

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Coram: Henney J et Montzinger AJ

High Court Ref number: 02/24

Lower Court Case No.: 13/2022

In the appeal between:

ASHLON JACOBS

Appellant

and

THE STATE

Respondent

JUDGMENT: 29 JANUARY 2025

Henney J et Montzinger AJ:

Introduction

1. This is a special review in terms s 303 read with ss 304(2)(a)¹ of the Criminal Procedure Act (“the CPA”)².

2. On 11 April 2022, the appellant, who was legally represented during the proceedings, was charged and convicted in the Riversdale Magistrate’s Court by

¹ As the accused was legally represented the review of his trial and sentencing proceedings could only come before this court by virtue of s 304 (2)(a) of the Criminal Procedure Act, generally referred to as a ‘special review’.

² Criminal Procedure Act 51 of 1957 (the “CPA”)

Magistrate Oosthuizen for contravening ss 66(2) of the Road Traffic Act (“the RTA”)³. On 13 September 2023, he was sentenced to three years direct imprisonment.

3. Almost a year later, on 4 July 2024, the Magistrate discovered a mistake in the conviction and sentence while preparing for an annual quality control inspection. The magistrate’s cover letter, which accompanied the trial record, states the following as his reasons why he submitted the matter for special review which also clearly sets out the issues that needs to be dealt with by this court:

“The record of abovementioned is submitted to you for your consideration. The following mistakes made by me was detected while I was preparing for my annual quality control inspection due to take place on 2024/7/15 and doing overhead checking of the cases I finalized. On realising the oversight, I immediately requested the office administration to have the matter transcribed in order to send it on special review. I also obtained a report from the Department of Correctional Services concerning the position of the accused. Same is attached. There are some parts of the record that is in Afrikaans due to various challenges we experience concerning language services. In order not to delay the matter any further I am forwarding the record for your attention as transcribed without having it translated.

On 2022/4/11 the accused pleaded guilty to a charge of contravening section 66(2) Act 93 of 1996. He indicated that he is pleading guilty to the charge and his attorney confirmed that the plea was in accordance with her instructions and read a statement the content which was confirmed by the accused. The plea was accepted by the state and I convicted the accused as charged. It is now evident to me that the accused actually pleaded guilty to contravening section 1(1) Act 50 of 1956. This oversight cannot be explained by me and any attempt might sound as an attempt to exonerate me of any blame.

If this oversight was not the worst I proceeded to sentence the accused on 2023/9/13 to a period of 36 months imprisonment. Once again, I can merely speculate that I read the provisions of section 89(3) of Act 93 of 1996 incorrectly or confused the two section. I can even speculate that I read the

³ National Road Traffic Act, 93 of 1996 (the “Road Traffic Act”)

plea before imposing sentence and sentenced the accused as if he was convicted of contravening section 1(1) Act 50 of 1956. I was however at fault and am now attempting to remedy the situation.

I am of the opinion that the admissions made by the accused indeed justify him being convicted of contravening section 66(2) Act 93 of 1996 and if His Honourable the Review Judge share my opinion I request that the conviction be confirmed. (See section 1(xi) Act 93 of 1996) With regard to the sentence I took cognisance of the provisions of section 89(6) Act 93 of 1996 and request the Honourable the Review Judge to predate the accused's sentence and change the sentence to period of imprisonment and period under correctional supervision served."

The plea proceedings

4. In the charge to which the appellant has pleaded, guilty , it is alleged that he contravened the provisions of section 66 (2) of the Road Traffic Act , 93 of 1996 in or about on 22 December 2021, near Bali Trading, close to the N2 in the district of Riversdale, he intentionally and unlawfully operated or drove a car, an Opel with registration number CY 389 392, without the consent of Mr. Anthony Whitebeard, the owner or the person in lawful possession of the car

5. Subsection 66(2) of the RTA creates the following statutory crime:

66. Unauthorised acts in relation to vehicle.—

(1)

(2) No person shall ride in or drive a vehicle without the consent of the owner, operator or person in lawful charge thereof.

