CASE NO.: CA 39/03

SUMMARY

DEON AMALOVU
COLLIN KUZATJIKE

versus

THE STATE

MAINGA, J *et* VAN NIEKERK, J

28 June 2005

MOTOR VEHICLE THEFT ACT, NO. 12 OF 1999

Previous convictions of motor vehicle theft proved against both appellants - such sustained after the commission of the offence for which appellants sentenced *in casu* - such convictions are not "previous convictions" for the purposes of sentence - magistrate erred in regarding himself bound to impose the mandatory sentence under section 15(1)(c)(ii) of the Act - should sentence under section 15(1)(c)(i) of the Act.

CASE NO. CA 39/03

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DEON AMALOVU **1ST APPELLANT**

COLLIN KUZATJIKE **2ND APPELLANT**

versus

THE STATE **RESPONDENT**

CORAM: MAINGA, J. *et* VAN NIEKERK, J.

Heard on: 2005.03.31

Delivered on: 2005.06.28

JUDGMENT

MAINGA, J.: Appellants were convicted in the Regional Court on two counts of theft of motor vehicles (the white/Green Golf motor vehicles) and were each sentenced to nine years on each count and this appeal lies against both those convictions and sentences.

The ground of attack by Mr Boesak for the appellants (who appeared *amicus curiae* and to whom this Court is indebted) was that the Court *a quo* erred and misdirected itself, by simply joining together the accused persons in the commission of the respective offences without proper foundation and that there was no basis for the Court to have relied on the common purpose theory, except that of the dubious sale contract on which both appellants appear to have co-signed as witnesses. Mr Boesak nevertheless conceded that the first appellant was properly convicted of the theft of the Golf CTI green in colour, Reg no N29852W, count 2 and the second appellant of the theft of the Golf 1300, 1993 model, white in colour, with Reg no BBN 172 EC, count 1. His main contention was that the first appellant should not have been convicted on count 1 and the second appellant should not have been convicted on count 2 as there was no evidence to support the convictions. Ms Dunn for the respondent also conceded that there was no evidence to support the conviction of the first appellant on count 1 and the second appellant on count 2. I agree. The Court *a quo* must have fallen into error in its reasoning when it accepted the contract of sale of the white Golf (count 1) bearing

the names of the appellants as witnesses as evidence that appellants jointly or in common purpose stole the vehicles and when the Court accepted the evidence of Sergeant Morgan that Feris, the owner of the green Golf (count 2), identified the seat covers, the seats on which the seat covers were, the wheels and tyres on the white Golf (count 2) which was parked next to the green Golf, as the accessories

of the green Golf. In as much as Feris did not testify to identifying the items and/or parts on the white Golf to be items or parts of his stolen vehicle, Sergeant Morgan's evidence is hearsay on that point and the Court *a quo* could not have relied on that evidence to find that appellants jointly or had a common purpose to steal the vehicles nor the fact that the first appellant's signature or name appeared on the contract of sale of the white Golf (count 2) when there was no evidence linking the first appellant's name or signature to the contract. Had the prosecution or the court recalled Feris to confirm the testimony of Sergeant Morgan on the accessories of the green Golf which Feris must have identified on the white Golf, unless there was a reasonable explanation how the accessories exchanged hands, I would have had no doubt that appellants jointly operated to steal the vehicles. Ms Dunn wisely conceded on this point. 'The essence of the doctrine of common purpose is that, where two or more people associate in a joint unlawful enterprise, each will be responsible for any acts of his fellows which fall within their common design or object' (Whiting R, 1986 SALJ, vol 103; Joining In at 38). The effect is that, where certain conditions are satisfied, the act of one person is attributed also

to others, so that it is for legal purposes just as if the others too had committed it (Whiting, supra, see also *S v Malinga & Others* 1963 (1) SA 692 at 695B; *S v Khoza* 1982 (3) SA 1019 A at 1036 F-G, *S v Daniels en 'n Ander* 1983 (3) SA 275 at 323 E-F; *S v Shaik & Others* 1983 (4) SA 57A at 65A.)

