

**REPUBLIC OF SOUTH AFRICA**



**NORTH GAUTENG HIGH COURT PRETORIA**

**CASE NO: A29/2009**

**DATE: 11 DECEMBER 2009**

**In the matter between**

**WILLEM GEORGE BARNARD**

**Appellant**

**and**

**THE STATE**

**Respondent**

**JUDGMENT**

**VICTOR. J:**

**INTRODUCTION**

[1] The appellant and his co-accused was convicted of theft of approximately 300metres of railway lines and sleepers in the Modimolle

Magistrate s Court. The appellant and his co-accused (who does not appeal) was sentenced to 6 years' imprisonment wholly suspended and only the appellant was ordered to forfeit his firearm and ammunition in terms of section 103 of Act No 60 Of 2000.

[2] The State alleged that the appellant together with his co-accused stole the railway line and cross members from the railway station known as Alma. The evidence of a Spoornet employee Mr Vogel was tendered by the respondent to prove ownership of the portion of line stolen. It soon became apparent during cross examination that it was not a simple task to identify which portion of line belonged to Spoornet and which portion was private. It was not possible for Mr Vogel who had inspected the very lines at Alma over many years to identify same from the plan and he had to resort to an inspection *in loco*. The Spoornet lines and the sideline belonging to the Farmer's Cooperative known as NTK were not easily identifiable on the plan. This plan was published in a directory of railway lines and siding privately owned in South Africa.

[3] Mr Vogel could not read the plan or testify with any certainty which portion belonged to Spoornet and which to NTK.

[4] An inspection *in loco* was undertaken and it was only thereafter that Mr Vogel came back more positively about which portion of railway line belonged to Spoornet and whether it indeed was the property of Spoornet which was stolen.

[5] The State called a Mr G van Moerkerken to testify

presumably to link the appellants co-accused to the theft. Mr Van Moerkerken an auditor testified that he had been approached by the appellant and his co-accused in order to draw up a joint venture agreement. Pursuant to the instructions he drew up the agreement and it would appear that one of the parties were not happy with the terms namely that it would be a joint venture in equal shares. The appellant provided the workmen and the technical know-how and he wanted a more advantageous profit split. There was some uncertainty about the date on which Mr Van Moerkerken was approached to draw up the agreement. It could have been in the year 2003 or 2004. After being challenged about the date he became uncooperative was not prepared to commit to a date.

[6] It was suggested on behalf of the respondent that the appellant and his co-accused had requested this agreement after the theft in order to try and cover their tracks. The agreement clearly corroborates the appellant's version namely that he and his co-accused were bona fide buyers of disused railway lines.

[7] The respondent also called one Mr Du Toit who was [.....] years of age. He worked for the appellant He had been working for him 6 years. He testified that the appellant's co-accused pointed out the relevant portion of the railway line that had to be removed. He had been Instructed by the appellant to meet the co-accused at the Alma Station as, he, the co-accused was going to point out the portion of the rail for dismantling and lifting. The appellant was not present and at no stage did the appellant point out the relevant portion to be lifted. The co accused did

indeed proceed to point out the exact portion of the railway line that had to be lifted. When the same sketch was shown to him as had been shown to Mr Vogel he to tell was unable to tell from the sketch which piece belonged to Spoornet as opposed to NTK. He confirmed that he dismantled and lifted approximately 300 metres.

[8] A Mr De Klerk also testified on behalf of the State. He confirmed that he purchased the railway line from the appellant. He had negotiations with both the appellant and the co-accused but his negotiation was with the appellant.

#### APPELLANT'S VERSION

[9] It was the appellant's case that he and his co-accused were house- visiting friends in particular his co-accused was not a man of means and the wife of the co-accused came to the appellant's farm on a daily basis for sewing in order to make items for sale and thereby supplement their income. During the course of that friendship it would appear that the appellant and his co-accused attended the same Church where the appellant was a deacon.

[10] During the course of this friendship the appellant suggested to his co accused that he try and source private railway lines that were for sale. The appellant himself was busy removing an underground railway line at a nearby mine. He did not have time to source prospective train lines for sale His co accused took on this task

[11] The appellant then gave his co-accused a directory which contained all the private lines in South Africa.

[12] It is the appellant's case that his co-accused sourced a private train line and gave the information to the appellant. The appellant's daughter Mrs P. attended to all his general administration and in particular to this task. Pursuant to that information she telephoned a Mrs R. of Spoornet and ascertained that the particular portion of railway line at Alma Station was indeed owned privately. She arranged for the line to be closed off with a clamp which meant that that particular portion of the railway line was no longer going to be used. The page of the directory reflecting the private ownership of the line at the Alma Station was handed in as an exhibit.

