THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 426/13

In the matter between Not Reportable

TSHEPO BONGANI ZWANE **FIRST APPELLANT**

AMOS NKOSINATHI ZWANE **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Zwane and another v The State* (426/13) [2013] ZASCA 165 (27 November 2013)

Coram: Mthiyane AP, Cachalia, Malan, Tshiqi and Majiedt JJA

Heard: **14 NOVEMBER 2013**

Delivered: **27 NOVEMBER 2013**

Summary: Criminal law – robbery with aggravating circumstances – adequacy of proof – falsehoods not always indicative of guilt – doctrine of recent possession – requirements restated – evidence adduced by the State not sufficient to sustain convictions – appeal upheld and convictions and sentences set aside

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ORDER

On appeal from: North Gauteng High Court, Pretoria (Fabricius J et Cilliers AJ, sitting as court of appeal):

The appeal is upheld. The order of the court below is set aside and substituted with the following:

'The appeal succeeds. The appellants' convictions and sentences are set aside'.

JUDGMENT

MAJIEDT JA (Mthiyane, Cachalia, Malan, Tshiqi JA concurring):

[1] The appellants, Mr Tshepo Bongani Zwane and Mr Amos Nkosinathi Zwane, were convicted in the Pretoria Regional Court on 9 counts of robbery with aggravating circumstances. The first appellant was also convicted on a count of the contravention of s 37 of the General Law Amendment Act 62 of 1955 (receiving stolen property), as a competent verdict on the offence the appellants had originally been charged with, namely theft of a motor vehicle. They were sentenced to 15 years' imprisonment on each of the robbery counts, ordered to run concurrently. In addition, the first appellant was sentenced to three years' imprisonment on the tenth count of receiving stolen property. An appeal to the North Gauteng High Court, Pretoria (Fabricius J, Cilliers AJ concurring) was unsuccessful, as was an application for leave to appeal against the convictions and sentences. This further appeal is with the leave of this court.

[2] Part of the record has been reconstructed, since the plea proceedings and the evidence of the first 3 State witnesses could not be transcribed. The reconstruction is based on the Regional Magistrate's notes of the proceedings. It is common cause that the reconstructed record represents a true reflection of the proceedings.

[3] The nine robbery counts relate to an armed robbery at Pick 'n Pay at Centurion, perpetrated during the early morning of 6 February 2006, in the course of which the supermarket and several of its employees were robbed of cash and other valuables. The tenth count relates to the theft of a Volkswagen (VW) Golf motor vehicle in which the two appellants had been travelling on the following evening, some 40 hours after the robbery, when they were arrested by the police. The first appellant was the driver of the vehicle and the second appellant was his passenger. I deal first with the tenth count, since the State has conceded that the conviction cannot stand. The first appellant's version was that he and the second appellant had borrowed this vehicle from a certain Mr Dan Tshabalala, who had since passed away. The vehicle was stopped by the police during the evening of 7 February 2006, since its registration number and colour did not accord with the official records. Goods were found in the vehicle's trunk, which turned out to have been part of the loot of the armed robbery at Pick 'n Pay the previous day. The first appellant testified that he had been unaware of these facts. He also adduced the evidence of Ms Johanna Mathlaba, the late Mr Tshabalala's widow. She confirmed that the appellants had borrowed the car from her late husband during February 2006 and that she was present when he handed the car's keys to the appellants. The State was constrained to concede the merits of the conviction on count 10, because as counsel for the State correctly pointed out before us, the trial court did not reject Mrs Mathlaba's evidence. The first appellant's version was consequently wrongly rejected by the trial court as false beyond reasonable doubt. The conviction on count 10, receiving stolen

property and the sentence imposed, must therefore be set aside. I turn to the convictions on the nine counts of robbery with aggravating circumstances.

[4] The State's case was based on circumstantial evidence. Several of the robbery victims testified. None of them were able to identify the appellants as the robbers. The appellants' convictions were based solely on the fact that recently stolen items were found in the VW Golf on the next evening after the robbery. I commence with a broad outline of the proved facts relating to the robbery before I deal with the evidence in respect of the goods found in the vehicle and whether its probative value was sufficient to sustain the convictions.

[5] Two robbers entered Pick 'n Pay at around 6h00, when the staff in the bakery section reported for duty. They violently overpowered the staff members, including two managers, and tied them up. A number of their accomplices joined the robbers shortly thereafter. Money bags containing cash, cheques, Pick 'n Pay documents as well as personal items and cellphones belonging to some employees were then taken by force. Some of the robbers were armed with guns. According to the evidence the robbery lasted just under an hour. The Regional Magistrate found that the appellants had been found in possession of the property shortly after the robbery had been committed; that the first appellant had furnished a false explanation for such possession and that the second appellant had associated himself with this falsity; that their explanations were not reasonably possibly true and that the only inference to be drawn from the appellants' possession of the recently stolen articles was that they had participated in the robbery.