In the absence of a prior agreement or proof of an implied agreement to steal the vehicles in question, appellants can only jointly be held liable for the theft of the vehicles on the basis of the decision in *S v Safatsa and Others* 1988 (1) SA 868 A only if certain prerequisites adopted in murder cases are satisfied and I find it unnecessary to labour this judgment with the said prerequisites. Suffice to say the Court *a quo* misdirected itself when it applied considerations of common purpose when there was no basis to do so. The totality of the evidence amounts to each appellant being liable for the theft of the one vehicle. Appellants' contentions in their grounds of appeal which they personally filed that the State did not prove the charges against them beyond reasonable doubt has no merit. As stated earlier, Mr Boesak wisely conceded that the State proved the theft of the green Golf (count 2) against the first appellant and the theft of the white Golf (count 1) against the second appellant. The complainants Henri Francois Feris and Marco van Jaarsveld without doubt positively identified their respective vehicles. Feris gave the engine number of his green Golf (count 2) as OX 161775 and the chasis number as AAVZZZ172 PUO 21462. Feris further noticed that the rims, tyres,

front and back seats were changed which is the evidence Sergeant Morgan testified to that Feris identified the said accessories and the seat covers on the white Golf (count 1) which was parked next to the green Golf which evidence Feris did not testify to. Feris further identified his vehicle by the scratch mark on the left side door and he gave the reason why that scratch was made, the little hole

in the left side indicator, and a crack in the corner or edge of the front bumper and when cross-examined by the first appellant he gave the reason how the crack was obtained, i.e. he ran against a wall. Van Jaarsveld identified his vehicle on (i) the driver seat sunviser which had a glue mark which was on the seat sunviser when he bought the vehicle; (ii) the black insulation tape which he personally used to hold the broken wires from the front of the car into the front doors where the speakers are; (iii) in the back speakers the screws which he used to hold the extra small speakers; (iv) the underwear with his name on, which was still in the boot of the vehicle and (v) the back bumper had a sticker which read ‘Protyre’ which was on the vehicle when he bought it. He also noticed that the rims and tyres, the driver’s seat, the demister were different and the grid which previously, had two lights then had four lights. The chassis number given by Feris was confirmed by Johan Nico Green who is attached to the Scene of Crime Unit and worked hand in hand with the Motor Vehicle Theft Unit, helping to restore original engine numbers on stolen vehicles. He examined the chassis number and observed that the number was ground away and was covered with spray paint which paint was

different from the original paint of the vehicle. He etched the chassis number of the vehicle in order to restore the original engine number and after the etching process the chassis number as provided by Feris became visible. The Court *a quo* in my view correctly accepted the identification evidence of the vehicles. The evidence of John Kuzatjike who according to the contract of sale 'Exhibit C'

allegedly bought the white Golf from one Burger Kandjii for N$18 000.00 which transaction was allegedly witnessed by the first and second appellants refutes the version of the second appellant as to ownership of the vehicle and the Court *a quo* correctly accepted that the second appellant stole the vehicle. John Kuzatjike, who is the father of the second appellant, not only denied ever buying a white Golf from Burger Kandjii, but he denied knowledge of the contract of sale. That evidence alone was sufficient to convict the second appellant for the theft of the white Golf (count 1). In his explanation of the plea, the second appellant stated that 'I know nothing about the green Citi Golf. With regard to the white Golf I have documents pertaining to ownership, because it is my car" and yet the documents he refers to, i.e. the contract of sale and the certificate of registration of the said vehicle are not in his name but that of his father John Kuzatjike which he fraudulently masterminded by using the identity number of his father. The second appellant, either out of sheer stupidity or being an unrepentant thief or a callous liar, in his notice of appeal states that the vehicle belongs to his brother

