IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 344/03

In the matter between

J E F ADENDORFF **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: **SCOTT, HEHER JJA and JONES AJA**

Heard: **11 MAY 2004**

Delivered: **25 MAY 2004**

Summary: Criminal law – theft of motor vehicle – admissibility of evidence – whether guilt proved beyond reasonable doubt – irregular leading of accused's evidence.

JUDGMENT

HEHER JA

HEHER JA:

[1] The appellant, then a man of some 48 years, was convicted by a regional magistrate of the theft of a motor car and sentenced to 4½ years imprisonment of which 18 months was conditionally suspended for 5 years. His appeal to the High Court against conviction and sentence was dismissed. With leave of that court he now appeals against his conviction only.

[2] The State case, shorn of controversy, created a framework for the appellant's complicity in the theft on the following basis. On 24 April 1993 a 1991 model silver BMW 520i motor car belonging to the complainant, Mr Van Aswegen, was stolen from the parking area of a shopping centre at Welkom. The appellant was a partner in a panelbeating shop in that city. During the afternoon of the same day the vehicle was brought to his premises and, with his concurrence, left there. After standing in the workshop for about two weeks certain minor repairs to the bodywork were carried out and it was resprayed from its original silver colour to charcoal. The appellant decided to fit a new engine in the car. He and his partner Mr Squire went to Johannesburg and purchased a second-hand engine from Dennis Auto Spares. The appellant also acquired the wrecked body which had formerly housed the engine. The body was identical to that of the stolen vehicle except that it was blue in colour. The engine was installed in the newly adorned body of the stolen car in the appellant's workshop by Squire and the appellant. The appellant caused one du Toit to attend to the registration of the

composite vehicle in his name. It was registered as a 1993 model (ie the year of registration). The vehicle was given by the appellant to his wife for her everyday use. In January 1994 the appellant and Squire were arrested. The car was recovered from the possession of the appellant's wife. The original body (with its chassis number) was found to have been paired with the new engine (with its engine number). Before the close of the State case the defence made certain admissions into s 220 of the Criminal Procedure Act. For present purposes those relevant are the following:

(1) Mr Van Aswegen was at all relevant times the owner of a silver BMW520i motor vehicle with registration number OKE 108860.

(2) The value of the vehicle was estimated at R75 000,00.

(3) The engine number of this vehicle was 35297092 and the chassis number OBL 55398.

(4) A certain Jan Matibela was instructed on 3 January 1994 to search for a house number 30311 in Thabong, Welkom. He established that there is no such number. [The address in question was said by the appellant to be that furnished to him by the 'client', Mr Wepeng.]

(5) A Mr Beckett arranged for the registration of the BMW in question after being instructed to do so by Mr Ben du Toit. Beckett was paid by Du Toit for his services.

[3] The State called as witnesses Squire, one Bester who was a general labourer in the panelbeating shop, a certain Badler, an employee of Dennis Auto Spares,

and a policeman (whose evidence added nothing to the case and merits no further mention). Indicative, perhaps, of the woeful quality of the prosecution, the State failed to call the complainant, Du Toit and Beckett as well as any witness from the registration authority (the Receiver of Revenue) each of whom must surely have contributed materially towards a clarification of the disputes. For reasons which will become apparent Badler was probably not the appropriate witness to summon from Dennis Auto Spares.

[4] In addition the State relied on two documentary exhibits ("B" and "D") the first of which was admitted in evidence during the testimony of Badler while the second was produced in cross-examination of the appellant having been referred to during his own evidence-in-chief. The contents of these exhibits were regarded by both courts below as corroboration for the evidence of Squire.The admissibility of both was vigorously contested before us on behalf of the appellant.

[5] That the vehicle was stolen was not in issue. The question which the magistrate had to decide was whether the State proved that the accused appropriated it to himself knowing that it had been stolen. The State relied on a number of incriminating statements allegedly made by the appellant to Squire and, fundamentally, upon the acquisition and disposition of the wreck by the appellant. The appellant's evidence was directed to a demonstration of the innocence of his state of mind. He also called a witness (Mr Posthumus) to the alleged payment to him of the price of the car by a black man. The magistrate, after a careful assessment of the demerits of Squire and Bester as witnesses and an indepth

consideration of the probabilities, rejected the appellant's version and found that the prosecution case had been proved beyond a reasonable doubt.