[6] It is plain and indeed uncontested that the items found in the trunk of the car were part of the spoils of the robbery. Appellants' counsel described them as 'the discarded remnants of the loot that does not have immediate value.' This discovery potentially implicates the appellants, in particular the

first appellant as the driver of the vehicle, in the robbery. The first appellant provided an explanation in this regard in his oral testimony, while the second appellant elected not to testify. I shall revert to this aspect shortly.

[7] Trenchant criticism on a wide range of issues was directed by appellants' counsel at the versions of Bosch and Rothman. Various contradictions between their versions were highlighted and some of these were contended to be material. In addition, argument was advanced before us, for the first time it seems, that whatever the appellants were alleged to have said to Bosch and Rothman was inadmissible since the appellants had not been warned of their constitutional right to remain silent. In this regard reliance was placed on *S v Orrie and another* 2005 (1) SACR 63 (C) at 75 I – 76 C. One or both of the police officials (there is a discrepancy in their versions on this aspect) asked the appellants whose car it was and the first appellant allegedly stated that it belonged to him. When questioned by Bosch about the presence of the money bags in the trunk, the first appellant is alleged to have explained that he was a taxi owner and that he used the bags for the taxi money. Both appellants are alleged to have explained that they had found the goods in a trash can in Elardus Park, a Pretoria suburb. When asked to point out the trash can, the appellants were unable to do so. It is common cause that the appellants had not been warned of their right to remain silent on this occasion. The first appellant denied having furnished these explanations and averred that he had informed the police officials that he had borrowed the car from Mr Tshabalala and that he was unaware of the items found in the trunk. The Regional Magistrate accepted the evidence of Bosch and Rothman, whom he found to be credible witnesses. He rejected the first appellant's version as false beyond reasonable doubt and made an adverse credibility finding against him.

[8] In *S v Orrie*, supra, Bozalek J extended the constitutional pre-trial rights afforded arrested, detained and accused persons in s 35 of the Constitution to suspects. The learned judge reasoned that the notions of fairness and justice,

based on a purposive approach, required the broadening of the ambit of these rights. This line of reasoning had been adopted in an earlier decision, *S v Sebejan & others* 1997 (1) SACR 626 (W), albeit obiter. But in a number of subsequent cases the courts declined to follow the *obiter dictum* in *Sebejan* and the *ratio decidendi* in *Orrie* (see, inter alia: *S v Ndlovu* 1997(12) BCLR 1785 (N); *S v Langa & others* 1998 (1) SACR 21 (T) at 27b-c; *S v Ngwenya & others* 1998 (2) SACR 503 (W); *S v Mthetwa* 2004 (1) SACR 449 (E); *S v Khan* 2010 (2) SACR 476 (KZP). In *S v Lachman* 2010 (2) SACR 52 (SCA) this court expressly left open this particular question (at para 39). As was the case in *Lachman,* I do not deem it necessary to decide this issue.

[9] The wide ranging criticism of the evidence of Bosch and Rothman is in my view not justified. The discrepancies which emerge in their respective versions are rather indicative of an absence of collusion and preplanned fabrication. In any event the trial court, having been in the infinitely better position of observing the witnesses itself, made credibility findings in favour of Bosch and Rothman and against the first appellant. The confines of an appellate court's powers to interfere in findings of fact are well established – see *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706, followed in a long line of cases, most recently in this court in *Fourie v First Rand Bank Ltd & another* 2013 (1) SA 204 (SCA) at para 14 and in *S v Kekana* 2013 (1) SACR 101 (SCA) at para 13. The State has in my view not only proved that the items were found in the course of the search but also that the appellants furnished false explanations in respect of the ownership of the vehicle (the first appellant) and in respect of the origin of the goods found (both appellants). These falsifications are not, however, without more necessarily in and by themselves conclusive of the guilt of the appellants. It is trite that the evidence must be assessed as a whole and that these dishonest explanations would be but one of the factors, albeit an important one, to be considered in concluding whether the State has proved its case. Regard must also be had to the inherent probabilities, taking into account all the evidence (see *S v Van der Meyden* 1999 (2) SA 79 (W) at 82D-E, cited with approval in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at para 8).