Whespesien Kazatjike who was studying in Brazil at the time. An extract from the notice of appeal reads:-

> *"There was no prove in court that the motor that was found in my possession was stolen.*
>
> *There was no prove in court that the car in my possession was register in my name nor did my identification number appear on the registration papers.*
>
> *The only thing that was proved was on the receipt of the cash sign where the chassis was bought my signature appear. That was because my brother was not at home when the people deliver the chasse to our place. I only sign for receipt of the chassis not for buying it.*
>
> *My brother travels a lot and therefore I receive the chassis for him. I was taken in to custody on February 1999, when my brother left the car in my position where he went to Brazil for studies.*
>
> *He built up the car with his own money and time before that he is a mechanic and do a lot of the work himself."*

Sergeant Ilongo testified that after the second appellant had been arrested by 911 and the white Golf was parked at the Motor Vehicle Theft Unit, he opened the bonnet of the vehicle and the engine number appeared original but the chassis number appeared welded on and he thus became suspicious that the vehicle could have been stolen. He therefore opened a case of possession of suspected stolen

motor vehicle. When he interrogated the second appellant, the second appellant informed him that the vehicle belonged to his father (John Kuzatjike). The latter denied ownership of the vehicle. Second appellant provided Sergeant Ilongo with the receipt of the chassis (number AAZZZ17ZEUO12249) which he purchased from Spare Centre, which receipt and chassis number Joseph of the Spare Centre sold and issued to the second appellant, which evidence Joseph also confirmed. The second appellant also provided Sergeant Ilongo with the certificate of registration of the vehicle and the contract of the sale. Second appellant did not cross-examine Joseph on the fact that he personally purchased the chassis number from the Spare Centre which chassis number was found welded to the white Golf. Sergeant Morgan confronted the second appellant as to what happened to the original chassis number and he informed Sergeant Morgan that he did not know anything about the vehicle and that the vehicle was bought by his father.

Regarding the Green Golf, Sergeant Morgan testified that he was called by the Okahandja Police who asked him to assist them in their investigation. The Okahandja Police took him to Mandume Flats in Wanaheda and they searched from room to room until they came upon the first appellant, one Pendukeni Emvula and Shaningua. They were arrested and taken to Katutura Police Station. In the course of this investigation the identity of the Green Golf came up and first appellant said it was his vehicle and he led them to his mother's place where the vehicle was parked. When he inspected the vehicle, Sergeant Morgan could see

that the chassis plates were refitted, the ignition wires were cut off, the door locks were damaged, the petrol cap was replaced and a type of a plastic was put in. Except for saying the vehicle was bought for him by his sister the first appellant declined to give the particulars of his sister and thus Sergeant Morgan failed to obtain a statement from the first appellant's sister. The version of the first appellant that the vehicle was bought by his sister was correctly rejected by the Court *a quo*. The first appellant, instead of calling his sister who allegedly bought the vehicle for him, called one Iyambo whose evidence was hearsay.

As I have already stated, I am satisfied on the totality of the evidence that the first appellant was correctly convicted on the second count and the second appellant was correctly convicted on the first count. In actual fact there is a very strong suspicion that appellants jointly operated to steal the vehicles in question. The *modus operandi* is the same. The first appellant registered the green Golf in the

name of his sister, one S Amalovu and the second appellant registered the white vehicle in the name of his father, John Kuzatjike and it is possible that the signature of Amalovu in the sale agreement of the white Golf is that of the first appellant and they possibly swapped the accessories of the vehicles to make the identification of the vehicles difficult. Consequently the State proved the theft of the Green Golf (count 2) against the first appellant and the theft of the white Golf (count 1) against the second appellant beyond reasonable doubt and the convictions will be confirmed.

In actual fact when the matter was argued before us, since Mr Boesak was appearing *amicus curiae* for the appellants, he was given the opportunity in the presence of the Court to confirm with the appellants on the concessions he made regarding the convictions which he did and appellants confirmed that the concessions were well founded and all they wished was to have their sentences ordered to run concurrently.

