CASE NO.: CA 88/2003

SUMMARY

THE STATE

versus

ROGER MBERIRA

GIBSON, J *et* VAN NIEKERK, J

12 AUGUST 2005

Appellant and co-accused charged with theft of motor vehicle under Motor Vehicle Theft Act, 1999 (Act 12 of 1999) - charge sheet alleged that owner of vehicle unknown - co-accused testified that he came to be in possession of vehicle after swopping vehicles with appellant - appellant put a different engine into vehicle - police found false chassis plate fixed to vehicle, broken ignition lock and broken driver's door handle - these found to be hallmarks of stolen vehicle - could not trace owner of vehicle because vehicle changed beyond recognition - State could not prove who owner of vehicle was - must only show that vehicle not *res nullius* or *res derelictae* - vehicle in question not such - shown to have been stolen - appellant brought vehicle to co-accused - even if he did not steal vehicle, appellant well aware that vehicle stolen - theft a continuous crime - appellant guilty of theft.

CASE NO. CA 88/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ROGER MBERIRA
APPELLANT

vs

THE STATE **RESPONDENT**

CORAM: **GIBSON, J et VAN NIEKERK, J**

Heard on: 2004-04-07
Delivered on: 2005.

APPEAL JUDGMENT

GIBSON, J *et* VAN NIEKERK, J: We shall refer to the main characters here as appellant and accused 2. The appellant was charged with accused 2, but only the appellant was convicted of the offence of theft read with the provisions of the Theft of Motor Vehicle Act, No 12 of 1999. He was sentenced to 5 years imprisonment. Appellant was legally represented and offered no plea explanation at the trial.

The appellant and his co-accused were charged that they had stolen a metallic blue Volkswagen Golf on or about 28 December 2000 at Windhoek. It was further alleged that the registration number and owner of the Golf were unknown.

The State presented the evidence of one witness, Sgt Morgan, who was the investigation officer. He was initially led to the house of accused no. 2 as a result of a request by the police at Okakarara. At accused 2's residence he found and confiscated the blue Golf on 28 December 2000. It had all the hallmarks of a stolen vehicle. On inspection he found that the chassis plate had been refitted (it was common sense that the Golf had a chassis plate belonging to another vehicle a Volkswagen Jetta). The right front door lock and handle had been broken out, the ignition lock had been broken and was taped together with insulation tape. He was unable to trace a registration number for the vehicle or its owner. There were indications that the engine had been replaced.

Accused 2 explained to Sgt Morgan that he had obtained the Golf from the appellant after a car swop. Indeed, this was also the plea explanation of accused two and his version throughout. Accused 2 also handed over certain documents in respect of the blue Golf to Sgt

Morgan: (i) special permit from the period 14 – 16 December 2000; (ii) an application for registration and licensing of motor vehicle dated 13 December 2000; and (iii) an application for a roadworthy certificate dated 13 December 2000. Although these documents were made out in the name of accused 2, they were signed by someone else. The chassis number appearing on the Jetta's chassis plate fitted in the blue Golf appeared on all the forms, but the engine number on the forms did not correspond with the engine number in the Golf.

This was the case for the State.

Appellant testified in his own defence. I shall deal with his evidence later.

Accused 2 also testified and told the court the following: He owned a Volkswagen Caddy which had become unsightly to his mind. He talked about his plan to improve it to friends. One day a man he knew from childhood introduced the appellant, the owner of a Volkswagen Golf who said he was interested. Accused 2 explained that he would like to swop the body of his caddy but retain his engine. The appellant suggested that this would be rather complex, why not swop the vehicles as a whole? Accused 2, who was knowledgeable about car engines, noticed that the Volkswagen Golf had an 18 cc engine. He

decided to test drive the vehicle. He liked the performance and agreed to an exchange but postponed the deal. One day the appellant turned up with the Golf and wanted the exchange to take place that day. Accused 2 declined and said he was due to leave the following day for a tour (accused 2 was a freelance tour guide). However he said the arrangement could be done the following day in his absence. He said he would leave the keys behind. He introduced his sisters Phyliss and Edith Karipozira who resided with him to the appellant and explained the deal. He explained that the appellant would call the following day to leave the Volkswagen Golf and take the white Caddy. After appellant left accused 2 told his sisters that the appellant was to remove the four tyres on the Caddy and put them on the Golf as they were newly bought.