[6] I do not propose to do more than summarise the principal elements of the State evidence. According to Squire-

1. The car appeared at the premises one Saturday afternoon (which, it was common cause, was the day of the theft). Squire observed the appellant, the appellant's wife, one Prinsloo and a Mark Jacobs standing near it. He did not then or subsequently see a 'client'.
2. The car was resprayed by the appellant and others at the business. The appellant told him that this was done at the request of the 'client'. It appeared to Squire that such respray was unnecessary and did not warrant the cost of the work.
3. During the week after the respray the appellant told him that he was interested in buying the car from a black client, and, shortly thereafter, that he had 'concluded a deal'. The appellant told Squire that he would like to fit a new engine in the car. According to Squire, although the engine 'had seen plenty of work' there was nothing wrong with it and he did not see the need to replace it.
4. At the appellant's request Squire phoned various scrap dealers. In consequence he and the appellant went to Dennis Auto Spares in Johannesburg where the appellant purchased a second hand engine. He also acquired from the same source, the wreck of a BMW motor car, identical to

that of the car in their workshop. The appellant told the seller to strip the wreck as he only wanted the bare body.

5. When Squire wanted to know what was going on the appellant said that the original owner of the car would report the car stolen and claim from the insurance company; that, he said, would provide ample time to change the engine and transfer the chassis numbers from the wreck to the car. He told Squire he had only acquired the wreck ‘for the numbers’.

6. The shockwell of the wreck (which bore its chassis numbers) was subsequently cut out of the body but was not transferred to the car in substitution for the existing shockwell as intended because after the secondhand engine was installed the car was used daily by the appellant.

7. The appellant told Squire that the reconstituted car would be registered as new.

8. The shockwell which had been cut out of the wreck was removed by the appellant during the week of their arrest. During cross-examination of Squire the following exchange took place:

> ‘It is the version of the accused that he at no stage gave any instructions pertaining to this shockwell and he was not even aware of the fact that it was kept. - - Oh, he was well aware where it was kept, that he had that shockwell.’

9. The appellant told Squire that the car had come to him through Jacobs. (It later appeared from the evidence of the appellant that the appellant and Jacobs had been partners in a firm called Stateway Motorcycles until

sometime in 1993 when Jacobs had acquired his share.)

10. After their arrest the appellant instructed Squire to make out a false job request which would purport to relate to the work done on the car. Appellant, his wife, Prinsloo and Squire came together ‘to put together an alibi for our problems’. (The arrest apparently extended beyond the vehicle now in question.) Squire recommended that the truth be told but he was outvoted. He accordingly lied to the police and only at a later time decided to tell the truth.

11. It was put to Squire in cross-examination that the original engine of the car had been defective by reason of part of a spark plug breaking off and falling into a cylinder, destroying a piston and causing irreparable damage to the cylinder and that he, Squire, had assisted the appellant in the ascertainment of the damage and its cause. All these propositions Squire denied. He not only contested the physical possibility of the posited event happening but adhered to his contention that the engine was in reasonable working condition.

[7] The important features of Bester’s evidence were the following-

1. On a certain Saturday afternoon in 1993 he observed the car standing in front of the business premises. He was told to drive it round to the workshop (a distance of about 100 metres) and did so. He noticed no fault in the engine.

2. The car was later resprayed a charcoal colour and the engine was replaced.

3. A wreck of a BMW car was brought to the premises. He was directed to cut out the shockwell from the otherwise bare shell of the chassis. Having done so he delivered it to Squire and the appellant. The following passage in his cross-examination is relevant:

> 'Dit is die beskuldigde se saak soos u in u polisieverklaring beweer dat u moes daardie wrak opsny nadat die parte verwyder was, daar was nie sprake daarvan dat u 'n skokbrekeromhulsel moes verwyder nie, afkomstig van hom nie.
>
> -- Kom ek stel dit vir u so. Toe ek my verklaring afgelê het, het ek dit dalk so soos u genoem, maar my geheue het nou soos die hofsaak verder gegaan het, het my geheue beter verstrek wat ek weet wat ek gedoen het op die einde van die dag. 'n Mens se geheue kom mos na 'n tydjie bietjie terug.'