This brings me to the sentences imposed on the appellants. We found that the appellants should not have been convicted on the second offence which means the second sentence of nine years each automatically falls away and will be set aside. As far as the judgment on the remaining sentence is concerned, my sister Van Niekerk, J, and I agreed that she would prepare that part of the Court's judgment. I have read her judgment and concur in it.

Accordingly the following order is made:

1. The appeal partly succeeds and partly fails.
2. The conviction of the first appellant on count 2 and that of the second appellant on count 1 are confirmed but the sentences of nine years each are set aside and a sentence of seven years each is imposed.

3. The conviction of the first appellant on count 1 and that of the second appellant on count 2 and the respective sentences of nine years each are set aside.
4. The sentence of seven years each imposed by this Court runs consecutively to the sentences being served by the appellants.

MAINGA, J.

I concur in the judgment by MAINGA, J. We agreed that I would prepare this Court's judgment on sentence, which follows below.

Mr *Boesak* on behalf of the appellants did not make any submissions regarding sentence, except to inform the Court, as my brother MAINGA, J, stated in his judgment, that the appellants instructed him to repeat the requests they made in the court *a quo* that their sentence should run concurrently with the sentence they are serving. The first appellant's notice of appeal also includes the magistrate's failure to so order as a ground for appeal. The short answer to this is that the magistrate did not commit an irregularity by ordering that the sentences run consecutively, as

section 15(4), read with section 16(3), of the Motor Vehicle Theft Act, 1999 (Act 12 of 1999) (hereinafter "the Act"), expressly provides that such a sentence shall not run concurrently with any other sentence of imprisonment.

There is however another matter with which requires this Court's attention. During the sentencing stage in the court *a quo* the prosecution proved a conviction against each of the appellants. In respect of the first appellant a J14 form was handed in which reflects that in case no. R/C 02/2001 he was convicted on 4 April 2001 on a charge of theft of a motor vehicle. On the same date he was sentenced to eight years imprisonment. In respect of the second appellant a J14 form reflected that this appellant was convicted on 8 February 2001 in case no. R/C 244/2000 on a charge of theft of a motor vehicle. On the same date he was sentenced to eight years imprisonment of which two years were suspended for five years on

condition that he is not convicted of motor vehicle theft committed during the period of suspension.

In the matter before us the offences for which the appellants were tried and convicted were committed during August 2000, i.e. before the date of the conviction proved against each of the appellants.

It is clear that both the prosecutor and the trial magistrate regarded the convictions proved against each of the appellants as a “previous conviction.” The magistrate

clearly regarded the convictions which he pronounced on 16 January 2002 as “second or subsequent convictions” within the meaning of section 15(1)(b)(ii) of the Act, and therefore regarded himself/herself bound to impose a mandatory minimum sentence of not less than seven years without the option of a fine on each of the counts of theft on which he/she convicted the appellants.

When the appeal was argued before us we *mero moto* raised the question whether the magistrate’s approach was correct. Counsel were requested to file written heads of argument on the matter, which they undertook to do. Ms *Dunn* for the respondent in due course provided us with helpful heads, for which we express our appreciation. Mr *Boesak* for the appellants failed to file any heads and offered no explanation. We have decided to proceed without his input on this aspect.

Essentially the question troubling this Court was whether the proved conviction must be a "previous conviction" as the expression is normally understood, namely "one which occurred before the offence under trial" (*per* HOLMES, A.J.A., in *R v Zonele and Others* 1959 (3) SA 319 (AA) at 330D). If this is so, the magistrate erred in regarding section 15(1)(c)(ii) as being applicable in this case. On the other hand, the question went further, did the legislature not intend by using the words "second or subsequent conviction" that any first or prior conviction for the same offence, regardless of the time when it occurred, would bring the provisions of

section 15(1)(c)(ii) into effect? It was not possible to make any inference from the magistrate's judgment on sentence whether he/she merely overlooked the fact that the proved convictions were not "previous convictions" or whether he/she realized this but interpreted the provisions of section 15 as obliging him/her to take these convictions into account, as he/she did not mention this aspect at all.