6. As indicated earlier, notwithstanding the charge for contravening ss 66(2), the appellant, however pleaded guilty to ss 1(1) of the General Law Amendment Act ("the GLAA"). An extract from the guilty statement reads:

"...I plead guilty voluntarily and without undue influence to a charge of use of motor vehicle without consent of the owner contravening Section 11⁴ [sic] of

⁴ The written plea referenced s 11. This is incorrect, it was obviously intended to refer to s 1(1) of the

Act 50 of 1956...

7. It is important to note that, before the enactment of the (“GLAA”) and the introduction of section 1(1) into our criminal justice system, an accused would typically be prosecuted for theft, with an alternative charge of unlawful use of a vehicle under the predecessors to the RTA. Whether an individual can be charged and convicted of theft for the unlawful use of a motor vehicle under section 1(1) of the GLAA is a matter we will return to later.

8. Subsection 1(1) of the GLAA criminalises the unlawful use of someone else's property as follows:

“Unlawful appropriation of the use of another's property is an offence

(1) 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 other 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 other 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.”

9. The plea was tendered despite the fact that the appellant was not charged with a contravention of section 1(1) of the GLAA the magistrate, in a letter to the reviewing judge, the magistrate still stated in his reasons for referral the he is of the opinion ..*“that the admissions made by the accused indeed justify him being convicted of contravening section 66(2) Act 93 of 1996 and if his Honourable the Review Judge share my opinion I request that the conviction be confirmed.”*

10. Firstly, it should have been apparent to the magistrate, the prosecutor, and the appellant's legal representative that the appellant was found guilty of a different crime than the one mentioned in the written guilty plea. Secondly, the magistrate and prosecutor should have been aware that the crime in terms of ss 66(2) of the RTA is more narrowly defined than the crime of contravening ss 1(1) of the GLAA. The magistrate should have been alerted by the obvious distinction in the substantive nature of the two crimes.

11. Notwithstanding the fact that the written guilty plea referenced a different crime than the offence with which the appellant was charged.

12. At the outset, the court *a quo* was bound by the express terms of the written guilty plea. Apart from considering whether the written guilty plea contained admissions of the elements of the crime in terms of ss 66(2) of the RTA, the fact remains that the appellant pleaded guilty to a crime with which he was not charged. Upon reviewing the admissions in the written guilty statement, it is clear that the appellant intended to plead guilty to ss 1(1) of the GLAA and that offence only.

13. It was not competent and in accordance with justice for the Magistrate based on the written guilty plea to make a guilty finding of a crime to which the appellant did not plead. This was gross irregularity. This alone justifies setting aside the conviction, whilst that should be the end of the matter. We wish to deal with other issues pertaining to the plea proceedings that needs to be addressed and specifically deal with the Magistrate's contention as set out in his reasons for conferral why on the admissions made by the appellant, he can also be convicted of contravening section 66(2) of the RTA. These are stated as follows:

13.1. The written guilty plea does not contain admissions to the elements of the crime under ss 66(2) of the RTA. The legal position is clear that a conviction '*can only occur in respect of a charge on which an accused is indicted, or a competent verdict in respect thereof*'⁵. In this case, the

⁵ *S v Bam* 2020 (2) SACR 584 (WCC) at [54]

appellant was charged with a specific offence while he pleaded guilty to an unrelated crime.