4. He took the remains of the wreck and sold it for R25,00 to DJE Scrap Metals.

5. In cross-examination the alleged incident with the spark-plug was raised by appellant's counsel:

> 'Die beskuldigde sal kom getuig in hierdie verrigtinge waarskynlik en sy weergawe gaan wees wat hierdie spesifieke BMW aanbetref, het die porselein-gedeelte en die elektrode in die enjinblok ingeval. Kan dit gebeur?
>
> -- Nooit, dit is onmoontlik.'

[8] The witness Badler produced what he described as a photocopy of a receipt taken from the records of Dennis Auto Spares. It purported to contained details of the sale of a second hand engine. On the copy the following information had been written in a different handwriting (ascribed by the prosecutor to the investigating

officer):

‘Reg: PVP 391 T

Masj: 30677230

O/stel: OBL 56375’

Defence counsel immediately registered his objection to the admission of the document but his objection carried no weight with the magistrate.

[9] The appellant gave evidence in his own defence. I shall deal below with certain disturbing aspects of the manner of presentation of his testimony. For the moment I am concerned with its substance. On 24 April 1993, a Saturday, the appellant was at his panelbeating shop in Welkom. At about 16.30 a silver BMW 5 series car was driven into the work area by a well-dressed black man who introduced himself as Zachia Wepeng. He pointed out damage to the bonnet, front bumper, the right front wheel and the lower control arm. He asked for quotes for repair and respray. On the following Monday the quotes were given to him. He supplied an address and telephone number and handed over a deposit of R500 in cash. No receipt was issued by the appellant. The work progressed over about a week and the client was present from time to time to observe it. The client asked the appellant to have a look at the engine. (From the beginning when the vehicle arrived on Saturday afternoon, it had been apparent to the appellant that the vehicle was running one cylinder short.) He and Squire diagnosed that a portion of a spark plug must have fallen into the cylinder. One piston was damaged beyond repair and a rebore of the cylinder was not feasible. Squire discussed the

acquisition of a secondhand engine with the client. The client took the original engine away to obtain a quote elsewhere. He never returned it. Squire phoned around for spares and prices. He found an engine at Dennis Auto Spares and negotiated a price of R10 000 for it. The following day the client told Squire to get the secondhand engine from Johannesburg. The appellant accompanied Squire to Johannesburg. He wanted to ascertain whether the engine was a good buy. After some negotiation the appellant purchased not only the engine but also the wreck. Before the engine was replaced he and Squire discussed the matter with the client who suggested that after a collision a car is never the same (presumably having in mind the possible adverse effects on the engine purchased for him). The appellant suggested that if the client did not want the car he would buy it. He established that a car of that model in good condition would cost about R60 000. He offered R28 000 which was rejected. The next day the client came again to the premises. The appellant had now established that the trade value of the vehicle was R70 000. He offered R45 000 plus the account for the engine (R10 000) and the repairs (more than R6000). The client insisted on cash. The accused had sold his share in Stateway Motorcycles for R130 000 of which R50 000 had been paid in cash, as were the monthly instalments. For that reason he had sufficient cash available in his safe at home. The appellant wrote out a contract and gave the original to the client: R43 000 was to be paid immediately and R2000 withheld against delivery of all documents relating to the vehicle. Wepeng said the documents were at his house and that he would bring them as soon as possible. (The documents were

never forthcoming.) The appellant specifically asked the client whether the car was “fully paid at the bank”. (He did not disclose whether he had received an answer.) He regarded the paperwork as unimportant by comparison with his possession of the vehicle and the written contract both of which he had secured. While the appellant was being paid by Wepeng in the presence of Squire, two gentlemen named Posthumus and Molnar entered the office and saw the money being counted. After the seller left the appellant told them he had purchased the still partly silver-coloured BMW which he pointed out to them. The appellant continued to work on the car. Du Toit, an insurance broker, had his vehicle in the workshop at that time. He asked about the charcoal BMW and what documentation the appellant had. The appellant told him that he had the receipt for the purchase of the engine but was awaiting other documentation. Du Toit suggested that time which might be wasted by the appellant on registering the car could better be spent on working on his (Du Toit’s) vehicle. He offered to attend to the registration. The appellant assumed that Du Toit would, for a fee, ensure that the necessary police clearance be obtained and the vehicle registered. (It is not clear whether the appellant meant a fee paid by him to Du Toit, or paid by the latter to the police and registration authorities.) The appellant also assumed that Du Toit would contact the seller, Wepeng. He, the appellant, had never, he said, personally registered a vehicle by taking it to the testing grounds. The appellant furnished Du Toit with the receipt and his identification document. Du Toit returned with forms from the registration authority (the Receiver of Revenue)

which had to be completed by the appellant as the buyer of the vehicle. On 15 May he signed the forms in blank. The police showed him copies of a similar form completed in a handwriting other than his own; on a third document it was obvious that someone had attempted to forge his signature. From other documentation that he had available it was clear to him that Du Toit had completed the documentation. In the written statement which, as will be seen, constituted his 'evidence', the appellant said

