

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A 540/05

In the appeal of:

JACQUES TERBLANCHE

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED 13 JUNE 2006

LE ROUX AJ

1. The Appellant in this matter was convicted by the Magistrate, Paarl, on a charge of contravening Section 1(1) of the General Law Amendment Act, Act No 50 of 1956. His conviction occurred on 29 April 2004 and on the same day he was sentenced with a fine of R3 000-00 or 12 months' imprisonment together with a further 18 months' imprisonment suspended for a period of 5 years on certain conditions. He appeals against both his

conviction and sentence.

2. The circumstances which form the background to the charge preferred against him arose as a result of a collision which occurred on the R44 Road between Paarl and Klapmuts on the late afternoon of 1 June 2003. The Appellant conducts a breakdown and towing away service in that region. It is common cause that the vehicle that the Appellant is alleged to have removed in contravention of the said section left the road, presumably as a result of one or more tyres that burst, rolled a number of times and came to standstill a distance away from the road surface. Dead and injured passengers were removed and thereafter the Appellant recovered the damaged vehicle and towed it away. The State alleged that, in doing so, he committed the offence of contravening Section 1(1) of Act 50 of 1956 which reads as follows:

“Any person who, without a bona fide claim of right and without the consent of the owner or the person having the control thereof, removes any property from the control of the owner or such person with intent to use it for his own purposes without the consent of the owner or any person competent to give such consent, whether or not he intends throughout to

return the property to the owner or person from whose control he removes it, shall, unless it is proved that such person, at the time of the removal, had reasonable grounds for believing that the owner or such person would have consented to such use if he had known about it, be guilty of an offence and the court convicting him may impose upon him any penalty which may lawfully be imposed for theft.”

3. The State called four witnesses while the Appellant also testified and called four further witnesses. It is convenient to deal with the evidence that was adduced before turning to the law. Before the first witness was called the Appellant briefly indicated that his defence would be that the driver of the vehicle furnished the required consent to tow the vehicle away and that he would also call four witnesses who would testify that he had the necessary consent.
4. The first State witness was Mr M Snyders. He testified that he was the driver of the vehicle in question and explained how it left the road, overturned, rolled a number of times and eventually came to a standstill. In an injured state, he managed to get out of the vehicle and saw injured people scattered all around. He felt pain in the area of his left shoulder

and neck as well as his left leg. He managed to take his cellphone from the cabin of the vehicle, sat down and phoned a friend whom he requested to notify certain people about the accident. A person then approached him, requested and took down certain personal particulars and enquired how he felt. While he was furnishing the particulars his cellphone rang again. It was the owner of the vehicle he had driven and he informed her about the collision. She took the necessary particulars and said she was on her way. When his cellphone then rang again the person who was taking down his particulars answered it while pretending that he was a police official. When asked by the Public Prosecutor whether that person was the Appellant before the court he responded in the negative. He proceeded to testify that after the person had taken down his particulars he requested him to sign the document in which the particulars were entered and he refused. No mention was made of the towing away of the vehicle at any stage.

5. In cross-examination by the Appellant he repeated that his own injuries were present in the area of his left shoulder and left leg. That evidence was not disputed. He was asked whether he was left-handed or right-handed and replied he wrote with his right hand. The Appellant then put it

to the witness that it was indeed him, the Appellant, who was the person who took down his particulars and although hesitant, the witness indicated that he was not in a position to deny it. He insisted, however, that the person pretended to be a policeman whilst speaking on his cellphone. This he did in the face of the Appellant's proposition to him in cross-examination that there were four policemen who were standing close by them and who would testify about the conversation between Snyders and the Appellant. When asked about the ownership of the vehicle, he testified that it belonged to Ms van der Westhuizen, an acquaintance of him. He denied the suggestion in cross-examination that attempts were made to contact the owner of the vehicle telephonically to obtain consent for its removal. Snyders also denied the suggestion, in the course of the cross-examination, that he, Snyders, requested the Appellant to phone the owners in view of the fact that Snyders' injured arm prevented him from doing so.