The definition of a previous conviction as set out in the *Zonele* case (*supra*) is in accordance with the general principle of the common law that when determining an appropriate sentence for an offence, only those convictions incurred by the accused before the commission of the particular offence ought to be taken into consideration (*R v Vos; R v Weller* 1961 (2) SA 743 (AA) at 747C; see also *R v Kolibele* 3 EDC 125; *r v Abrahamson* 13 CTR 1140 (SC); *R v Matlala* 1927 TPD 411).

Interpreting the words “previously sentenced” and other similar expressions in section 334 *ter* (prescribing the compulsory sentence of corrective training), section 334 *quat* (prescribing the compulsory sentence of imprisonment for the prevention of crime) and section 335 (prescribing the compulsory sentence of declaring the accused an habitual criminal) of the Criminal Procedure Act, 1955 (Act 56 of 1955), as amended, the Appellate Division in *R v Vos (supra)* held that the expressions should, in the absence of express provisions to the contrary, be

interpreted in a manner consonant with the common law principle set out above. It upheld (at p749E) other decisions to the same effect in *R v Hough* 1960 (2) SA 287 (T); *R v Wilson* 1960 (1) PH H166 (OKA); *R v Butelezi* 1960 (1) SA 659 (N); *R v Nxumalo* 1960 (3) SA 231 (N); and *R v Potgieter and Others* 1960 (2) PH H281 (C).

Ms Dunn referred in her heads of argument to *R v Nyengola* 1960 (4) SA 666 (O), a decision of the Full Bench of that Division. In that decision the Court acknowledged the general common law principle, but stated that this principle is usually adopted by the Courts when imposing sentences left to their discretion. The Full Bench interpreted the provisions of sec 334 *ter* and the Fifth Schedule of Act 56 of 1955 as being compulsory and held that the Legislature did not have the

common law principle in mind when enacting those provisions. In this regard the Full Bench said (at p670B-C):

> "These provisions indicate that the Legislature was not concerned with the deterrent effect of a conviction nor the reformative effect any sentence may have had on an accused, otherwise it would not have treated convictions of more offences than one on the same day or of offences on separate counts as separate convictions for the purpose of taking into account previous convictions. The Legislature seems to have been concerned more with the type of criminal the accused person is, judging by the nature and seriousness of the offences he has committed so that he can receive treatment to suit his criminal propensities."

The Full Bench came to the conclusion that –

> "……. a previous conviction must be taken into account when imposing a sentence in terms of sec. 334 *ter* although the offence in respect of which the accused was so convicted and sentenced was committed subsequently to the one for which he has now to be sentenced."

Relying in part on *Nyengola's* case, Ms *Dunn* urged that this Court should follow the same approach and find that any earlier conviction, regardless of whether it occurred after the commission of the offence for which an accused must be punished under Act must be taken into consideration for the mandatory sentence in section 15(1)(c)(ii) to be imposed.

It must immediately be pointed out that *Nyengola* was overruled by the Appellate Division in the *Vos* case when the Court came to the opposite conclusion, namely

that the relevant legal provisions relied on by the Full Bench did not indicate clearly that the existing law (i.e. the common law principle regarding previous convictions) had been changed (see p749A-D).

It remains for this Court to decide whether the common law in regard to previous convictions has been amended by the Motor Vehicle Theft Act. In this regard I bear in mind the rule of statutory interpretation that a Court "…… cannot infer that a statute intends to alter the common law. The statute must either explicitly say it is the intention of the legislature to alter the common law, or the inference

from the ……..[statute] must be such that we can come to no other conclusion than that the legislature did have such an intention." (*Casserley v Stubbs* 1916 TPD 310 at 312). There is also the further rule that, in the absence of an express provision, the existing law can only be amended by necessary implication: a possible implication is not sufficient (*Kent NO v South African Railways and Another* 1946 AD 398 at 405).