'As far as the Stateway Motorcycles tax invoice is concerned I deny that it is my handwriting and I deny that I at any stage provided Du Toit with such document.'

[This is the document that became Exhibit D.] Du Toit was a friend of Mark Jacobs the original owner of Stateway Motorcycles. The appellant speculated that because a quote supplied by him to Du Toit in connection with the latter's BMW 735I had been addressed as 'c/o Stateway Motorcycles' and because Jacobs and Du Toit did landscaping work together and used Stateway Motorcycles invoices to supply to clients, Du Toit must have come into possession of the Stateway Motorcycles tax invoice which was then used at the Receiver of Revenue's office in the course of registering the appellant's vehicle. The appellant contended that when he paid Du Toit to obtain the necessary registration documents he did not suspect that he would employ fraud in doing so. He had no prior knowledge of Beckett's role in the registration process. Du Toit returned with the charcoal BMW and handed a disc to him. He did not notice the date on the registration document until his wife brought to his attention that the vehicle was registered as a 1993

vehicle.

[10] During the course of an insipid and disinterested cross-examination by a prosecutor who had not been involved in presenting the State case and was apparently not *au fait* with the evidence the following exchange took place:

'I want to show you a document and this is a receipt for a BMW520 motor vehicle. Have you ever seen this receipt, or can you tell the Court do you know anything about this receipt, where this came from?—This receipt I saw whilst the police were questioning me for the first time. I have no specific knowledge of this document.

COURT: Is that receipt going to be handed in?

PROSECUTOR: Yes, I just want to show it to My Learned Friend. The State wishes to hand in this document and request the Court to mark it Exhibit, I think it will be D.

COURT: The Court will receive it as EXHIBIT D.

PROSECUTOR: So you have never told the Receiver of Revenue that this vehicle's value is R97 000,00?—Never, never.

Because I want to put a statement to you and that is that that specific document was given to the South African Police by the Receiver of Revenue. – I would suspect so, yes.

You will not dispute that fact? – No, I will not dispute that, no.

Did you aso tell Mr Du Toit when he was to register this vehicle in your name where you got hold of this vehicle and this was indeed a secondhand vehicle? – Yes, I did.

Because sir I also do have in my possession copies of certain forms in which it is stated that this registration was a very first registration of this motor vehicle, do you have any knowledge of that? – I have knowledge of that, I was shown by the police. But prior to that I had not seen these documents.

So you do agree that the documents that have been completed at the Receiver of Revenue states that this registration is a very first registration of this specific vehicle? – The

documents show so, yes.

Yes. – Yes.

You will not dispute that fact? – No, I do not dispute that.

Can you think of any reason sir why Mr Du Toit will say that this is a first registration when you had specifically told him that this is a secondhand vehicle that has been repaired by yourself for your own purposes? – I have no idea why he did register it that way. I have said before that I have never personally registered any vehicle physically.

Did Du Toit indeed register this vehicle in your name?

-- Yes.

COURT: In the accused's name?

PROSECUTOR: Yes, in the accused's name, that is correct. Can you just tell the Court what happened when Du Toit returned with this charcoal BMW to yourself once he had registered it? – He had stuck the licence disc to the car and he said that it had all been finished. As far as I can remember that was our words. .

Was any registration documents handed to yourself by Du Toit? – Yes, he did give me a licensing slip.'

Asked by the prosecutor what Du Toit had to gain by registering the car on false papers he replied

'I do not know. The only gain I could see was that by doing it the work on his car progressed and that is it.'

The appellant paid Du Toit R250 for his services. He did not know that a change of ownership form had to be signed by the seller of a car. Although he had been in the motorcycle trade for about 20 years he had never sold anything but was purely 'workshop orientated'.

[11] Any re-evaluation of the evidence for the purpose of deciding this appeal must needs be preceded by a determination of the admissibility of exhibits B and D.