6. The next State witness was Mr Jack. He testified that at about 19h30 on that particular evening he was phoned and requested by Ms van der Westhuizen to go to the R44 Road and to fetch her vehicle which had been damaged in a collision. He went there together with three of his friends,

one of whom was Mr Hendricks and in whose vehicle they were travelling. They never got so far as the accident scene because on their way they drove past a tow truck with Ms van der Westhuizen's vehicle being towed behind it. Having turned around and having followed the tow truck they managed to attract the driver's attention after which he stopped at the side of the road. When Jack asked him who had given him permission to tow the damaged vehicle away, he did not respond. Jack also asked him for written proof of consent by anybody which he was unable to give. The driver then contacted the Appellant who arrived some time later. He was accompanied by three policemen in a separate vehicle. They requested the Appellant to release the damaged vehicle while the Appellant insisted on payment of some R2 000-00 before he would do so. Jack testified that he only had about R500-00 to R700-00 with him and offered to pay that in the event of them releasing the damaged vehicle. That was refused. According to Jack the Appellant was aggressive and after there was somewhat of an altercation between the Appellant and his driver the Appellant got into the cabin of the tow truck and drove away towards the Klapmuts police station. The police officials who attended the scene at the roadside left to another accident scene and were not further involved.

7. Mr Jack and his friends then followed the Appellant's tow truck with Ms van der Westhuizen's damaged vehicle behind it to the Klapmuts police station. At the police station an argument apparently ensued during which they could not persuade the Appellant to release the damaged vehicle and at some stage a police official, Inspector van der Westhuizen, advised the Appellant to take the vehicle away to his own premises. In cross-examination Mr Jack testified that Mr John van der Westhuizen, the husband of Ms van der Westhuizen referred to above, was the owner of the damaged vehicle. It was put to Mr Jack that the reason why the Appellant was not prepared to hand the damaged vehicle over to him was because he was not the owner thereof. His reply to this proposition was unclear and could not be recorded. The Appellant elaborated by suggesting to Mr Jack that the SAPS had tested the registration number of the vehicle and ascertained that it belonged to a Van der Westhuizen – he would only have been prepared to release the vehicle to him, Jack, once Van der Westhuizen had given the necessary consent. This Mr Jack confirmed.
8. The third State witness was Ms van der Westhuizen. She testified that she and her husband were the owners of the vehicle in question. She

confirmed that she phoned Snyders after 18h00 on the day in question. She spoke to him personally and he informed her that there was an accident. He only managed to tell her that it happened on the Klapmuts Road before the phone disconnected. She immediately went to another friend, Mr Matthews, because she did not have transport. Mr Matthews then phoned the number of Snyders again and spoke to a person who had answered the phone. He told the person not to make any arrangements for the removal of the vehicle until they had arrived on the scene. The person, however, told Mr Matthews that they need not come to the scene and that they should rather go straight to the hospital. The person said he was a police official. On their way to the hospital they phoned Mr Jack and asked him to attend the scene and to wait for their arrival after they had been to the hospital.

9. Sometime later Mr Jack phoned again and told her to come to the Klapmuts Police Station because the vehicle had already been towed away and the person in charge of the tow truck refused to hand it over to them whereafter they had gone to the police station. She then went to the police station and on their way they drove past a tow truck with her damaged vehicle being towed behind it. She nevertheless proceeded to

the police station, claimed that she was the owner of the vehicle, showed the registration papers in support of her claim but they were not interested. The next morning she went back to the police station and there they told her to communicate with the Appellant about the matter. Despite numerous further efforts and visits she had not been able to get her vehicle. She never gave any permission to anybody to tow her vehicle away.

10. In cross-examination she confirmed that she had phoned Mr Snyders and that he informed her about the accident. She also told the court that the Appellant consistently refused to release her vehicle and at the same time remained unable to show any document to proof that Snyders had signed for the tow away. It was suggested by the Appellant that an oral consent was sufficient and she denied that she had given an oral consent. He suggested that the reason why she took so long before she was on her way to the police office was because he and Snyders had been unable to get hold of her earlier. He put it to her that when Snyders got into the ambulance he was desperate. It was at that stage that Snyders stated that he was unable to get hold of anybody and that he, the Appellant, could tow the damaged vehicle to his yard – Snyders said he would inform the

relevant people about it at a later stage. The Appellant suggested to her that Snyders had made a proper arrangement with him for the vehicle to be towed away and that it was only because of the costs involved that she refused to pay and denied that consent was given.

