REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION HELD AT WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2022/00090

In the matter between:

JULIAN JANTJIES **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Jantjies v S* (HC-MD-CRI-APP-CAL-2022/00090) [2023] 622 (06 October 2023)

Coram: LIEBENBERG J *et* CHRISTIAAN AJ

Heard: **15 September 2023**

Delivered: **06 October 2023**

Flynote: Criminal Law – The doctrine of recent possession – Where a person is found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, a court is entitled to infer that such person is the person who committed the offence of theft.

Summary: The appellant was found in possession of a stolen TV nine days after the complainant's house was broken into. He agreed to sell the property with his co-accused and was transacting as the owner. The learned magistrate found that his possession was recent and his explanation ie that he obtained it from one Stan, was a

fabrication. The court held that there are no reasonable prospects of success on the grounds raised in respect of conviction.

Held that the learned magistrate gave careful consideration of all the factors during conviction and the court of appeal will not reject credibility findings of the trial court in the absence of irregularities or misdirection.

Held further that the omission to mention something either in their statements they gave to the police or in court, does not mean that it did not happen and contradictions do not lead to the rejection of the evidence as a whole.

Held further that where the court is required to draw inferences from circumstantial evidence, the law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. The court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt.

Held further that it is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. To do otherwise would undermine the administration of justice.

The court accordingly dismissed the appeal.

ORDER

The appeal against conviction is dismissed.

APPEAL JUDGMENT

CHRISTIAAN AJ (LIEBENBERG J concurring):

[1] The appellant and his co-accused (accused 1) were charged in the Magistrate's Court at Keetmanshoop on one count of theft. The appellant was convicted of theft on 14 March 2022, and was sentenced to 24 months' imprisonment of which ten months are suspended for five years on condition that the appellant is not convicted of theft, committed during the period of suspension. The allegations by the State were that on or about 22 and 23 December 2020, at Keetmanshoop, the appellant wrongfully, unlawfully and intentionally stole two watches, a necklace and television set, valued at N$10 500.

[2] The appellant, acting in person, lodged his notice of appeal well within the time frame provided for by the Magistrate's Court Rules.

[3] In the Notice of Appeal, the appellant enumerated seven main grounds on which the appeal against conviction is founded, namely:

'(a). The learned magistrate misdirected herself and erred in law and in fact by totally ignoring and attaching no weight to the fact that the evidence provided during the state case was incoherent and contradictive in nature.

(b). That the learned magistrate misdirected herself and erred in law and/or fact totally ignoring and attaching no weight to the fact that the State failed to summon the Investigation Officer to whom the Appellant have the right to cross examine as it is due to his investigation that the appellant stand accused on this matter, and as an investigation officer there are procedures that he should follow. While he investigates a case and he should guide the Court through his investigation diary on how he came to the conclusion he had made.

(c). That the learned magistrate misdirected herself and erred in law and/or fact by totally ignoring and attaching no weight to the fact that the complainant did not provide any proof of ownership for the said TV set, that the appellant told the Court was given to him by the owner who is according to Court papers the rightful owner Mr Standley Ui Nuseb.

(d). The Learned Magistrate misdirected herself and erred in law and fact by totally ignoring and attaching no weight to the fact that the second State Witness Ingrid Nicoline Lourence

stated in her statement given on 11 January 2021 that Accused 1 was at her place on 07 January 2021 to sell a Rose Gold watch for N$80, 00, whilst the Accused was remanded in custody until 10 February 2021 without bail. That part of her statement is untrue and not possible.

(e). The learned Magistrate erred and misdirected itself in law and fact by totaling ignoring and attaching no weight to the fact that on the 14" day of January 2021, during her testimony the Second witness of the state changed her version from her statement, as to who sold the gold rose watch to her, between Accused 1 and Accused 2.

