

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

CASE NO. A 200/11

In the review between:

THABO RICHARD MOFOLO

versus

THE STATE

CORAM: ZIETSMAN, AJ *et* NAIDOO, AJ

JUDGMENT BY: NAIDOO, AJ

DELIVERED ON: 27 OCTOBER 2011

NAIDOO AJ

[1] The appellant was convicted of Robbery with Aggravating Circumstances in the Bloemfontein Regional Court on 10 March 2010, and was sentenced to Fifteen (15) years' imprisonment. With the leave of the court *a quo*, he now appeals against such conviction and sentence. He was legally represented during the trial in the Regional Court. Mr S J Reinders appears on behalf of the appellant in this court and Mr M Strauss on behalf

of the State.

[2] By way of background, I set out briefly the evidence in this matter. The complainant, Bernardus Johannes Van Wyk (Van Wyk) was driving home in the early hours of the morning of 17 June 2009, when he was accosted by four men at a robot on Nelson Mandela Drive. Two of them forced him out of his motor vehicle at knife point and severely assaulted him, causing him to lose consciousness. He testified that he also thought that they had a firearm, although he did not see it. They told him that they had a firearm. When he regained consciousness, he discovered that he had been robbed of his motor vehicle, a white Volkswagen Jetta, and its contents, his jacket, watch, cellular telephone and wallet. The contents of the vehicle included his house keys, sunglasses, his study material (he was an apprentice electrician), and electrical equipment necessary for his work as an apprentice. Van Wyk was not able to identify any of the robbers.

[3] Later that day, a fruit vendor, Stoffel Moreng (also known

as Tello Moreng) was picked up by the appellant, who was his friend, and one other person, known as Fanna, in a white Jetta vehicle. He went with them for a ride to a few places before they dropped him off at the place at which they had picked him up. His evidence was that the appellant drove the motor vehicle and even said that it was his (appellant's) motor vehicle, which he intended to use as a taxi at night. When this witness was dropped off, he was told that the appellant and Fanna were going to the Shoprite supermarket.

- [4] Constable Mokoena, the third witness for the State went to the shopping centre at which Shoprite is situated after receiving information that a white Jetta vehicle, which was stolen, was heading for Shoprite. He was in the company of a number of his colleagues, and observed this vehicle approaching. When it was parked, he approached the vehicle and there he saw that the appellant, the only occupant of the motor vehicle, was seated in the driver's seat drinking an alcoholic beverage. The appellant was placed under arrest, at which time he said that the vehicle belonged

to someone else and offered to show the police who this person was. Mokoena and his colleagues appeared not to believe the appellant and made no attempt to follow up on his assertion that someone else was the owner of the vehicle.

- [5] The accused was the only witness for the defence and his version was that his wife, who was pregnant at the time, needed to visit the doctor, but he had no vehicle. He contacted Fanna to assist him take his wife to the doctor. Fanna arrived in the white Jetta. They thereafter went to pick up Tello Moreng to take him to the appellant's employer. The employer was looking for a driver to drive his taxi at night, and he took Moreng because the latter was unemployed. He and Fanna thereafter dropped Moreng off at the spot where they had picked him up and thereafter headed to Shoprite to pick up Fanna's wife. His evidence is that Fanna drove the vehicle at all times. Fanna left the vehicle to go in search of his wife. He was seated in the passenger seat when the police arrived, took him out of the vehicle and placed him under arrest. He told the police the vehicle

did not belong to him and offered to take them to the owner of the vehicle. However, they did not want to listen to him and assaulted him. He denied being involved in the robbery and the taking of Van Wyk's vehicle, insisting that his contact with the vehicle was through Fanna.

[6] It is common cause that the vehicle had no registration plates or licence registration disc. The vehicle was identified by Van Wyk as the vehicle he was driving and which was taken during the robbery a few hours earlier. He did this by comparing the Vehicle Identification Number as well as the engine number of the recovered vehicle with the Certificate of Registration of his vehicle. They were the same. He was also able to identify it by a tear on the steering wheel and the cable which he had used to attach the electric aerial to the vehicle, although the aerial itself had been removed. There was no dispute that the vehicle in fact belonged to the complainant, Van Wyk.

[7] There was, consequently, no direct evidence that the

appellant was one of the people that had assaulted and robbed the complainant of his vehicle, the matter being decided on circumstantial evidence. The learned magistrate accepted the evidence of the State witnesses, holding that Moreng and Mokoena were credible and reliable witnesses. She held that the appellant did not make a good impression on her and rejected his evidence as false, stating that the appellant did not convince her that his version was true. The learned magistrate found that in view of the fact that the appellant was found in possession of the vehicle within a few hours after the complainant was robbed of it, she was satisfied that the only reasonable inference that could be drawn was that the appellant was one of the robbers that attacked the complainant and robbed him of his vehicle.