11. The last State witness was Mr Richard Hendricks. He accompanied Mr Jack to the scene of the accident and confirmed that they never attended there due to the fact that they encountered the tow away vehicle with the damaged vehicle behind it earlier. He corroborated Mr Jack's version save in respect of the response of the driver of the tow away vehicle. According to Hendricks the driver responded by stating that the driver of the damaged vehicle, i.e. Snyders, had given him permission to tow the vehicle away. During cross-examination it was suggested to Hendricks that the reason why they went from there to the police station was that Jack could not prove his ownership of the vehicle. Hendricks responded by saying there was no particular decision to go to the police station. What happened, according to him, was that the Appellant drove away without any decision and they simply followed him.
12. The Appellant then testified and described how he arrived at the scene of

the accident and that Snyders was pointed out to him as the driver of the vehicle involved. He went to Snyders where he sat next to the damaged vehicle. His observation was that Snyders had only sustained minor injuries (*"lig beseer"*) and that he did not suspect or observe anything that indicated to him that there were serious injuries present. He was able to communicate with Snyders and Snyders was not traumatised. Snyders confirmed that he was the driver of the vehicle but informed him that he was not the owner. He indicated that the owner was a woman from Kraaifontein. When he asked him whether arrangements had already been made to tow the vehicle away he replied in the negative and added that he did not even know where his cellphone was. The Appellant then found the cellphone in the damaged vehicle. The reason why they were looking for the cellphone was that, according to Snyders, there were two numbers on the cellphone which they could dial in an attempt to find the people who could give the necessary consent for the tow away of the vehicle. Having found the cellphone he, the Appellant, then dialled the number on the instruction of Snyders. Snyders could not dial himself because his right arm was injured. They could not get an answer at any one of the numbers. When eventually it became clear that Snyders was going to be taken to hospital they had a conversation about what would

happen to the damaged vehicle.

13. The conversation culminated in an agreement in terms whereof Snyders gave the Appellant oral consent to tow the damaged vehicle to their premises for safe-keeping. Due to the injuries to the arm of Snyders, he could not sign the usual consent form. Accordingly, he only entered Snyders' particulars and asked him again whether he could not sign. Snyders complained that his arm was too sore. As they were putting Snyders into the ambulance his cellphone rang. Appellant answered the phone and spoke to a lady who requested to speak to Snyders. She mentioned that she had noticed that he had been looking for her. He briefly told her what had happened after which she requested him to tell Snyders that she would be going to the hospital which he did. He then told three policemen who stayed behind that Snyders had given him oral consent to tow the vehicle to the Appellant's premises. When one of the policemen enquired about whether Snyders had signed anything, he told them that Snyders could not sign due to his injuries. After a number of hours they managed to negotiate the damaged vehicle to the road and then towed it away. According to the Appellant the rest was history. Two vehicles with people forced his driver to stop, threatened him with death

and eventually they managed to escape to the charge office. He had consent to tow the damaged vehicle away.

14. In cross-examination he stuck to his version that Snyders had injuries to his right arm and leg. He could not explain why he did not dispute Snyders' evidence that it was his left shoulder that was injured. He said he had planned to produce a hospital card to prove Snyders' injuries but had not been able to do so yet. He insisted that Snyders did give him oral consent to tow the vehicle away.
15. The Appellant then called his secretary, Ms DS Croy as a witness. She stated that the driver of the tow away vehicle called for help over the radio on the afternoon in question. In response she accompanied the owner of the business (which in context, is the Appellant) and when they arrived at the scene they encountered a commotion. She confirmed a series of leading questions to the effect that the persons on the scene who insisted that the damaged vehicle be removed could not furnish proof of ownership of the vehicle. According to her the driver of the tow truck refused to drive further because he feared for his life, upon which the Appellant got into the driver's seat and drove the truck further. During cross-examination she

answered that nobody at the scene attempted to ascertain the veracity of Mr Jack's version that he was requested by the owner to obtain the damaged vehicle. The major part of her evidence referred to the general practice pertaining to the various ways in which consent to tow a damaged vehicle away could be obtained without it necessarily being applicable to the matter before the court. To that extent it was irrelevant.