(f). The Learned Magistrate erred and/or misdirected herself in law and/or fact by totally ignoring and attaching no weight to the fact that while under oath during cross-examination, Ingrid Laurence said that she did not mention the issue of the nappies in her statement, but mentioned it to the State Prosecutor that morning giving the impression that on the said day she and the State Prosecutor had discussed the matter and that is where the issue of the nappies was raised.

(g). The Learned Magistrate erred and misdirected herself in law and/or fact by totally ignoring and attaching no weight to the fact that where there exist the slightest suspicion that there might be a remote possibility that one of the parties involved in a matter is remotely acquainted or related to him/her, a Presiding Magistrate should willingly recuse himself /herself from the matter as there exist the possibility that the learned Magistrate Elsabe Konjore and Emma Kahuika could be related/acquainted as they are both originating from the village of Vaalgras.'

[4] The appellant pleaded not guilty to the offence and opted not to disclose the basis of his defense in terms of s 115 of the Criminal Procedure Act, as amended. The appellant testified in his defense, after the close of the State's case, and did not call any witness.

[5] The evidence adduced by the State may be summarised as follows: On or about 22 and 23 December 2020 at Keetmanshoop, the house of the complainant (first S tate witness) was broken into and a black Telefunken television (TV), a silver mix watch, and necklace set and a Yardley rose colored watch were stolen. On 23 December 2020 the appellant and his co-accused, approached the second State witness in an attempt to sell the silver mix watch and a rose colored necklace set. The second State witness agreed to the sale and offered the appellant and co accused the payment of N$200. The complainant laid a complaint with the police and an

investigation ensued. The appellant and the co-accused were arrested and charged with theft, after the television set and the watched were recovered from third parties who bought the items from the appellant and his co-accused. The second State witness was confronted by the police and confirmed to the police that the appellant and his co-accused sold the items to her.

[6] The appellant testified that he received the TV from a man named Stan who asked him to keep the TV for him in exchange for a loan, which was payable by 27 December 2020. It was further agreed, that should the loan repayment not be made by 27 December 2020, the appellant would sell the TV in order to recover the loan.The appellant contacted Stan on 27 December 2020 and he informed him to sell the TV in order to recover the loan.He, therefore proceeded to sell the TV to a third party and proceeded to Tses to collect his personal items. The appellant testified that he was informed by his girlfriend on 30 December 2020 that the police was looking for him in connection with the theft of the jewelery and the TV. He reported himself to the police and was arrested, charged and convicted of theft. All the stolen items were recovered.

[7] Dissatisfied with his conviction, the appellant approached the court on the grounds stated above.We will now deal with the prospects of success on conviction.

Prospects of success on appeal

Conviction

[8] In deciding the question whether there exist reasonable prospects of success on appeal, I apply the test alluded to before, but from a slightly different angle as it is also important to understand that '[i]n the absence of an apparent and material misdirection by the trial court, its findings are presumed correct'.[1]

[1] *S v Sindano* (HC-NLD-CRI-APP-SNA-2020/00013) [2021] NAHCNLD 16 (26 February 2021) para 4 and the authorities referred to. See also *S v Ameb* 2014 (4) NR 1134 (HC) para 43, 46-48; *S v Gey van Pittius and Another* 1990 NR 35 (HC) at 40C-E; *S v Slinger* 1994 NR 9 (HC) at 10D – E, *S v Tshoko en 'n Ander* 1988 (1) SA 139 (A) at 142I/J – 143A and *R v Dhlumayo and Another* 1948 (2) SA 677 (A). See also: Awene *v S* (HC-NLD-CRI-APP-CAL-2017/00003) [2019] NAHCNLD 141 (05 December 2019) para 11 and 14, *Arnold v S* (HC-MD-CRI-APP-CAL-2018/00070) [2019] NAHCMD 279 (9 August 2019) para 4; *Isaac v S* (HC-MD-CRI-APP-CAL-2018/00011) [2018] NAHCMD 213 (16 July 2018) para10.