The following day the appellant did call, he collected the keys for the white Caddy. Edith noticed that the appellant was busy about the Golf and the Caddy in the process of removing a variety of things. She did not take much notice and expected the appellant to call her before departure. Sometime later she noticed that the white Caddy had gone and the Volkswagen Golf was in its place. Instead of leaving the keys with her, the appellant had left them with the neighbour.

On his return accused 2 noticed that the appellant had taken away his tyres and that the door handle of the blue Golf was broken off. He checked the engine and noticed that it was not the one he had seen in the vehicle before. He started the vehicle and noticed from the sound that it was a smaller engine than the 18cc. He did not know where the appellant lived because the latter always called on him. He eventually got the address from the mutual friend who had introduced them. He tracked the appellant down and asked for the car papers, the original engine and his tyres. Appellant said he would bring these items later. It went quiet again. Eventually appellant returned the tyres.

Meantime accused 2 had to move to a new home, it had no fence. So he left the blue Volkswagen Golf at a neighbour’s house for security reasons. Some time later appellant got in touch and said he wanted to register the two vehicles involved in the exchange and needed evidence to confirm the deal as well as N$450.00 to pay for the registration of the Golf in accused 2's name. Accused 2 told the appellant where to call on him where he was making plans for his next tour. Appellant turned up and asked that they draw up two agreements of sale, one for the Caddy and one for the Golf. He said this was necessary to show some value on the transaction for tax purposes. They requested some stationery from a Mr Karonga in whose office accused 2 was. Mr Karonga did not become involved in what was

going on, nor did he pay attention to the two men. In Court Mr Karonga confirmed the visit of appellant on accused 2 that day and his supply of stationery. After appellant obtained the documents he wanted he left and was not heard of for some time thereafter.

Eventually accused 2 traced the appellant to the offices of the vehicle registration authorities and obtained from him the three already completed documents he later handed over to Sgt Morgan. He also took back his N$450 and told appellant that he did not want to go through with the deal any longer because there were too many problems. Thereafter he looked for appellant for two weeks to get back the Caddy, but only found the appellant without the car. Accused 2 made arrangements with appellant to re-swop the Caddy and the Golf. Then appellant disappeared again. One day accused 2 got a call from his brother in Okakarara. Accused 2 left immediately. Together with his brother, and the appellant they went to the Police Station where the Volkswagen Caddy had been kept the night before together with the keys. When the discussion about the exchange took place, Accused 2 was surprised to hear the appellant denying any knowledge of the car exchange and knowledge of the association with the Volkswagen Golf. Accused 2 told the police about the whereabouts of the Volkswagen Golf. According to accused 2 the police became suspicious and decided to check the Golf because the appellant

distanced himself from it. Accused 2 made arrangements to make the keys in Windhoek available to the police. It was then that it was examined by Sgt Morgan, who concluded that it was stolen for the reasons already mentioned.

Appellant's story under oath, in short, was that he bought the Caddy from accused 2 for N$3000, that he paid the full purchase price and that he struggled to get the car's papers from accused 2. He spent a further N$10 000-00 on repairs. He never registered the Caddy in his name. He denied all knowledge of the blue Golf or any car swapping deal.

The learned trial magistrate accepted the deductions made by Sgt Morgan that the Golf was indeed stolen as soundly based and good in logic. The Court also found ample corroborative evidence of appellant’s possession of the Golf from the evidence of accused 2, his sister, Edith, and Mr Xoagub (Kleintjie) and convicted the appellant of theft of the blue Volkswagen Golf. The denial that he had had anything to do with the blue Golf was a material fact from which the Court drew the conclusion of the guilty mind of the appellant.