16. The Appellant's next witness was Sergeant Volmink of the Klapmuts police station. Also his evidence consisted to a large extent of responding to questions of general import pertaining to practices prevailing at accident scenes. That part of his evidence is clearly irrelevant. As far as the matter before the court was concerned, he testified that he saw the Appellant at the scene of the accident. In response to the leading question of the Appellant he confirmed that the Appellant did approach them at a stage and told them that he had obtained consent from the driver of the damaged vehicle to tow it away.

17. The next witness was Inspector CJ Paulse of the South African Police Services. He confirmed that he had earlier in a written statement stated that Sergeant Volmink informed him that the Appellant had made an

arrangement with the driver of the damaged vehicle to tow it away. He also confirmed that he saw the Appellant speaking to the driver of the damaged vehicle at the scene of the accident. He also asked the injured driver personally whether he had given such consent to the Appellant and the injured driver confirmed the same. In cross-examination he did not deviate from that version. He stated that the driver was seriously injured in his view as he was lying in a crumpled position on the ground while groaning from pain. He was not in a position to give any written consent. The Appellant was standing next to the injured driver.

18. The next witness was Inspector van der Westhuizen of the South African Police. He confirmed that he also attended the accident scene and then returned to the Klapmuts police station. Later the Appellant arrived there with the tow truck and the damaged vehicle together with other male persons. They were having an argument and because the other male persons were under the influence of intoxicating liquor and unruly he told them to come back the next day. He thereupon told the Appellant to take the damaged vehicle to his premises because they had no space at the police station. He never asked them for documentary proof of ownership but did not believe that they had any papers with them.

19. After his last witness had been called the Appellant informed the court that he had obtained the medical report which contained the information in relation to Mr Snyders' injuries but that he did not wish to tender it in evidence.
20. In his judgment in the court *a quo* the learned Magistrate analysed the evidence and concluded that the State had proved that the Appellant had not been given the necessary consent to remove the damaged vehicle. The learned Magistrate then proceeded to deal with certain legal authorities and principles pertaining to the section under which the Appellant had been charged and concluded that all the requisites for a conviction under the section had been satisfied. Accordingly, he found the Appellant guilty as charged.
21. In the course of his judgment the learned Magistrate referred to the police witnesses and remarked that their evidence reflected an unsatisfactory situation. He questioned the role of the police and their relationship with the Appellant or his business. I must say that the remarks are consistent with my own impression of the evidence. There are certain indications on

record of what I regard as an unhealthy state of affairs as far as the relationship between the Appellant and the police officials are concerned. In view, however, of the decision that I have arrived at in this matter it is not necessary to explore that matter further. I shall, for the purposes of this judgment, assume that the Magistrate was correct in his finding that no consent as contemplated in Section 1(1) of Act 50 of 1956 had been obtained. On that assumption the question still remains whether the State has proved the Appellant's guilt beyond reasonable doubt.

22. On an analysis of Section 1(1) of Act 50 of 1956 it seems to me that before a conviction can follow it is necessary for the State to prove at least the following:

22.1 That the Appellant had no *bona fide* claim of right;

22.2 That in addition the Appellant had not obtained the consent of the owner or person in control of the damaged vehicle;

22.3 That without such *bona fide* claim and consent he removed the damaged vehicle from the control of the owner or person having

control;

22.4 That it was removed with the intent to use it for the Appellant's own purposes;

22.5 That when doing so he had no reasonable grounds for believing that the owner or person exercising control would have consented to such use.