[9] The aforesaid principle was succinctly set out as follows in *S v Bailey*[2]

'On appeal before us the conviction of the appellant was assailed on a number of grounds, both factual and legal. Before evaluating the submissions in this regard, and at the risk of restating the obvious, it is apposite to reiterate the approach of a court of appeal when dealing with the factual findings of a trial court. It is well settled that the powers of a court of appeal to interfere with such findings are strictly limited. If there has been no misdirection on the facts, there is a presumption that the trial court's evaluation of the evidence as to the facts is correct, and that a court of appeal will interfere therewith only if it is convinced that that evaluation is wrong. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony. In order to succeed on appeal the appellant must therefore convince us on adequate grounds that the trial court was wrong in accepting the evidence of the State witnesses - a reasonable doubt will not suffice to justify interference with their findings. (See, for example, S v Francis 1991 (1) SACR 198 (A) at 204*b* - e; S v Mlumbi en 'n Ander 1991 (1) SACR 235 (A) at 247g - h; S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e - f.)'

Ad Ground 1

[10] The appellant submitted that the learned magistrate erred in law and in fact by ignoring and attaching no weight to the fact that the evidence provided during the State case was incoherent and contradictive in nature. Ms Jacobs argued to the contrary and said that this ground has no merit as the prosecutor called several witnesses who corroborated each other's evidence on material aspects, especially regarding the stolen items and those sold by the appellant. She further argued that the court found the witnesses to be credible and that the appellant failed to show how the evidence of the State witnesses were incoherent.

[11] In S v Amupolo[3], Munsu AJ (as he then was) with Kesslau AJ concurring, said the following at paragraph 18:

'[18] Contradictions in evidence should be material and it is not uncommon for witnesses to differ in minor respects on the details. Contradictions are not per se an indication

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[2] *S v Bailey* 2007 (2) SACR 1 (C) para 16.

[3] S v Amupolo (HC-NLD-CRI-APP-SNA-2022/00003) [2022] NAHCNLD 70 (8 July 2022).

that the witness is unreliable[4]. It will depend on the facts of each case and a court must consider the nature of the contradictions, their number, importance and bearing on other parts of the witnesses' evidence.[5] Furthermore such contradictions should not be seen in isolation.'[6]

[12] Taking a closer look at the court *a quo's* judgment, it reveals that the State's case rested on the evidence of two witnesses (the complainant and the second State witness), which supplemented each other in material respects. It is further clear that the court has weighed the evidence of the two witnesses against that of the appellant and found that the appellant failed to put his version to the two witnesses during cross examination and found that the appellant's version was far-fetched and without merit, and rejected it as a lie from which no truth could be derived. The court found that the State version was not placed in dispute and that the State proved its case beyond reasonable doubt.

[13] The appellant failed to show the nature of the contradictions, their number and the bearing they had on other parts of the witnesses evidence, making it impossible for this court to evaluate and find that the court *a quo* misdirected itself.

[14] Considering the above and the rulings in *S v Ameb*[7] and *Isaac v S*[8], this court will not lightly interfere with findings of credibility and fact of the court a quo as the trial court had advantages which the court of appeal cannot have, namely, seeing and hearing witnesses whilst experiencing the atmosphere of the trial; also having the advantage of observing the demeanour and personality of witnesses. Furthermore, where the trial court indicated that it was influenced by the demeanour of the witnesses, the appeal court, as a rule, is guided by the trial court. The court of appeal will not reject credibility findings of the trial court in the absence of irregularities or misdirection. It is trite law that the function of deciding the acceptance or rejection of evidence falls primarily on the trial court. The first ground of appeal against conviction is therefore unmeritorious.

Ad Ground 2

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[4] *S v Auala* (No 1) 2008 (1) NR 223 (HC).
[5] *S v Hituamata* (CC 09/2015) [2017] NAHCMD 45 (24 February 2017).
[6] *S v Unengu* 2015 (3) NR 777 (HC).
[7] *S v Ameb* 2014 (4) NR 1134 (HC).
[8] *Isaac v S* [2018] NAHCMD 213 (16 July 2018).