[12] **Exhibit B**

This document, which was relied on by both courts as providing evidence of the chassis number of the wrecked BMW purchased from Dennis Auto Spares, was produced by Badler during his testimony. He had apparently been asked by the police to look for documents relating to the purchase of the engine and body. He possessed no independent recollection of the visit by the appellant and Squire to the scrapyard. Exhibit B purported to be a copy of a receipt no 39443, certified as a true copy by a member of the SAPS. Badler did not bring the book with him which contained the original receipt. The prosecutrix informed the court that the annotation in Afrikaans had been written by the investigating officer prior to her seeing the copy and that it would be proved through that officer at a later stage. That person was however, not called as a witness. Although Badler purported to interpret the document it was clear that he had no personal knowledge of its contents, was unable to say who had written the original receipt, had not himself made the copy and, perhaps, had never looked at the original himself. Under cross-examination he claimed to have correlated the details appearing in the annotation with information in the secondhand goods register kept by Dennis Auto Spares relating to the purchase of the wreck and engine and, accordingly, purported to confirm the correctness of the information. He did not have that book

at court, nor did he claim to have made the original record or possess personal knowledge of the transaction. Although the objection was argued before us on the sole basis that the exhibit was hearsay and therefore inadmissible, it seems to me that there are in truth three separate issues. The first, which is of no importance in the case, is the admissibility of the copy to the extent that it purported to be a copy of the original receipt. The copy was clearly secondary evidence in the absence of proof that the original had been lost or destroyed (*R v Amod & Co (Pty) Ltd and another* 1947 (3) SA 32 (A) at 40) or could not be produced for an acceptable reason. It was inadmissible to prove the contents of the original (ignoring the other shortcomings to which I have referred). The second aspect relates to the contents of the annotation on the document. The document had no relevance since it was, in this regard, a document created from another. To that extent it was also secondary evidence. At best it might have been used to refresh memory if the police officer had been called. The magistrate should have excluded it. The third matter for consideration is the comparison carried out by Badler between the notation and the contents of the secondhand register. Here too Badler might have been entitled to rely on it to refresh his memory but he did not, and, in any event, he was apparently not the author of the entry in the register. Once again, his evidence must have been secondary. On this possibility also, the exhibit should have been excluded.

[13] **Exhibit D**

This document was relied on by both courts as proof that the chassis number

of the wrecked vehicle was used on the registration papers, that such information could only have been derived from the appellant (since only he had an interest in furnishing the information to Du Toit and had access to the shockwell of the wreck) and, of course, as material corroboration for Squire and Bester. Counsel for the appellant submitted that the document was hearsay and should not have been admitted. I do not agree. The document was introduced into the case by the evidence-in-chief of the appellant, although he denied being responsible for it or having knowledge of its contents. The prosecutor was entitled to cross-examine the appellant about it. As the extract quoted in paragraph [10] shows, the prosecutor asked the appellant whether he admitted that the document had been obtained by the police from the registration authority. The appellant knew the police had been in possession of the document or were aware of its existence because they had questioned him about it. The contents of the document were consistent with the source which the prosecutor attributed to it. If the appellant found the combination sufficient to convince him of the correctness of the prosecutor's assertion, why should he not admit the fact? The appellant said he did not place it in dispute. So there was an admission as to its source. Counsel submitted that the appellant, having indicated that his knowledge was secondhand, intended no more than 'I do not dispute that if it is proved as a fact'. That construction does not fit the language of the exchange. The appellant's response was unequivocal and in context meant that it was unnecessary to call evidence to prove the source of the document. That such an admission could properly be made

and accepted in evidence despite its correctness not falling within the personal knowledge of the accused was, I think correctly, found to be the law in *S v Naidoo* 1985 (2) SA 32 (N), leaving the weight to be attached to the evidence to be decided on a conspectus of all relevant proven facts. See also *Sher and others NNO v Administrator, Transvaal* 1990 (4) SA 545 (A) at 554J-555B. A factor which may be highly persuasive of the importance of a document so admitted is the internal evidence provided by the document. In the present case such evidence is the following:

(a) The document bears the name and logo of Stateway Motorcycles, a firm of which the appellant was very shortly before May 1993 a proprietor;

(b) The document is, *prima facie*, addressed to the appellant at his residential address.