Apart from section 15 the only other relevant section in the Act is section 19, which provides that "[O]n a conviction for an offence under this Act, a previous conviction for a similar offence under any other law shall be deemed to be a previous conviction under this Act." There are no provisions in the Act which expressly amend the common law. There are furthermore no provisions which indicate that the Act is to apply retrospectively, an interpretation against which

there is also a presumption (Steyn (*supra*) at 96 a.f.). In this regard it is important to bear in mind the provisions of Article 12(3) of the Namibian Constitution, which provides:

> "No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed." [my underlining]

These provisions are an expression of the principle of legality in holding persons liable for crimes and punishing them for committing those crimes. Underlying this principle is "the policy consideration that the rules of criminal law ought to be as clear and precise as possible so that people may find out, with reasonable ease and in advance, how to behave in order to avoid committing crimes (Snyman Criminal Law (4th ed) at p41; p49-50). Although these provisions obviously strike at the retrospective operation of penal provisions, they also apply to my mind in the situation under discussion. At the time the appellants committed the offences for which they were punished in this matter, i.e. August 2000, they had no convictions against them. Therefore, at that time the only penalty which was mandatory against them was the penalty contained in section 15(1)(c)(i), i.e. they were liable to be punished not less than 5 years imprisonment. If the convictions dating 4 April 2001 and 8 February 2001 after the commission of the offences in this case

are held against them in such a way that the mandatory provisions of section 15(1)(c)(ii) are applied, they are liable to sentence of not less than 7 years imprisonment. This is a penalty which exceeds the penalty which was applicable in their case at the time they committed the offences.

At this stage it is apposite to refer to the principle that where a difference in punishment relates to the different times at which the offence is committed and tried, the time of the offence is the determining factor. (See *R v Vos) (supra)* at

748H). In this regard STEYN, JA, said in *R v Mazibuko* 1958 (4) SA 353 (AA) at p357:

> "Hoewel ons strafwette lui dat die oortreder by skuldigbevinding binne die perke van die aangewese maksimum strafbaar sal wees, is dit nie die skuldigbevinding nie maar die misdryf waaruit bedoelde strafbaarheid ontstaan. Sodra die misdryf gepleeg is, is die dader aanspreeklik nie slegs vir die sivielregtelike gevolge van sy daad nie maar ook vir die strafregtelike. Hy word onmiddellik aanspreeklik vir 'n straf binne die perke van die strafsoort of strafsoorte waarmee sy daad alsdan beteuel word."
>
> [my translation follows:]

> "Although our penal laws state that the offender shall upon conviction be punishable within the limits of the indicated maximum, it is not the conviction but the offence from which the intended liability originates. As soon as the offence is committed, the perpetrator is liable not only for the civil law consequences of his deed but also for those of the criminal law. He becomes immediately liable for a punishment within the limits of the type or types of penalty with which his deed at the time is controlled."

Although this statement was made in the context of deciding whether a statutory amendment increasing a penalty applies retrospectively, the principle is in my view also applicable here. (See *R v Vos (supra)* 748H-749A*; R v Rainers* 1961 (1) SA 460 (AA) at p465E-466A).

Having regard to the above mentioned authorities it is my view the provisions of section 15(1)(c)(ii) of the Act must be interpreted in such a manner that they remain in conformity with the common law.