- 13.2. Even if the written guilty plea contained admissions that could sustain a conviction in terms of ss 66(2) of the RTA, the irregularity in the proceedings cannot be cured by relying on Chapter 27 of the CPA which deals with the provisions in s 256 – 270⁶. This would require treating the two offences as competent verdicts of each other, which is problematic for at least three reasons. Firstly, a contravention of either ss 1(1) of the Amendment Act and ss 66(2) of the RTA are not competent verdicts of each other. Secondly, a contravention of ss 66(2) of the RTA is not a competent verdict for any of the crimes listed in sections 256 – 269A of the CPA. Thirdly, although a contravention of ss 1(1) of the GLAA is a competent verdict of theft in terms of ss 264(1)(c) of the CPA, the appellant was not charged with theft in this instance⁷. However, a person in the position of the appellant can in fact be charged under ss 1(1) of the GLAA.
- 13.3. Furthermore, this is not a situation where s 270 of the CPA is applicable. That section provides that whenever the evidence presented at a criminal trial fails to prove the elements of the offences listed in sections 256–269A of the CPA but proves the commission of an offence that is incorporated in the original offence, a conviction may follow for the offence so incorporated.
- 13.4. The charge could have been amended and a not guilty plea could have been entered. Also, the appellant's attorney could have consulted with the appellant to take instructions on whether the appellant still wished to plead guilty to the wider offence of ss 1(1) of the GLAA or to contravening section 66(2) of the RTA.
- 13.5. The failure of the appellant's legal representative to intervene is also a major factor that contributed to the injustice. As the person who drafted the written guilty plea statement, the legal representative should have been aware of the substantive requirements of the relevant crimes. It is

⁶ These sections deal with competent verdicts in terms of which an accused could be found guilty

⁷ Similar approach in *S v Kok* 2015 (2) SACR 637 (WCC at [22]-[23])

implicit that the legal representative must have explained the different crimes to the appellant, leading to the decision to plead guilty to ss 1(1) of the GLAA. plead guilty, is a direct contributor to the injustice in the proceedings.

14. In respect of the elements of the crime under ss 66(2) of the RTA, the appellant never admitted to "driving" or "riding" in the vehicle. Instead, he admitted that he alone pushed the car to the airfield. The appellant has therefore not admitted facts sufficient to sustain the elements of either "driving" or "riding" in the car. The accused also conveyed that he was not inside the vehicle at the time he was found with the car. The appellant repeated this to the Correctional officer and claimed that when the police encountered him, he was outside the car. Lastly, the element of removing the car without the consent of the owner or person lawfully in charge thereof cannot be sustained on the written guilty plea. According to the accused, he saw the vehicle standing next to the road for a few days before he decided to push it into the bushes. This presupposes the possibility, which is not unreasonably improbable, that the owner had abandoned the vehicle.

15. This unfortunate error in the proceedings could have been prevented if the appellant was charged with the main charge of theft and in the alternative of contravening ss 1(1) of the GLAA. This approach has been endorsed by our court decades ago in *S v Velela*⁸ and prosecutors should rather take the cautionary approach and charge an accused with theft where it is alleged that the person had exercise control over property of the owner with the intent to use it for his own purposes without the owner's consent.

16. Returning to the crime for contravening section 1(1) of the GLAA in this matter. Having regard to the written guilty plea the appellant may have made enough concessions for him to be found guilty of this crime. Subsection 1(1) is a crime that is a species of theft, which is a continues crime⁹. Therefore, if the appellant found a vehicle next to the road that was stolen or that was removed from the owner's

⁸ P 585 par C - E

⁹ *S v Cassiem* 2001 (1) SACR 489 (SCA)

possession and continues to remove it with the intent to use it for his own purposes, the appellant would be guilty of the offence in terms of the subsection.

17. For all of these reasons, we are of the view that the conviction and sentence must be set aside. Ordinarily it would not be necessary to consider the further request by the magistrate to still find the appellant guilty of a crime to which he did not plead.

18. The effect of the error is that the accused must still serve 2 years of a 3-year sentence of a crime he did not plead guilty to and for which a wrong sentence was pronounced. The prejudice and injustice to the appellant in these circumstances are apparent and do not require further elucidation.

19. In the result, we make the following order:

“That the conviction and sentence is set aside”.

It is left within the discretion of the Director of Public Prosecution or the senior prosecutor of the lower court to decide whether to institute the proceedings against the appellant *de novo*.

**R.C.A. HENNEY
JUDGE OF THE HIGH COURT**

**A. MONTZINGER
ACTING JUDGE OF THE HIGH COURT**