The appellant noted an appeal against both conviction and sentence. The grounds of appeal against conviction, noted here are not exhaustive in this judgment. Among these are -

1. That the learned magistrate erred in finding that the respondent had discharged the onus to prove all the elements of the offence.

2. That the learned magistrate failed to approach the evidence of accused 2 with caution, as required by law.

3. That the learned magistrate erred in law and fact in that the appellant was not found in possession of the alleged stolen vehicle.

4. The learned magistrate erred in law and/or fact in failing to approach the evidence of Miss Edith Kariposira with sufficient caution in that she was a sister of accused 2 and erred in accepting her evidence whereas it was contradictory and inconsistent with that of the appellant and accused 2.

The appellant's submissions both written and oral in Court are lengthy and show commendable industry. This judgment would be long and cumbersome were I to list all the points taken up in support of the

issues raised. The point I wish to make is that no slight is intended against counsel, who went out of his way to render such full service to his client.

The appellant opens with an attack on the court's acceptance that the State had proved its case to a sufficient degree as required in a criminal trial, in particular that the state did not lead sufficient evidence to prove that the motor vehicle was stolen and that the appellant was the culprit. The State's response is that whereas it did not call all the witnesses referred to in evidence, no negative inference may be drawn against the State and in any event sufficient proof, i.e. beyond reasonable doubt was put before the court entitling the trial magistrate to convict the appellant. Counsel's submission invites the Court to range over principles that have been stated so many times in our and other Courts, but I do believe it is necessary to go over them in view of the circumstances of this case. At page 524 of the 4th edition of The South African Law of Evidence by Hoffman and Zeffertt, under the subheading "The *quantum* of proof", the learned authors make the following observations:

> "The rules of the *quantum* of proof deal with the degree of conviction which the court must feel before it can make a finding for the party who bears the onus. There are few things about which anyone can say that he feels absolutely certain, but short

> of this point there is a wide spectrum of possible degrees of conviction. One must say that, on the evidence, the happening of an event was remotely possible, reasonably possible, more probable than not, very probable, almost certain. In fact the law employs two different standards of proof. One is called the criminal standard, and applies to all issues in a criminal trial upon which the burden lies upon the prosecution. It is traditionally expressed as requiring proof beyond reasonable doubt". (my underlining).

In this case looking at the state and condition of the blue Golf when it was exchanged, putting that together with the appellant's action in regard to the car on the occasions of his visits with the car, together with his assertions over the car, as well as the inadequate and late denial, it is very probable that the Golf was stolen and the appellant was well aware of the fact.

The words I have underlined in the quotation above may easily lead to a misunderstanding about their meaning. However, a useful and clear exposition of the accepted standard in criminal proceedings, is to be found in a case that is the *locus classicus*, ie *Miller v Minister of Prisons* [1947] 2 A11 ER 372, at 373. In this case Lord Denning, in his inimitable style had this to say,

> ".....It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not

> mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence of course its possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice".
>
> (See other authorities, *S v Kubeka* 1982 1 SA 534 W, *S v Munyai* 1986 4 SA 712 (V); *R v M* 1946 AD 1023, 1027; *R v Difford* 1937 AD 370, 373.)

It will be clear from the various authorities above that deciding whether or not there is proof beyond reasonable doubt, as State counsel pointed out, is best left to the trial court in whose area lie obvious advantages over the appellate court, such as seeing and hearing the witnesses, observing their demeanour, sensing the nuances of the trial and the impressions left by the atmosphere in the trial: See *S v Kelly* 1980 3 SA 301 A at 308E. Unless the court has misdirected itself on fact or law, or committed some other irregularity that had resulted in a fundamental denial of justice the appellate Court must defer to the court of trial.

In any event, in a criminal trial by the State the decision what evidence has to be led or what witnesses to call is one exclusively for the State.