[15] The appellant, according to his testimony, informed the investigating officer that he obtained the TV from Stan. The appellant submitted that the State ought to have called the investigating officer and the learned magistrate ought to have drawn an adverse inference from the State's failure to call the investigating officer. Ms Jacobs on her part, argued that there was no obligation on the State to call the investigating officer to testify, as he would only corroborate what the two witnesses testified. It was further submitted that the witnesses were clear and direct in their evidence and there was no need for clarification by the investigating officer.

[16] It is clear from the reading of the judgment of the learned magistrate that although the investigating officer was not called to testify, the court considered other factors such as the appellant's denial of any knowledge of the watches that he sold with the co-accused when he was arrested. The court also considered the appellant's failure to mention the existence of Stan, to the complainant and the second State witness during cross-examination, when it was their evidence that he transacted as if he was the owner of the TV. The court was thus entitled to conclude that the involvement of Stan is a recent fabrication. The court *a quo* convicted the appellant based on the doctrine of recent possession. There was, in our view, no reason for the State to call the investigating officer to testify.

[17] As stated above, the court of appeal will not reject credibility findings of the trial court in the absence of irregularities or misdirection. This ground of appeal therefore falls to be dismissed.

Ad ground 3

[18] The appellant argued that the learned magistrate misdirected herself and erred in law and /or fact when she ignored and attached no weight to the fact that the complainant did not provide any proof of ownership for the said TV and that he told the court that the TV was given to him by the owner who is, according to court papers, Stanley Ui Nuseb. Ms Jacobs, argued that this ground has no merit, as the learned magistrate dealt with the proof of ownership in her judgment.

[19] The learned magistrate considered that, the fact that the appellant was transacting as the owner, he had control of the TV and was disposing it off by selling

it. She further considered the time between the housebreaking and the time of the transactions and was satisfied that accused was in possession of recently stolen property. The court concluded that the aspect of ownership was not placed in dispute by the appellant at any stage during the proceedings and that the complainant recovered all the items. Further to this, the appellant offered a bare denial and that appellant's explanation of Stan is a far-fetched defense and reject it as a lie from which no truth can be derived.

[20] The third ground of appeal against conviction is equally unmeritorious.

Ad Grounds 4, 5 and 6

[21] Grounds 4, 5 and 6 of the appellants notice deal with the criticisms levelled against the State witnesses' contradictions and/or omissions to mention something either in their statements they give to the police or in court.

[22] Ms Jacobs argued that a mere mistake by a witness in a witness statement does not mean that the witness is not credible. She further argued that the State's case was based on circumstantial evidence, and that the law is not requiring the court to act upon absolute certainty. Ms Jacobs concluded that the learned magistrate considered all the evidence and discrepancies and came to the conclusion that the State witnesses were credible and therefore did not misdirected itself.

[23] Looking at the circumstances of the case as a whole, I agree with counsel for the State that although there were a few contradictions in the State witnesses' testimonies, these contradictions, as pointed out earlier, do not warrant the version of complainant and State witness to be rejected as a whole. In *S v Hituamata*[9], the court had the following to say regarding contradictions and omissions in police statements and oral statements:

'Again, with regard to the criticisms levelled against State witnesses that the omission to mention something either in their statements they gave to the police or in court, does not mean that it did not happen. Furthermore, the fact that the witness had contradicted himself or is contradicted by other witnesses does not show that the witness is a liar and his evidence should be rejected in its totality. The contradictions per se do not lead to the rejection of the witness' evidence and what the trier of facts has to take into consideration are matters such as

[9] *S v Hituamata* (CC 09/2015) [2017] NAHCMD 45 (24 February 2017) para 41.

the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence. These differences could either be immaterial to the charge the accused is facing or bona fide mistakes made by a witness. It must be borne in mind that the trier of facts, when assessing the evidence of witness while rejecting one portion of the sworn testimony of a witness, may accept another portion. *R v Khumalo* 1916 AD 480 at 484.The court must weight up the previous statement against viva voce evidence and assess evidence as a whole to determine whether it is reliable or not.'

