IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 65694

GEORGE DAVID BUZO

APPELLANT

VERSUS

THE STATE

RESPONDENT

CORAM: HEFER, VAN DEN HEEVER et SCHUTZ JJA

DATE HEARD: 14 NOVEMBER 1995 DATE

FILED: 17 NOVEMBER 1995

SCHUTZ JA

R E A S O N S F O R J U D G M E N T

SCHUTZ JA:

At the conclusion of argument this appeal was allowed and the conviction and sentence set aside. The reasons now follow.

The case is concerned with the alleged theft of an old Toyota motor vehicle CFR 362 T on 11 December 1992. Two contradictory versions were advanced in the Regional Court at Kempton Park. According to the complainant Esaia Makarige the appellant George Buzo obtained the keys of the vehicle by a ruse and decamped with it to the Eastern Cape. The appellant, on the other hand, claimed that the

complainant had lent him the vehicle for the purpose of making such a trip, not on 11 December but on a later date. Accepting the complainant's version and rejecting that of the appellant, the magistrate convicted and sentenced the appellant to five years imprisonment. An appeal to the Witwatersrand Local Division failed, but that Court gave leave to appeal to this Court both on conviction and sentence.

It was common cause that the complainant and the appellant were tenants at the same house. They knew one another, were indeed friends. According to the complainant, although the appellant had a job at Chloorkop he also repaired refrigerators on private account. On 11 December 1992, which was a Friday, the complainant was planning to drive to his "homeland" in the Toyota. The appellant told him that he

needed to deliver a refrigerator to premises along the route to the "homeland" and requested the complainant to load up the refrigerator and himself and drop them off at the premises. The complainant assented and the refrigerator was loaded onto what the complainant in his evidence in chief called the bakkie. Under cross-examination he said that the vehicle was not a bakkie at all but a 2000 GSL sedan, and that the refrigerator was loaded onto the roof carrier.

When they arrived at the appellant's delivery destination in Enkhaleni section, Tembisa, the refrigerator was unloaded. The complainant requested to use the toilet, and while he was doing so the appellant asked for the keys so that he might re-position the vehicle in order to speed up the complainant's departure. He handed him the keys.

I shall leave over for the moment the complainant's description of what happened next. Suffice it to say that the vehicle disappeared down the road in a dust cloud with the complainant in vain pursuit. He was not to see the vehicle again, and the appellant not until his trial.

The other State witness was sergeant Herselman, who was stationed at Adelaide in the Eastern Cape. Before proceeding with his evidence it is necessary to note that it was ultimately agreed that the vehicle was involved in an accident at Adelaide at between 23.10h and 23.15h on 15 December, that is the Tuesday; also that the complainant had laid a charge of theft in the Transvaal a few hours earlier, at about 18.30 or 19.00h.

To revert to Herselman, he arrested the appellant for reckless or

negligent driving. The latter told him where the vehicle was to be found and took him to a house which his brother, a police assistant, hired in Lunguleto. According to Herselman's evidence in chief the vehicle, which was a sedan, was concealed at the back of the house, but in cross-examination he conceded that it was possible that it had been placed where it was for reasons other than concealment. He attached the vehicle on 18 December, and the appellant was released on the same day after he had appeared in court. I shall deal with his evidence as to the conversation which he had with the appellant about the origin and ownership of the vehicle at a later stage.

Turning to the appellant, his account of earlier dealings over the car was wholly denied by the complainant. What it came to was this.

The car did not have a roadworthy certificate and had been at another mechanic's place for a long time awaiting repairs. The complainant lost patience. Accompanied by the appellant he went to him and retrieved the car, which had not yet been roadworthied. The appellant took it to his sister's place and propositioned the complainant to sell it to him. The complainant was prepared to let him have it for R1000, as he was his "brother". The appellant approached his employer, one Griesel, who agreed to advance him the necessary money within a week. In the meantime the appellant paid the complainant an advance of R300 out of his own savings telling him that his employer would lend him the balance. When he went back to Griesel the latter pointed out that the appellant did not have a driver's licence, and said that he did not want

him to purchase from a black person as the vehicles of the blacks gave trouble. He dropped the subject of the purchase in consequence. In cross-examination he added that the complainant and he decided to leave over the finalisation of their dealing until January. The complainant's evidence had been that he had bought the vehicle for R800 but that he was busy having it repaired and that at the time of its disappearance it was worth from R1000 to R2500.

In the meantime the appellant had, according to his account, done repair work on the car and the complainant had allowed him to drive it around daily, so that the latter had to take a taxi to work or rely on lifts from friends. In fact for a period he had the custody of the vehicle and rode around in it as he would. In so far as these things were put to the

complainant he denied them saying that he would as little lend his vehicle as his wife.