However there is an exception to this principle in that by virtue of S 186 of the Criminal Procedure Act, 51/77 it has been held that the Court has a duty to subpoena a witness if it feels it is necessary to do so in an attempt to discover the truth so that justice is done to both sides: See *S v Van Der Berg* 1995 NR 23. Therefore in its decision not to call Mr Haikera or other policemen or the brother of the second accused, the State was acting well within the spirit of the law. There was nothing however to stop the Court if it felt that justice was not served by the omission of that evidence, from acting in terms of S 186. To my mind there is little that these witnesses could have added.

Appellant's counsel submitted that the police investigation was not conducted diligently and that the evidence presented to the court is scant in the extreme. It was submitted that the evidence of the one witness, Sgt Morgan called by the State was flawed. It had short comings and was inadequate in parts. For example, counsel argued that there is no evidence before the Court that Police ever investigated the colour of the car, that the police ever circulated particulars of the vehicle to find out if it had been reported stolen, whether Detective Sgt Morgan ever attempted to determine if the vehicle has any distinguishing features, whether there were security numbers, whether any attempts, through etching, were made to see whether the original chassis or engine number could be recovered, whether there was any

ignition key which was used initially. Counsel questioned why material witnesses who could have assisted the State case were not called, e.g Mr Haikera (the owner of the Jetta whose particulars were found on a plate screwed onto the Volkswagen Golf), Mr Karamata (who was the owner of the engine in use in the Volkswagen Golf) or Mr Fender, from Spare Parts Centre, the source of the engine in the Volkswagen Golf. In a young and developing democracy the police do not always possess all the facilities and resources that they ought to have or need and thus such omissions will be expected from time to time. As long as the State has sufficient other evidence, such omissions can be overlooked.

With regard to the question whether the vehicle was stolen, the respondent argued that it was not necessary to seek and call the complainant to prove that the vehicle was stolen as the appellant did not challenge the claim that the vehicle was stolen, that on an examination of the totality of the evidence, including that of the appellant taken together with the circumstantial evidence and the probabilities of the case, the learned trial magistrate’s logical deductions were overwhelming and pointed to the one and only conclusion that the State had proved the case beyond reasonable doubt. The appellant’s authority and exercise of physical control over the Volkswagen Golf leads to the one and only answer.

In our view the Court properly and fairly evaluated the evidence of Eunice Kariposira and Mr Xoagub. Regarding the contradictions in the evidence of Kariposira and the inconsistencies with the evidence of Xoagub, I am in agreement with the submissions of the State that the fact that a witness contradicts himself/herself or is contradicted by other witnesses does not show that the witness is a liar and his/her evidence should be wholly rejected. In *S v Oosthuizen* 1982 3 SA 571 T, Nicolas J considered the question of contradictory testimony and self contradictions in a witness. After citing passages in Wigmore on Evidence vol III chapter 35 and 36, he concluded, at page 576G:

> "But the process does not provide a rule of thumb for assessing the credibility of a witness. Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence".
>
> (See also: *S v Mlonyeni* 1994 2 SACR 261 E; *S v Nair* 1993 1 SACR 451 A; *S v Mkohle* 1990 1 SACR 98 A).

It is particularly important to bear the above *dicta* in mind when looking at the contradictions between the witness Kariposira, her brother, and the appellant. What point could possibly be served by their denial of acquaintance with Xoagub when there was so much to

be gained from his evidence supporting the second accused’s claim of the visits otherwise denied by the appellant or that the appellant handled or exercised possessory powers over the Volkswagen Golf? It is clear that Xoagub’s explanation that accused 2 and his sister Edith Karipozira were confused by the use of his real name as opposed to his nickname of “Kleintjie" which they were familiar with, is reasonable and satisfactory in the circumstances. In our view the evidence of Edith that the appellant came to the house with the Golf a number of times before eventually leaving it there in place of the Caddy must be accepted. If this fact is accepted, there is no reason why accused 2 would have refitted the chassis plate or broken the ignition or the right front door handle. To what end? It seems to us that the only person who had reason to disguise the identity of the Golf was the person who initially brought it there, namely the appellant.