(c) It is dated 15 May 1993 being the date upon which, according to the appellant's evidence, he signed the documents presented to him by Du Toit;

(d) It relates to a BMW 520I motor vehicle.

In the absence of rebutting evidence the only reasonable conclusion to be drawn from the uncontested proved facts is that the document was placed in possession of the Receiver in connection with the registration of the car in question. That the document has other more crucial implications for the appellant I shall deal with in greater detail hereafter. That the document was both admissible and significant in the context of the case is certain. What is equally clear however is that it could not be relied on as the courts below did to prove that the chassis number of the wreck

was included in the documents submitted to the registration authority, for the simple reason that once exhibit B was ruled out, as it should have been, there was no proof of what that number was. (Nor indeed of the number of the engine purchased by the appellant from Dennis Auto Spares, though that can be inferred as I shall show.)

[14] The conclusion must therefore be that both the courts below misdirected themselves in relying on exhibit B, in accepting that the chassis number of the wreck was reflected on exhibit D and in drawing inferences that they drew against the appellant from these documents. The question which confronts us is whether the evidence and findings of credibility, cleansed of the misdirection and its effects, are sufficient to prove the case against the appellant beyond a reasonable doubt. In my view the probabilities are clear and decisive.

[15] There is material corroboration to be found for important elements of Squire's evidence, first, as to whether the engine of the car was defective from the outset as was the appellant's testimony. Squire disputed this and stoutly maintained that there was no indication that the car was running on five cylinders. Bester, with whom there was no reasonable possibility that Squire had colluded, was equally firm; he had good reason to recall since he first drove the car and, if the appellant's evidence were true the problem with the engine would have been very marked. Both Squire and Bester had difficulty in conceiving of the physical possibility that a broken spark plug would fall into the cylinder (a difficulty which I share) and the appellant chose not to enlighten the court as to how that could

have taken place. The weight to be accorded to the condition of the engine is important because it provides the only reason offered by the appellant for the purchase and installation of the secondhand engine. Second, as to the reason why the appellant acquired a wreck having a body identical in style to that of the 'clients' car (or the one he had purchased, depending on the precise sequence of events), Squire told the Court that the appellant said that the sole purpose was the numbers, ie to enable him to use the chassis numbers in the registration of the car. The appellant gave no explanation whatsoever. It had been suggested to Squire in cross-examination that the appellant would say that it was a 'business decision'. That however makes no sense. Squire testified that the appellant expressly asked the seller to strip the body and that such parts as afterwards adhered to it were of no value. Bester agreed that everything of value had been removed. The appellant did not testify on these matters. What was done was to produce in cross-examination of the State witnesses, certain spare parts and to suggest to the witnesses that they still bore yellow markings akin to those placed on parts by Dennis Auto Spares. Badler confirmed the suggestion. But the parts were seemingly insignificant and still lay unused long after they were allegedly acquired. They could hardly have provided the reason for the purchase of the body and the appellant did not say they did. Third, Squire testified that the shockwell (which bore the chassis numbers) was cut out of the wreck with the intention of performing a similar exercise on the car and welding the one in the place of the other on the car's chassis. The accused, he said, did not follow the plan through

because the car was by then already in continuous use. However the appellant was astute to remove the excised shockwell after their arrest. Bester was instructed to perform the physical task of cutting out the shockwell. When he had done so, he delivered it to Squire and the appellant. Then he sold the remains to a scrap dealer for a nominal sum. In cross-examination counsel put to Bester that the appellant would say that his task was to cut the wreck up after the parts had been removed and that there was never any instruction from the appellant that the shockwell should be removed. However, the appellant did not testify to that effect and the evidence of the State stood unrebutted. Fourth, Squire said that the appellant told him that he intended to register the vehicle as new. Although this was denied by the appellant the evidence is clear that the car was so registered. The appellant himself admitted that the registration documents showed that it was registered as a 1993 vehicle and he told the prosecutor that he would not dispute that it was registered as new. This is also consistent with the contents of exhibit D. Fifth, whatever the practical implications attaching to the use of the shockwell, the thrust of the appellant's statement to Squire concerning his use of the numbers is clear – he did not intend to register the vehicle using the original chassis numbers on the car. *Mirabile dictu*, when the police obtained a document from the registration authority which must have emanated from the appellant's agent, it contained chassis numbers which were not the original numbers of the car, although it is common cause that the vehicle which was recovered from possession of the appellant's wife still bore the original numbers and those numbers were certainly