[10] It is convenient to deal first with the second appellant's position. The only basis for this conviction is his presence in the motor vehicle, and further, the fact that, in the Regional Magistrate's words, he had 'associated himself with the lie of [the first appellant] in confirming to the police that the property had been picked up' (ie found in a trash can). While not outrightly conceding that the conviction is unsustainable on the evidence, counsel for the State did not argue with any vigour for the dismissal of the appeal. The evidence against the second appellant is woefully inadequate to sustain a conviction and his election not to testify was entirely justified given the absence of any incriminating evidence against him. His appeal must accordingly be upheld.

[11] The inference that a person found to be in possession of recently stolen property is the thief or one of the thieves (or, in this instance, one of the robbers) can only be drawn as the only reasonable inference where the nature of the goods stolen and the time lapse between the theft (or robbery) and the discovery of the goods in that person's possession lend themselves to such a finding (see *S v Parrow* 1973 (1) SA 603 (A) at 604B-E; *S v Skweyiya* 1984 (4) SA 712 (A) at 715 C-D; *S v Mavinini* 2009 (1) SACR 523 (SCA) para 6). The crucial question would be whether the items concerned are of the type which can easily and quickly be disposed of, in which event anything beyond a relatively short time lapse cannot be said to be recently stolen (see *Skweyiya* at 715E). In my view the items found in the trunk of the car had little or no value to the robbers and are of the type that can be disposed of quite easily. These items were found in the trunk the very next evening after the robbery. It is in my view a sufficiently short time lapse to justify invoking the doctrine of recently stolen property. But that is only one side of the case. The other side is the defence evidence of the first appellant and Ms Mathlaba, set out above.

[12] It is trite that, while the false evidence or false denial of an accused person is of importance in relation to the drawing of conclusions and a finding of guilt, caution must be exercised not to elevate it to a compelling inference that, because an accused person is a liar, he or she is in all probability guilty, since false testimony or a false statement does not always attract the most adverse inference of guilt (see *S v Mtsweni* 1985 (1) SA 590 (A) at 593H – 594A). In *Skweyiya* the appellant gave not one, but two false explanations for the presence of stolen goods in the trunk of the motor vehicle he was driving when he was stopped by the police. This court held that a false explanation is a relevant consideration, but is not conclusive of guilt (at 716A-C). In my view the false explanation proffered by the first appellant, absent any other incriminating evidence, is not adequate proof of his complicity in the robbery. People lie for a myriad of reasons and any attempt to ascertain the reason(s) in the instant case is to venture into the realm of conjecture and speculation. On the evidence adduced by Ms Mathlaba which, as stated, was not rejected by the trial court, the appellants did not open any part of the VW Golf for inspection (ie including the trunk) before they drove off with it. This evidence fortifies the conclusion that I have reached that there was insufficient evidence to convict the first appellant. It was argued by counsel for the State that it was highly improbable that Mr Tshabalala, assuming he was involved in the robbery, would lend his vehicle with all the incriminating stolen goods in the trunk to the appellants a day after the robbery. But it is in my view equally improbable, if not more so, that the first appellant, if he had participated in the robbery and thus having been aware of the stolen goods in the trunk, would brazenly drive around with the vehicle a day after the robbery and, when stopped by the police, admit that he is the owner of the car.

[13] Counsel for the State contended further that the fact that, on the evidence, large amounts of money had been paid by the first appellant into the bank account of one Mzwandile Sibanyoni (the first appellant's brother), namely R20 000.00 cash on 6 February 2006, R10 000 cash on 7 February 2006 and 18 000 cash on 14 March 2006, was wrongly ignored by the trial court as being indicative of the first appellant's guilt. The contention is devoid

of merit. The first appellant explained that this was money paid out by Old Mutual on an insurance policy of his father, which the first appellant had to distribute amongst the various beneficiaries. No attempt was made by the State to follow up this information by eg obtaining the policies and related information from Old Mutual by subpoena *duces tecum*. As the trial court correctly found, although there were several contradictions and inconsistencies in the first applicant's version on this aspect, it could not be rejected as false beyond reasonable doubt. There was no onus on the first appellant to prove these facts – the State bore the onus and failed to procure evidence which may have gainsaid this explanation if indeed it was untrue. The appeal must therefore be upheld.

[14] I make the following order:

The appeal is upheld. The order of the court below is set aside and I substituted with the following:

'The appeal succeeds. The appellants' convictions and sentences are set aside'.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

For Appellant:	H L ALBERTS
Instructed by:	Pretoria Justice Centre, Pretoria
	Legal Aid Board, Bloemfontein
For Respondent:	ANNALIE COETZEE
Instructed by:	Director of Public Prosecution, Pretoria
	Director of Public Prosecution, Bloemfontein