23. If, as I have done above, it is assumed that on the evidence the Appellant had not obtained the necessary consent, it is unlikely that he could have had a *bona fide* claim or could have reasonably believed that grounds existed that the owner or person exercising control would have consented to the removal. The aspect that gives me difficulty, however, is the requirement that for a conviction to follow it must be proved that the Appellant removed the damaged vehicle "*with intent to use it for his own purposes*". On a *prima facie* reading of the evidence the vehicle could not have been used for its ordinary purposes at all because it was damaged and had to be towed away. The Appellant could therefore not have intended to use the vehicle in the sense of driving it or moving from one

location to another. The learned Magistrate, in his judgment, did not regard this difficulty as insurmountable and concluded that the necessary use manifested itself in the following way:

“Die aspek wat dan nou onder gebruik verstaan word in hierdie spesifieke geval kom ek na toe terug. Voertuig duidelik is nie in staat om maar net weggery te word nie deur die persoon wat wettig in beheer daarvan was nie. Sekere dienste moes gelewer geword het. Dit is nie ‘n noodgeval gewees nie want daar is mense op pad om die voertuig te herwin of hulle in staat daartoe sou gewees het kan die hof nie bepaal nie. Die gebruik wat die hof hieraan gee of toeken is die skepping van ‘n skuld of die generering van ‘n bedrag wat verskuldig word, nie soseer ‘n retensie of ‘n sekuriteit vir ‘n skuld nie, maar om self ‘n skuld te bewerkstellig deur die voertuig in te sleep sonder toestemming en dan die mense aan te spreek, die werklike eienaar aan te spreek vir ‘n bedrag ...”

24. This is clearly a wider interpretation of the word “use” than one would ordinarily have been inclined to attach to it. The conclusive legal question is whether the legislature intended such a wide meaning or not when the section was enacted.

25. The history of the section is by now well-known and it is not necessary to elaborate upon it.

See eg.: **R v Sibiya 1955 (4) SA 247 (AD)**

S v Rheeder [2000] 4 All SA 300 (SCA) at 303, para 7

26. Despite criticism it must now also be accepted as established law that the section is aimed at the unlawful removal of the article and that consequently it does not include the situation where the article is in the lawful possession of a person who uses that article for an unauthorised purpose.

S v Motiwane 1974 (4) SA 683 (NC)

S v Schwartz 1980 (4) SA 588 (T)

S v Rheeder, supra, at 303, para 8

27. The crucial enquiry is therefore whether the Appellant intended to use the article for his own purposes at the time of the removal thereof and it is in that context that the meaning of the word “use” must be established. In

this regard there exists, in my view, a clear distinction between “control” of an article and the “use” of that article. I agree with the following observation of **Snyman, Strafred, 4th Edition** where the learned author states the following at p 519:

“Wat onder ‘beheer’ en ‘gebruik’ verstaan moet word, is feitlike vrae wat met inagneming van verkeersmaatstawwe beantwoord moet word. Die blote hou van ‘n saak in besit is nog nie dieselfde as gebruik daarvan nie.”

28. In my view the history of the section and in particular the need to address the consequences flowing from the judgment of **S v Sibiya**, i.e. to penalise the temporary removal and use of an article, not accompanied by the intention to permanently deprive the owner thereof, must play a role in ascertaining the intention of the legislature.
29. In **R v Mtshali 1960 (4) SA 252 (N)** the accused took a woman’s grammaphone and wireless because he thought she had stolen his money. Towards the end of the judgment (in the case of **Mitshali** Holmes, J. (as he then was) made the following obiter remark:

“The Crown did not ask for a conviction under Act 50 of 1956. It seems that that Act only applies to a user as distinct from a retention. It may be that the Act should be extended by amendment to cases of retention, otherwise a higher purchase owner may be able to spoliator with criminal impunity from a defaulting purchaser, with a view to holding the merx pending payment of arrears.”

30. This obiter remark lead **Milton, SA Criminal Law & Procedure, 2nd Edition**, to state the following at p 7, para J4 – 10, footnote 3:

“Holmes, J. expressed the view (obiter) in R v Mtshali 1960 (4) SA 252 (N) at 256 (X had taken a wireless by means of security for a debt which he had said Y owed him and had no intention of playing the wireless) that ‘use’ does not include ‘retained by way of security’. This is to give a rather special meaning to the word ‘use’, for retention is surely a form of use. The learned Judge employs the word ‘use’, in the sense of putting an article to the purpose for which it was designed or to some use other than a purely passive one. Though it seems doubtful whether the word can be so restricted, such restriction can perhaps be supported on the ground that it was such restricted ‘use’ which Sibiya’s case held to be non-penal and

which Mtaung's case regarded as theft. In other words, it can be argued that the statute was passed to penalize the active user."