- [8] One of the considerations that the appellant pertinently requests this court to make is whether his possession of the vehicle entitles it to infer the appellant's guilt on the charge of robbery. In **S v Mtsweni 1985(1) SA 590 (A)**, at page 593 F to G, the Learned Judge, Smallberger

AJA, cited the following extract from the case of **S v Essack** 1974(1) SA 1:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

Smallberger AJA also referred to the often quoted passage from **R v Blom** 1939 AD 186, which is to be found on page 188:

“(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”

A similar view was held in the matter of **S v Jantjies** 1999(1) SACR 32 (C), which we were referred to in the

appellant's Heads of Argument. I quote from the headnote:

"The facts of every case have to be examined to determine whether an inference about the commission of some or other offence is the only reasonable inference that can be drawn. The mere possession of a stolen thing, shortly after it was stolen, does not per se justify the inference that the possessor was the thief or, even worse, the housebreaker and thief."

- [9] The appellant was not a satisfactory witness and had difficulty in relating the sequence of events leading up to his arrest with any degree of credibility. He contradicted himself and the evidence of Moreng, especially with regard to the reason for inviting Moreng to go for a ride in the vehicle. It was apparent that he was not being truthful about who drove the vehicle, no doubt to distance himself from the fact that the vehicle was obtained by illegal means. In this regard, the Learned Magistrate correctly, in my view, accepted the evidence of Moreng and Mokoena that the appellant drove the vehicle, and rejected the accused's version. Although his version was that Fanna was called to transport his wife

to the doctor, the appellant seemed to have forgotten about it and said that when Fanna arrived, he arranged with him to pick up Tello Moreng. When he was pertinently asked about this by the prosecutor, he said that he made a mistake by asking Fanna to pick up Moreng, but later said that his wife was taken to the doctor before they picked Moreng up.

- [10] I agree with the learned magistrate that the appellant's version of the way events unfolded is not reliable or credible and it does appear that he was fabricating parts of his version. The question that consequently arises is whether the appellant's untruthfulness justifies an inference of guilt. In this regard I align myself with what Smallberger AJA said in the Mtsweni case (as translated in the headnote): ***"Although the untruthful evidence or denial of an accused is of importance when it comes to the drawing of conclusions and the determination of guilt, caution must be exercised against attaching too much weight thereto. The conclusion that, because an accused is untruthful, he therefore is probably guilty must especially be guarded against. Untruthful evidence or a***

false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case.”

- [11] The evidence is that the complainant, who was robbed of his motor vehicle in the early hours of the morning of 17 June 2009, was unable to identify his attackers. One can reasonably infer from the fact that the appellant was arrested in possession of the complainant's vehicle some twelve to fourteen hours after his vehicle was taken from him, that he robbed the complainant of his vehicle. The circumstances are such that it can also be inferred that he stole the vehicle after the complainant was robbed. The facts also lend themselves to a finding of guilt in terms of Section 36 or Section 37 of the General Law Amendment Act 62 of 1955. There are consequently no facts to establish the appellant's guilt in respect of the robbery, and he ought not to have been convicted of robbery, but of one of the lesser offences I have mentioned.

[12] In my view, a conviction in terms of Section 37 of Act 62 of 1955 would be the most appropriate in this case. The policemen who arrested the appellant made no attempt to follow up on his version that the vehicle belonged to someone else. It is common cause that the appellant was in Fanna's company up to the time that Moreng was dropped off at the stop street, and that he was advised that the appellant and Fanna were on their way to Shoprite. It would have been relatively easy for the police to have pursued the investigation in respect of Fanna and even to have obtained a statement from him in respect of his involvement in this matter. With regard to the conduct of the appellant, even assuming that he was a passenger in the vehicle, it is improbable that having observed the absence of registration plates and a licence disc on that vehicle, that he would not have at least entertained the suspicion that the vehicle was stolen. Indeed the inference is inescapable that he must have been aware or suspected, when he first observed the vehicle, that it

was stolen. But he continued with his activities and even advised Moreng that he intended to hire the vehicle out as a taxi. He assumed control of the vehicle in preparation of his intended use of it. In **S v Mani 2002(2) SACR 393 (EC)**, it was held that *“where the evidence did not indicate that the accused had participated in the actual theft of a stolen motor vehicle found in his possession, but that he had become aware of the fact that it was stolen and had not participated in the disposal of the motor vehicle, which he was retaining for his own use, he was guilty of receiving stolen property and not theft”*

In view of what I have outlined above, I align myself with this view.

- [13] In view of what I have said, I do not deem it necessary to deal with the submissions made by Mr Reinders and Mr Strauss in respect of the imposition of the prescribed minimum sentence. However, the submissions of both Counsel in respect of what an appropriate sentence would be in respect of a conviction in terms of section 37 of the General Law Amendment Act 62 of 1955 have been taken into account. It is also noted that the appellant spent nine months in custody awaiting trial.

I, accordingly, propose that the following order be made:

1. The conviction of Robbery with Aggravating Circumstances is set aside and substituted with the following:

The Accused is found guilty of contravening Section 37 of the General Law Amendment Act 62 of 1955.

2. The accused is sentenced to Twenty Four (24) months' imprisonment, back-dated to 10 March 2010.

NAIDOO, AJ

I agree,

P. ZIETSMAN, AJ

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Mr M Strauss
The State