Concerning his taking the car to the Cape, the appellant explained that he had to attend a function in his "homeland" but lacked transport. He approached the complainant who agreed to lend him the car for this purpose, adding that he was not to be away for long. On the day of his departure the complainant asked him first to drive to his lover's place of residence in Enkhaleni. They did not go straight there but drove around, picked up two girls and proceeded to their destination at Enkhaleni, which was a shebeen at Mathumba's house. He handed the complainant R50 to buy drink. After they had been drinking for some time the two girls said that it was late and that they wished to leave. He also

indicated that it was time for him to go. To this the complainant responded that that was grand and that he might leave. He left with the girls, leaving the complainant in the shebeen knowing that he was going to his "homeland" and thereafter to Adelaide.

He called at a friend, Lucas Mbeka, to tell him that he was going away, and he then drove to Adelaide. There he had an accident with the car and was arrested because of it.

There was much uncertainty as to what the appellant's version was as to the date on which he left, but overall it seems to have been Saturday 12 December. Before leaving he had told the complainant he might be away for two or three days, and that he had to get back to work. Although he contradicted himself about dates, perhaps because of

uncertainty as he said, he did at one stage claim that he had told the complainant that he would be back on the Monday or the Tuesday (i.e. the 14th or the 15th) and that the complainant was satisfied.

Two observations should be made about the appellant's evidence at this stage. He several times got into trouble over dates, but I am not persuaded that this was necessarily because he was lying. Both he and Herselman seem to have been confused about dates. The second observation is that several significant parts of his version were not put during the cross-examination of the complainant. But again I am not persuaded that this was because of the appellant's untruthfulness, for the reason that his evidence in chief was also very scantily led, and his version at times attained coherence only when he volunteered fuller

The appellant did not return on Monday, but on that day (the 14th) he was told that the appellant had telephoned asking that a sum of R600 should be provided at Adelaide for his bail. Leaving aside the problem of dates, which runs right through this case, this corroborates the appellant's version that on the day of his arrest he had telephoned Griesel from the charge-office at Adelaide. He added that on that occasion he also telephoned his sister requesting her to tell the complainant what had befallen him. (The complainant denied that any consequent communication ever reached him.)

Luce Khubeka (presumably the "Lucas Mbeka" referred to in the appellant's evidence) deposed that the appellant had regularly visited him in a Toyota Corolla which had recently been painted blue (which was the

colour of the complainant's car). He did not see him drive any other vehicle. On a Saturday in December 1992 the appellant again arrived and told him that he was on his way to his "homeland". He did not see him again for some time.

Khubeka added that the car had no roof carrier. It is possible that this car was not the one owned by the complainant (as the magistrate pointed out): but then Herselman had said of the car identified as the one allegedly stolen from the complainant that it, also, did not have a roof carrier. This appeared to contradict the complainant's evidence that the repaired refrigerator had been loaded on the carrier for delivery. The complainant's evidence had suggested that the carrier was a regular appurtenance to the car when he had said, "Die yskas het ek bo-op die

draer (carrier) die drarak het ek dit daarop gelaai."

The magistrate dealt with the problem created by Herselman's evidence by saying:

> "Dit volg nie noodwendig dat klaer die onwaarheid gepraat het nie, want as daar juis vir die yskas 'n drarak opgesit is - geleen is - dalk selfs beskuldigde se eie drarak, wat daarna weer verwyder en verkoop is, praat hy nie die onwaarheid nie. Dit was nooit met horn (klaer) geopper nie" (namely that the car did not have a roof carrier).

Notwithstanding the valid criticism about not putting the version, this observation is generous to the complainant's credibility indeed. The speculation indulged in by the magistrate involved that between the time of his having left the complainant pounding after him in the dusty road at Enkhaleni and his arrest at Adelaide, he had disposed of this useful attachment to his recently purloined vehicle. I find this most strained.

The more natural inference is that the complainant may have been untruthful.

There are, in my opinion, several other reasons for having doubts about the complainant's version. Chief among them is the unlikelihood of the appellant simply abandoning his job (as is the complainant's suggestion) where his services were valued, for an old car worth one or two thousand rands. I say that this is the complainant's suggestion, because if it is not, his version faces the next improbability, that the appellant would have engaged in this barefaced theft in the presence of witnesses, when his victim knew him well, indeed lived in the same house with him, and knew that he worked at a factory at Chloorkop. It was presumably to meet these difficulties among others that the

complainant sought to disparage the appellant: saying that a man who was constantly troubling him for R2 coins was hardly one with whom he would negotiate the sale of his car, and that when the appellant did get some money from repairing refrigerators, or received his wage, he would stay away all night (implying thereby what one may imagine). Griesel contradicts this picture of a man of no substance, even if in need of credit. The magistrate brushed aside the complainant's manifestations of ill-will towards the complainant on the ground that one might expect such an attitude towards a man who had stolen one's car. Maybe. But why be untruthful about the appellant?