31. This approach seems more or less in line with the following extract from De Wet and Swanepoel, *Strafreg*, Fourth Edition, at p 341:

"Wat gebruik is, is 'n vraag wat volgens verkeersopvattinge met verwysing na die soort saak waaroor dit gaan, beantwoord moet word. Mens gebruik 'n boek deur dit te lees, 'n skildery deur dit te besigtig of te laat besigtig, 'n kledingstuk deur dit te dra, 'n fiets deur daarop te ry, 'n motorkar deur daarmee te ry. Blote detensie van die ding is darem nog nie gebruik nie."

32. In **R v Seeiso 1958 (2) SA 231 (GW)** the court had to interpret the word "control" in Section 1(1) of Act 50 of 1956 and it was in that context that Diemont, J. stated the following at 233G – H:

"In my view the word 'control' as used by the Lawgiver in this sub-section does not mean possession nor does it refer to the bare physical detention of the article. The person who has the detention may or may not be in control of the article depending on the circumstances under which he

acquired the article. Such factors as the management of the article and the regulation of its use must be taken into account. In order to determine these matters we must look to the nature of the article and the use to which it is intended to be put.”

33. Although, as stated, these words were used in the context of “control” I do not think it would be inapposite to take the nature of the article and the use to which it is intended to be put into account when interpreting the word “use” in the same section. Grammatically the word “use” may have a passive meaning such as to retain something or it may have an active meaning requiring active use for the purpose it was manufactured. Should only the active interpretation prevail it would follow that the actions of a person who removes an article with the intention to deprive the owner temporarily of the use thereof and to merely retain the article as security would not be penalisable. At the same time it must be questioned whether the removal of an article coupled with only an intention to retain the same as security could be equated with an intent to “use” (as opposed to an intent to “retain for security”, “to hold”, “hold in safe-keeping” etc.). Assuming, as I have done above, that the Appellant in the present matter, without the consent of the owner or person in control, removed the

damaged vehicle it could at best have been accompanied with the intention of financial gain arising from the temporary custody thereof. The vehicle was damaged and could therefore not be used for the purpose it was designed or manufactured for. I am in serious doubt as to whether this kind of use was contemplated by the Lawgiver when enacting this section.

34. Being in doubt I must therefore resort to the ordinary canons of construction when dealing with enactments of the nature in question. In accordance with that approach and bearing in mind that the word “use” is used as a verb in this section I am more inclined to associate the meaning thereof with an intended active rather than a passive use in the sense of merely keeping the article pending compensation or payment. Accepting that this is not conclusive I must also bear in mind that under the common law there are various presumptions favouring a restrictive approach when interpreting provisions which give rise to criminal sanctions. This approach entails the acceptance of only the strictest meaning of words employed by the legislature. It is expressed in the adage *“in poenis strictissima verborum significatio accipienda est”*.

See **Steyn, Uitleg van Wette, 5th Edition, p 111**

To this can be added the common law presumption that in the case of doubt the most favourable interpretation of the subject should prevail.

Steyn, supra, p 115

35. In addition, it is now a constitutional imperative that statutory provisions should be interpreted in accordance with the object, spirit and purport of the Constitution which entails, *inter alia*, upholding the fundamental rights set out in the Bill of Rights such as the liberty and freedom of citizens.
36. Applying all these considerations to the interpretation of the word “use” in Section 1(1) of Act 50 of 1956 I have come to the conclusion that the more restrictive meaning should be accorded to the word “use” and that it should not be interpreted on the basis of including the mere retention of an article which cannot be used for the purpose for which it was designed and/or manufactured. Had this been a case where the vehicle in question was not damaged and removed for purposes of temporarily driving it in the interest or for the benefit of the Appellant, it would have been a different

matter. However, in view of the particular circumstances of this case where a damaged vehicle was removed for the purpose of keeping it in custody and in the hope that payment for that service would occur, I am unable to find that such conduct constitutes a criminal offence under Section 1(1) of Act 50 of 1956.

I would therefore uphold the appeal.

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A J LE ROUX, AJ

I agree. It is so ordered.

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N J YEKISO, J