accessible to Du Toit. The final element which provides support for Squire's version is this. He told the magistrate that Mark Jacobs was present during the initial appearance of the car at the appellant's premises and that the appellant afterwards told him that the car had come to him through Jacobs. Exhibit D, apparently produced to the registration authority on behalf of the appellant, purports to be an invoice from a firm owned by Jacobs on the date reflected on that document. With regard to the fourth and fifth and sixth considerations I do not lose sight of the appellant's denials of any responsibility for the terms in which the vehicle was registered other than the innocent assistance provided by possession of his identity document, the receipts for the purchase of the engine and the two change of ownership forms signed in blank. It is significant that the appellant, who was the only person who could have told the court what the receipts contained, did not suggest that any of them reflected the chassis numbers of the wreck. The importance of these considerations is the tremendous co-incidence that, if Squire lied in regard to any or all of such matters, his evidence should nevertheless be borne out by objective facts of which he could have possessed no knowledge.

[16] Both Squire and Bester were very carefully evaluated by the magistrate with due regard to their imperfections as witnesses. Having done so, he found no ground for believing that either was dishonest in his implication of the appellant. In so far one is able to test the magistrate's conclusions against the record his assessment is fully borne out. Counsel submitted that both witnesses cherished personal grievances against the appellant which, together with intensive

interrogation by the police, rendered them willing and able to distort facts and fabricate evidence that implicated him falsely. Both witnesses conceded their grudges. But the possibility of the intricate falsification and conspiracy which would have been needed to create their versions is, I consider, very remote. It is also directly at odds with the impression which a reading of the record conveys. The magistrate, who was alive to the aspersions cast on them by counsel, found nothing in their demeanor to warrant the suspicion.

[17] Did exhibit D possess evidential value other than mere support for Squire? It can be accepted as a fact that exhibit D was recovered from the possession of the registration authority and that it contained details peculiar to the appellant and the car, as I have previously noted. But the document should be looked at as a whole. Its tendency was without doubt to present the vehicle in a false light to the registration authority with a view to procuring a new registration. The appellant (and his counsel) did not seek to suggest otherwise: the answer was that Du Toit (or possibly Beckett) was responsible for its contents. But the probabilities are heavily opposed to this conclusion. Primarily, as the magistrate found, Du Toit had no reason to commit a complicated fraud whether for the paltry sum of R250 or at all. The appellant (on his version) had neither asked him to do so nor suggested such a course. When Du Toit was placed in possession of the car, he had no reason to suspect that it had been stolen, it was plainly not a new vehicle. He could easily have determined the engine and chassis numbers from the vehicle itself. Instead the appellant would have us believe that he went out of his way to create an

elaborately false invoice which contained a false chassis number and that he did so because he wished avoid the police inspection which necessarily precedes registration of a secondhand (or rebuilt) vehicle. (That he must have used the engine number of the secondhand engine is overwhelmingly probable although not proved as a fact.) By contrast, the appellant possessed an interest in having the vehicle registered. He knew that it was required to undergo a police inspection and that he lacked documents from the seller which he had not received. He did not place Du Toit in possession of any document which related to or established the previous ownership of the vehicle. It is interesting to note that the only document he did possess which bore on that proof ie the 'contract' said by him to have been signed by the seller, he did not give to Du Toit. He testified that he assumed that Du Toit would contact Wepeng if he required any information from him. He does not however explain why he thought that Du Toit would be prepared to go to this additional trouble. When he received the registration documents from Du Toit he made no enquiry as to how Du Toit had procured the registration of the vehicle in all these circumstances and Du Toit himself apparently had no comment or complaint. All in all the version of the appellant concerning the circumstances of the registration is inherently improbable and, especially in so far as it is suggested that the details in exhibit D found their derivation in anyone but the appellant himself.

[18] Added to all this, the appellant's evidence teems with smaller incidents of inherent improbability:

(i) According to the appellant the ‘client’ came regularly to the workshop during the process of respraying and changing the engine yet there is only the appellant’s word that such a person existed. (The evidence of Posthumus was discounted by the magistrate for what seem to me persuasive reasons.)

(ii) The appellant claimed to have received R500 in cash as a deposit for the work on the vehicle and paid R43 000 in cash as the purchase price, but in neither instance was a receipt given or received.