[24] In the matter of *S v Gemeng & 1 Other*[10]*,* the legal principles regarding the evaluation of circumstantial evidence were laid down as follows:

'[41] The proper approach to circumstantial evidence is set down in *S v HN* 2010 (2) NR 429 (HC) in the headnote as follows:

'Where the court is required to draw inferences from circumstantial evidence, it may only do so if the "two cardinal rules of logic" as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inferences from them save the one 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. The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence. There is thus no onus on an accused to convince the court of any of the propositions advanced by him and it is for the state to prove the propositions as false beyond a reasonable doubt. Caution must be exercised not to attach too much weight to the untruthful evidence of the accused when drawing conclusions and when determining his guilt.'(Our emphasis)

[25] Having considered the evidence in its totality and the reasons for conviction in the judgment of the court *a quo,* we conclude that the court *a quo* did not misdirected itself in its evaluation of the evidence and the contradictions pointed out by the

[10] *S v Gemeng & 1 Other* (CC 20/2016) [2022] NAHCMD 145 (29 March 2022).

appellant do not make those witnesses dishonest or unreliable. The trial court, having the advantage of observing them when they were testifying, concluded that they were truthful and credible witnesses. The learned magistrate found that their versions were reliable in the circumstances and the accused's version cannot reasonably and possibly be true.

[26] It is our considered view that the learned magistrate correctly applied the above legal principles by considering all the relevant factors. There are, to our mind no reasonable prospects that the appellant would succeed on the grounds raised in respect of conviction.

[27] This court further finds that there was no misdirection on the part of the court *a quo* when it found that the appellant is guilty of the charge of theft. Therefore grounds 4, 5 and 6 fall to be dismissed.

Ad Ground 7

[28] The appellant argued that the learned magistrate misdirected herself and erred in law and/or fact by totally ignoring that there might be a remote possibility that the learned magistrate is remotely acquainted or related to the complainant and should have recused herself as they both originate from the village of Vaalgras.

[29] Ms Jacobs argued that this ground has no merit, as this issue was not raised from the commencement of the trial until its finality. It was further argued that no grounds for recusal were placed on record but only raised on appeal, while no reason is provided why this issue was not brought under the trial courts attention.

[30] In *Ndeitunga v Kavaongelwa*[11], the learned judge remarked as follows at para 75:

'. . . in our law, the controlling principle is the interests of justice. It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that, after the outcome of the case is known, there is a possibility that litigation may be commenced afresh, because of a late application for recusal

[11] *Ndeitunga v Kavaongelwa* (I 3967/2009) [2013] NAHCMD 350 (21 November 2013) followed in *Bernert v Absa Bank* Ltd 2011 (3) SA 92 (CC) para 75.

which could and should have been brought earlier. To do otherwise would undermine the administration of justice.'

[31] The Supreme Court in the matter of *the Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others*[12] in para *25*, stated the following while discussing recusal:

'The departure point is that a judicial officer is presumed to be impartial in adjudicating disputes and that the presumption is not easily dislodged. A mere apprehension of bias is therefore not sufficient to rebut the presumption'.

[32] It is clear from the record of proceedings, that the appellant failed to bring the application as soon as the bias was perceived, and only brought the application after the matter was finalised, and in his notice of appeal. As such, the recusal of the presiding officer will not be in the interest of the administration of justice, wherefore this ground of appeal falls to be dismissed.

[42] Consequently, It is ordered:

The appeal against conviction is dismissed.

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P Christiaan

Acting Judge

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J C Liebenberg

Judge

[12] *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and* Others 2019 (3) NR 605 (SC).

APPEARANCES

APPELLANT:	J Jantjies- In Person Hardap Correctional facility, Windhoek
RESPONDENT:	S Jacobs Of Office of the Prosecutor-General, Windhoek