[13] What is of importance is that prior to the lifting of the railway line the officials of Spoornet damped the rail line. This could be done when Spoornet itself sold railway line alternatively it could be done when a private owner of a side line sold the line In this case the line was clamped and this was further comfort for the appellant who had visited the site only once on a Friday afternoon. This fact also meant that he had no reason to raise any queries about the validity of the sale.

[14] The entire version of the appellant's co-accused was that he had nothing to do with the situation; he had not pointed out the line; he had not become involved in the sale of the line and therefore knew nothing about it. His version was rejected by the Magistrate in light of the evidence of the State witness.

[15] A perusal of the photographs does indicate a disused railway line. It is next to the silos and it is possible to confuse which particular of railway line belongs to Spoorinet and which belongs to NTK. The appellant ultimately had to accept that the line taken by them belonged to Spoorinet had not been purchased and did not belong to NTK.

[16] The question to be determined in this appeal is whether the court a quo erred in accepting that the respondent had proved that the appellant had the necessary intention to commit theft. None of the state witnesses implicated the appellant in the theft Mr Vogel demonstrated the difficulty in identifying the piece of rail. The co accused was the person who set up the illegal operation for the appellant to dismantle and remove the rail. The version of the co accused was clearly false in the light of the evidence of the state witnesses. The respondent could not show that the appellant was aware of the illegality of the operation.

[17] Once the appellant's version could reasonably be true the proper test has to be applied:

*'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to*

*be false; some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.*<sup>1</sup>

[16] The appellant's conduct has been consistent and he carried out the operation in the normal course of business. At the relevant time the appellant approached the local police Capt Strauss and told him that they were busy removing rail lines which had been purchased. Mrs R. of Spoornet had been approached. He had not instructed his workers to be furtive He had not been secretive in his dealings with the merchant who purchased the line. The relevant line had been clamped All the aforesaid conduct can hardly be consistent with an intention to commit theft.

[18] It was necessary for the Magistrate to have regard to all the evidence before convicting the appellant. The test of course is whether the guilt was established beyond reasonable doubt There was no doubt in the appellant's mind that the railway lines were lawfully removed by him.<sup>2</sup>

[19] The State never called Capt Strauss to rebut the appellant's evidence or Mrs Roos to do so. The court a *quo* placed too much weight on the fact that the appellant never attended to the payment of the purchase price for the rails to NTK. It was quite clear from the evidence that his business administration was left to his daughter Mrs Putter.

---

<sup>1</sup> S v Van der Meyden 1999 (1) SACR 447 (W) and S / Trarnor 2003 (1) SACR 35

<sup>2</sup> Volume 3 P3ge 283 hne 20 to page 284 line 5, pago 289 line 228.

[20] These parties all lived on a farm and it is quite clear that administration was only done on an *ad hoc* basis when and if necessary. If Mrs Putter was presented with an invoice she would effect payment. Throughout this period the appellant liaised with his daughter in order to ascertain the progress of the removal of the lines. The question of payment for the lines did not have to be addressed by the appellant. The co-accused was attending to the administrative side of things.

[20] During this time the appellant and his co-accused fell out over a Church-related matter and they did not speak to each other. When the appellant tried to speak to his co-accused the latter "*het op hom gegil*".

[21] The fact that the appellant and his co-accused were engaged in a bitter dispute was also not undermined in any way by the respondent. The lack of communication between the appellant and his co-accused also led to absurdity and facilitated a situation where the appellant was duped by his co-accused.

[22] It is also unclear why the court *a quo* declared that the appellant could not hold a firearm but did not impose the same sentence on his co-accused. It is correct that the Statute does provide for the removal of the right to possess a firearm on being convicted of theft. The court however in exercising its

discretion to order the removal of the firearm was obliged give reasons. There is nothing on the record to show on what basis the court exercised its discretion.

[23] By virtue of the conclusion I come to on the conviction of the theft it's unnecessary to say anything more about the sentence in respect of the firearm and ammunition.

The order that I would make is the following:

1 The appeal is upheld

2 The conviction and sentence of the appellant in the court a quo are hereby set aside and replaced with the following: "The accused is found not guilty and acquitted."

**VICTOR J**

**JUDGE OF THE HIGH COURT**

I concur and it so ordered

**MABUSE AJ**

**ACTING JUDGE OF THE HIGH COURT**