

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 160/2012

In the matter between:-

THE STATE

and

SIFISO TSHABALALA

CORAM:

KRUGER, J *et* DAFFUE, J

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

8 NOVEMBER 2012

[1] This is an automatic review. The accused was charged in the magistrates' court, Harrismith for housebreaking with the intent to steal and theft. He pleaded not guilty, but was eventually convicted on 16 April 2012 as follows:

"Guilty of possession of stolen property."

He was sentenced to thirty six (36) months' imprisonment.

[2] The review was initially referred to Mocumie, J who directed the following enquiries to the presiding magistrate.

- “1. Why was the accused not found guilty on housebreaking with intent to steal and theft on the basis of “recent possession”?
2. Should the presiding officer not have endorsed the relevant section of the General Law Amendment Act on which the accused was convicted on the J4 and J15?”

[3] The registrar of this court was informed by the acting chief magistrate of Bloemfontein that the presiding magistrate was only appointed on a temporary basis and that his contract expired. Consequently he was not available to attend to the remarks of Mocumie, J and the High Court was requested to deal with the matter accordingly.

[4] It is possible to convict an accused of housebreaking with the intent to steal and theft on the basis of the so-called “doctrine” of recent possession. See **S v JANTJIES** 1999 (1) SACR 32 (C) at 35 – 36 and **S v MSIMANGA EN ‘N ANDER** 2005 (1) SACR 377 (O) at 380 h. The reference to

a “doctrine” is sometimes criticised. I refer to the comments of Hattingh, J in **S v MSIMANGA** *loc cit* as well as the following comment of Milton:

“As such the ‘doctrine’ is simply a common-sense observation on the proof of facts by inference.”

See Milton JRL, **THE SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE**, Volume 2, 3rd edition, p 637.

A review court cannot set aside a conviction and replace it with a conviction on a more serious crime even if it is of the view that the acceptable evidence justifies such a conviction. It is therefore unnecessary to consider whether the evidence is sufficient for a conviction on housebreaking with the intent to steal and theft.

- [5] There is no crime such as “possession of stolen property”. The presiding magistrate probably had in mind to convict the accused of contravention of section 36 of the General Law Amendment Act, 62 of 1955, but did not indicate this at all, neither in the judgment, nor on the J4 and J15.

[6] Section 36 provides as follows:

“Failure to give a satisfactory account of possession of goods –

Any person who is found in possession of any goods, other than stock or produce is defined in section 13 of the Stock Theft Act, 1923 (Act No 26 of 1923), 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.” (emphasis added)

The underlined words indicate the elements of the crime created in the section, i.e. (a) goods (b) the suspect must be found in possession (c) there must be a reasonable suspicion that the goods have been stolen and (d) the suspect must be unable to give a satisfactory explanation of the possession.

[7] Broome JP made the following observation pertaining to section 36 of Act 62 of 1935, the predecessor of the

present Act, whilst accepting that his comments apply to section 36 of the present Act as well:

“The very drastic provisions of the section are directed against a person who is, as it were, caught red-handed with the stolen goods. That cannot be extended to apply to a person who is shown to have had direct control at some time other than the time when he is caught, nor to a person who, not being found in possession, falsely claims ownership.”

See **R v HASSEN** 1956 (4) SA 41 (NPD) at 43A. Snyman is of a similar view and according to him the state must prove that the accused was in possession of the goods at the moment that they were found by the police. See Snyman CR, **CRIMINAL LAW**, 5th Edition, p 525.

There must be a reasonable suspicion that the goods have been stolen and that suspicion must at least exist at the moment that the goods are found. Once the first three requirements have been proven, and only then, is it necessary to examine whether the accused was unable to give a satisfactory account of his possession. The

accused's explanation will be regarded as satisfactory if it is reasonably possible and shows that he *bona fide* believed that his possession was innocent with reference to the purposes of the Act, namely the prevention of theft. The test in determining whether the accused has given a satisfactory explanation is subjective and it therefore does not matter whether the accused's belief was unreasonable. See **S v AUBE** 2007 (1) SACR 655 (WLD) at 657 and 658 and Snyman *loc cit* at 527.

[8] The presiding magistrate committed a misdirection in relying on **S v PARROW** 1973 (1) SA 603 (AD) and Milton *loc cit* for his conclusion that the accused was "guilty of possession of stolen property on the doctrine of recent possession, because the items were in question, (sic) the house of the complainant was broken into on the 28th and you were seen on the same day carrying the items of the complainant."

[9] Neither the Appeal Court in **PARROW**, nor Milton is authority for the proposition that an accused can be convicted of contravention of section 36 of Act 62 of 1955 –

the failure to give a satisfactory account of possession of goods suspected of being stolen – based on the doctrine of recent possession and in doing so, the court *a quo* disregarded the elements to be proven in order to establish the guilt of the accused.

[10] There was thus no legal basis for a conviction, but over and above that, the presiding magistrate failed to have proper regard to the following:

10.1 There is no evidence that the accused was seen carrying any property of the complainants, especially on the day when the offence of housebreaking occurred;

10.2 At no stage did any police official find the accused in possession of goods suspected of being stolen;

10.3 The complainant's wife, Ms Sitebe went to the accused's house where she found the accused's girlfriend and on her version recovered a blanket, two dishes and a piece of steel wool which she believed was theirs. These items had no identification marks. The state called the accused's girlfriend, Ms Radebe

who confirmed that Ms Sitebe visited her. She could not argue with Ms Sitebe pertaining to the ownership of the blanket at that stage as she was staying with her parents for a few months during her maternity and did not know how accused became in possession thereof. She denied that the other items, the two dishes in particular, were removed from their home by Ms Sitebe.

10.4 When Ms Radebe confronted accused later, he confirmed that he bought the blanket for their baby and during the trial accused confirmed the transaction regarding the blanket under oath. He handed in a receipt as proof of purchase as an exhibit.

10.5 Other items that were allegedly stolen from the complainant's house were found in possession of third parties. Their evidence tended to incriminate the accused, but as stated right from the outset it is not our duty at this stage to consider whether accused could or should have been found guilty of either housebreaking with the intent to steal and theft or theft based on the doctrine of recent possession.

Even if we would be inclined to find so, we are not at liberty to interfere.

[11] For the reasons advanced herein the conviction and sentence cannot stand and should be set aside.

ORDER

[12] Therefore the following order is made:

12.1 The conviction and sentence of the accused are set aside.

J. P. DAFFUE, J

I concur.

A. KRUGER, J

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