The second accused’s account of the recovery of his vehicle in Okakarara through the intervention of a third party, his subsequent arrival at the scene and the revelations about the whereabouts of the blue Golf and the account of the agreement to exchange vehicles is so unique and detailed it can only be true. What is more, his explanation throughout was consistent, already from the time that he visited the police station at Okakarara. On the basis that the initial discovery of the stolen Golf in his possession led to some suspicion that he was in

possession of recently stolen property, the consistency of his explanation is relevant and serves his credibility (See Hoffmann & Zeffertt (*supra)* at p123.)

The facts of this case call for the application of the rules of logic: *R v Blom* 1939 AD 288. The proved facts and evidence of the damaged door lock, the damaged ignition, the false chassis plate, lead only to one compelling conclusion: that the blue Volkswagen Golf was a stolen vehicle and the appellant was the person responsible or was aware that it was stolen. Obviously the key to the Golf would not fit the door lock – appellant was compelled to remove it lest accused 2 discovers that the key does not fit.

Theft is a continuing crime, by this is meant that "…….theft continues as long as the stolen property is in the possession of the thief or of some other person who was a party to the theft or of some person acting on behalf of or even, possibly, in the interests of, the original theft or party to the theft". (*R v Von Elling* 1945 AD 234, 246).

There is no evidence here of who the owner of the car was or indeed that the appellant was the original thief, or was party or assisting some person with interest in the car. In my view it matters very little in the circumstances. Having regard to the evidence as a whole in particular

the condition of the vehicle it is inevitable to come to the conclusion, as the only one possible conclusion on the proved facts, that the appellant was well aware that the blue Volkswagen Golf was stolen. The fact that the appellant was in process of alienating it in a contract of exchange as his own made the appellant just as guilty as the original thief: *S v Cassiem* 2001 1 SACR 489 SCA; *S v Nakale* 1994 NR 264.

The charge brought alleged that the vehicle belongs to person/persons unknown. As the appellant's counsel rightly conceded that it was not necessary on a charge of theft to prove ownership: See *S v Kariko* 1998 2 SACR 531 Nm 535. The only issue is whether the vehicle was a *res_nullius* or *res derelictae.* The expressions are defined in Snyman Criminal Law 4th Edition, page 480-481 at sub paras (ii) and (iii):

> "*Res derelictae*, that is, property abandoned by its owners with the intention of ridding themselves of it……
>
> Res *nullius*, that is, properly belonging to nobody although it can be the subject of private ownership, such as wild animals or birds other than those reduced by capture to private possession".

In this matter the evidence of Detective Sgt Morgan was that all identification marks of the Volkswagen Golf had been removed, a foreign plate carrying a chassis number of another vehicle had been

partly screwed into position but revealed an undoubted tampering beneath. The only deduction that can be made from these blank details is that who ever stole the vehicle did everything to ensure that the owner, whoever he may have been, could never identify the vehicle, had the vehicle belonged to no one or been abandoned there would never have been a need to go to such lengths to hide its identity. In any event in this case there is ample evidence that the appellant showed all the actions of a proprietor who valued his possession in that, on the common evidence at the time of the deal to exchange the cars, the appellant determined the value of the blue Golf as N$3000.00.

In the result I find that the Court did not err in its findings that the Volkswagen Golf was stolen and the appellant was involved in such theft, and is thus guilty of theft.

The appeal is therefore dismissed.

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GIBSON, J

I agree

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VAN NIEKERK, J

BEHALF OF THE APPELLANT **MR S. UEITELE**

INSTRUCTED UEITELE LEGAL PRACTITIONERS

ON BEHALF OF THE RESPONDENT **MR KUUTONDOKWA**

INSTRUCTED PROSECUTOR GENERAL