 2 within the ambit of the crimes of which he was charged. The third question is based on the same reasoning and it should be regarded as a genuine question of law, i.e. whether the court erred in finding that there was no circumstantial evidence upon which the guilt of accused 2 was proven beyond reasonable doubt. Both second and third questions have a bearing on the issue as to whether the proven facts constitute the commission of the crimes with which accused 2 was charged in line with the quoted statement by Corbett CJ in **Magmoed**, *loc cit*.

[24] Although the questions were raised in Afrikaans, I shall in my order translate the Afrikaans, adapted as required, into English.

[25] Wherefore the following orders are made:

1. The applicant's application for leave to appeal to the Supreme Court of Appeal in terms of the provisions of s 319(1) of the Criminal Procedure Act, 51 of 1977, is granted.
2. The following questions of law are reserved for consideration by the Supreme Court of Appeal:
 - 2.1 Did the acting trial judge err in his application of the doctrine of recent possession?

- 2.2 Did the acting trial judge apply the law correctly in acquitting accused 2 in respect of all charges based on his finding that accused 2 was not found in possession of the robbed Mercedes Benz motor vehicle of the Bazzards and should the acting trial judge not have inferred in accordance with the doctrine of recent possession, and bearing in mind the direct evidence also, that accused 2 committed the crimes together with accused 1?
- 2.3 Did the acting trial judge err in finding that there was no circumstantial and/or direct evidence that proved the guilt of accused 2 beyond reasonable doubt, bearing in mind that the proven facts constitute the commission of the crimes?
3. It is directed that the three questions of law shall be specially entered into the record and that a copy thereof be transmitted to the registrar of the Supreme Court of Appeal.

J.P. DAFFUE, J

On behalf of applicant: Adv A. M. Ferreira
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

On behalf of respondent: Adv L. Tshabalala
Instructed by:

Bloemfontein Justice Centre
BLOEMFONTEIN

/sp