(iii) The appellant carried out, on his version, work on the car to the value of R6000 and purchased an engine and body for R10 800 without any meaningful assurance of being paid and without any proof that the car belonged to the ‘client’. It must be remembered that when he paid for the second-hand engine the original engine had already been taken away by the ‘client’ and his ‘security’ in the vehicle was limited to whatever value the remaining body may have possessed.

(iv) The conduct of the appellant in proceeding with the registration of the car before receiving the seller’s documents, without making any attempt to contact him despite being in possession of a phone number and an address and without any assurance that the seller had the right to dispose of the vehicle is inexplicable in an experienced business man with no ulterior motive.

(v) I agree with the magistrate’s conclusion that the appellant’s professed naiveté about the procedures and requirements for the registration of motor

vehicles is hard to swallow. He was for 20 years involved in the motorcycle trade, during at least some period of which he was a partner in a business which sold motorcycles; during 1993 he ran a panelbeating business. Even accepting that the burden of his experience was on the technical rather than the selling side, it is incredible that he did not acquire sufficient awareness to know that proof of consent of the seller is required before formal transfer of a second-hand vehicle can be effected. He certainly knew that a police inspection would be required.

(vi) The circumstances under which Du Toit apparently undertook to and did cause the car to be registered raise more questions than answers about the motives of the appellant.

[19] When I weigh the shortcomings in the evidence of Squire and Bester with the strong corroboration for their versions against the manifest weaknesses and improbabilities in the evidence of the appellant I am left in no doubt at all as to where the truth lies. The car came to the appellant within hours of the initial *contrectatio*. The conduct of the appellant from beginning to end was consistent and consistent only with knowledge on his part that the car was stolen. The steps which he took were directed first, to concealing its origins and second to procuring registration into his own name in such a manner that no suspicion of its true origins would be aroused. I do not ignore the fact that when the car was recovered certain of its windows still bore the sandblasted numbers which corresponded to the original chassis numbers. Of course it is probable that a person wishing to

conceal his possession of a stolen vehicle would attempt to replace those windows. He would probably also be careful to ensure that the numbers on the registration certificate corresponded with the numbers on the engine and chassis of the vehicle. That a suspect did neither might, in some circumstances, be decisive of his innocence. That the appellant did neither is a factor which is overwhelmed by the weight of the probabilities which point to a guilty state of mind. He was rightly convicted of its theft.

[20] Before I conclude I find it necessary to refer to the manner in which the appellant's evidence was presented at the trial. During the course of the State case defence counsel had on several occasions objected strongly to the putting of leading questions to witnesses. At the close of the State case counsel for the appellant informed the magistrate that he had 'for the convenience of the court' prepared a memorandum (of 15 pages) during consultation with his client and 'with the court's leave' proposed that his client should read it into the record. The State prosecutor did not object and the court, without comment, allowed counsel to proceed. This was an entirely improper procedure which should not have been sanctioned. The consequence was that the evidence in chief of the accused was substantially a continuous series of leading questions derived from a statement the origins of which were an amalgam of his own version and the thoughts, suggestions and glosses of his legal advisers (and, perhaps, other witnesses who may have been present during consultation, since the circumstances were never investigated in cross-examination). The statement was in fact read by counsel into

the record, interpolated with his own comments on it, and occasional additional leading questions such as the following:

'May I just interrupt myself there. This morning during consultation you said, indicated that you might have made a mistake as to your estimates of time. -- Yes';

and

'The car was now at the panel beating shop for approximately three weeks.' Would that be correct or is it also a shorter period? --- It was a shorter period than that, I just judged it more or less. I am sure that it was shorter than ……that.'

(The statement was dated before the start of the trial and the State evidence had subsequently pointed to a shorter period. Hence the reason for counsel casting doubt on the accused's statement.) The accused said there was nothing he wished to add to the statement. The result was that the Court was deprived of the benefit of hearing him give evidence in chief and had no means of assessing the accuracy of his confirmation. This might have been of less importance if the prosecutor had made a serious effort to test the reliability of the statement. But he did not do so. The magistrate was well aware that the evidence of the appellant was controversial throughout and that the prosecutor was probably ill-prepared. He abrogated his duty by submitting to counsel's agreement on the procedure which was adopted.

[21] The appeal is dismissed.

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J A HEHER
JUDGE OF APPEAL

SCOTT JA)Concur

JONES AJA)