The magistrate was much impressed by the complainant's statement that he would as little lend out his car as his wife, and was equally

unimpressed by the appellant's evidence that the complainant, whilst owning a car, had to make use of other means to get to work. Leaving aside the complainant's wife, who to my mind was allowed to play too prominent a part in the case, the appellant had quite a good explanation. The complainant could not use his car to go to work because it was not then roadworthy. By contrast he, the appellant, could well drive around in it, he without a driver's licence, in the narrow township streets to which the traffic police did not penetrate.

Another questionable aspect of the complainant's version is the time he took, the more than four days between the 11th and 15th December, to lay a charge of theft. True, the complainant had an explanation. It was that immediately after the theft he had gone to the

appellant's sister's home, where he did not find the appellant himself (I do not know whether the innuendo was that he had expected to find him there). The sister said that they should wait for a while, but she also said that she knew that the appellant would sell the vehicle! I would have thought that this should have increased the urgency, if anything. At some stage the sister gave him the appellant's ID book (another form of real security?) Then, on the 15th, the sister accompanying him, he reported the theft. I am not impressed by this explanation, and think that if anything it tends to support the suggestion made by the defence as to the motive for the complainant's having laid a charge at all, namely that the complainant had become impatient or angry or concerned when the time within which the car was to have been returned (this is, of course,

on the appellant's version) was running out or had run out. In other words it may have been a method of applying pressure for the immediate return of the car, a method which did not work because a few hours later the car was involved in an accident and the appellant was arrested. The appellant conceded that he was late in returning , as things had gone wrong and he had been delayed at Adelaide.

The magistrate said that the complainant had not been proved to have been mendacious. That may be, but there was, of course, no onus on the appellant to have done so. The magistrate also held that there were no inherent improbabilities in the complainant's version. For reasons already given I do not agree.

He went on to say that there were no contradictions in his version.

With this also I do not agree. His unlikely story as to how the appellant got the keys from him while he was in the toilet is riddled with contradiction. In the course of his evidence in chief he said that the car was on the property round a corner from the entrance gate and that the appellant's proposal was that he would reverse it as far as the gate so as to facilitate the complainant's departure. Yet as he came out of the toilet door and saw the car being driven to the gate (as arranged) he became disturbed and started to shout and run. Further, having said that the only reason for repositioning the vehicle was as already stated, he added that he had also gained the impression that the car was so close to the house as to impede persons wishing to pass. He also contradicted himself as to whether there was another person in the car with the appellant.

The magistrate relied upon the fact that the appellant had lied, in that he had not told Herselman that he had borrowed the car. The criticism is justified, but its weight in the ultimate decision of the case is debatable. The appellant had been arrested in a faraway place after being involved in a serious accident. Then it appeared that the car he had been driving had been reported stolen. It would have been a tall story indeed to tell the sergeant; that the man who had reported the theft had in fact lent him the car; a story that has so far failed to persuade two Courts; indeed it was considered by them to be not reasonably possibly true.

The magistrate further held the appellant to have contradicted himself as to his conversation with Herselman, in that when he was

asked why he had told the latter that he had bought the car, he initially deposed that Herselman had lied in saying that he had said so, whereas later in his evidence he claimed that he had answered as Herselman had said because of the way in which the question had been posed.

Herselman had said that the appellant had told him that he had bought the car and that it was his. When the appellant was in the box the magistrate asked him why he had told Herselman that he had bought it. The appellant answered that Herselman had asked him to whom the car belonged and he had answered that it belonged to the complainant. The magistrate persisted by asking whether, if Herselman had said in evidence that the appellant had claimed that he had bought the car, Herselman would be telling a lie. The answer was that he had later said

that he had bought it, but the initial question had been, who owned it. In the result he had told Herselman both that the complainant owned the vehicle and that he the appellant had bought it. These details also were not put to Herselman, but I think that the magistrate misdirected himself in saying that the appellant had called Herselman a liar, or that he had contradicted himself. It may be added that although according to the appellant the sale was then in limbo, it had not been finally cancelled. Griesel's evidence tends to confirm that the sale or proposed sale was not simply an invention. Strong confirmation is provided by the complainant's lack of reaction when told by the appellant's sister that the appellant would sell the car.

The complainant is to all intents a single witness, as the magistrate

recognised. Not only do I not regard him as being substantially unblemished as a witness, as the magistrate did, but I view his evidence with some scepticism, for reasons already given. As far as the appellant's version is concerned, whatever improbabilities there may be in it, I do not think that it can be said that it could not reasonably possibly be true, particularly when the support of his witnesses is taken into account. The magistrate appears to have ignored the substantial support that Griesel gave to the defence, whilst emphasizing the contradictions between him and the appellant. Whatever the reasons for these contradictions I do not think for a moment that Griesel's evidence was an invention.

The magistrate has misdirected himself substantially, and upon a

fresh consideration of the matter I do not consider that the State has proved its case beyond reasonable doubt.

It is for these reasons that the appeal succeeded and the conviction and sentence were set aside.

W P SCHUTZ JUDGE OF APPEAL HEFER JA)
CONCUR
VAN DEN HEEVER JA)