Ms *Dunn* referred to the following statement by HOLMES, AJA, in the *Zonele* case:

> "Generally speaking, previous convictions aggravate an offence because they tend to show that the accused has not been deterred, by his previous punishments, from committing the crime under consideration in a given case. One knows, from practice and from thousands of review cases, that judicial officers usually confine their attention, as far as convictions are concerned, to previous convictions. <u>But I can see no reason why a judicial</u>

> officer, in deciding what particular form of punishment will fit the criminal as well as the crime, should not be informed of subsequent convictions, because of the light they may throw on the form of sentence which will be the most appropriate."
>
> [my underlining]

She then appears to submit, in effect, that the approach underlined in the passage above cannot be taken if the provisions of section 15(1)(c)(ii) are interpreted to mean that the "second or subsequent conviction" must be a second or subsequent conviction in the sense as consonant with the common law principle. She submits in her heads of argument:

> "4. …..[I]t is Respondent's respectful submission that the Legislature did not want the normal principles applicable in taking previous convictions into account when sentencing an accused, to apply when sentence is considered for a second or subsequent conviction in terms of section 15 of the Act.
>
> 5. Respondent submits that in the wording of Smit A.J.P. in the matter of ***R v Nyengola ibid,*** that the Legislature intended that the matter at hand indeed falls within the category of certain circumstances in which the court may be justified in looking at subsequent convictions because of the light they may throw on the form of punishment which will best suit the criminal as well as the crime, regardless of the fact that the offence for which the conviction and sentence was imposed, was committed after the current offence before court.

> 6. Respondent respectfully submits that if this was not the intention of the Legislature, it would be unnecessary to include s.15(1)(c)(ii) which prescribes what type of sentence is to be imposed for a second or subsequent conviction."

I do not agree with this submission. The approach set out in the underlined part of the passage in *Zonele's* case does not stand in the way of the interpretation of section 15(1)(c)(ii) which I favour. It would appear as if learned counsel for respondent is confusing the taking into consideration of a ("true") previous conviction for the purposes of triggering the mandatory provision in section15(1)(c)(ii) (or the ignoring of a conviction which is not a ("true") previous conviction, thereby not triggering the mandatory provisions of section

15(1)(c)(ii)), on the one hand, with, on the other hand, what I may refer to as the *Zonele* approach, i.e. the taking into consideration of convictions subsequent to the commission of the offence for which the offender is to be punished. The two approaches are not mutually exclusive. Although, in the case, as here, where a certain mandatory minimum sentence of imprisonment of not less than a certain number of years without the option of a fine is prescribed by law, there is perhaps not much room for the *Zonele* approach, because the Court's discretion is restricted in the sense that the form of punishment is pretty much decided by the statute itself. However, there is still the possibility, subject to section 15(5), of suspending part of the sentence in accordance with section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

To sum up, the conclusion I have reached is therefore that the learned magistrate should not have regarded the convictions proved against the appellants as previous convictions and should therefore not have sentenced the appellants in terms of section 15(1)(c)(ii). He/she should have regarded them as first offenders and imposed a sentence in terms of section 15(1)(c)(i) of the Act. The magistrate was, however, entitled to have regard to the convictions proved against the appellants in order to determine the issues like the appellant's good or bad character, their apparent reformability and the like, in order to determine an appropriate punishment within the confines of section 15(1)(c)(i) (See *Zonele's* case; *R v Owen* 1957 (1) SA 458 (AD) at p462F-G).

The appellants now have to be sentenced afresh. In my view there is sufficient information on record for this Court to impose sentence, instead of referring the matter back to the magistrate. The appellants were both young persons when they committed the offences and when they stood trial, about 21/22 years of age. The first appellant informed the court *a quo* that he was serving a sentence of 10 years imprisonment. If this is so, he must have sustained some other conviction in addition to the one proved against him. The second appellant was also serving the sentence imposed on him earlier. Both appellants were studying at NAMCOL at the time and it is hoped that they will continue. The second appellant had a girl friend with whom he had a child who was a baby. On the other hand it also clear that both appellants displayed, in spite of their youth, a marked level of cunning in

their dealings with the motor vehicles in question. Both cars were changed in material respects, obviously in an attempt to disguise their original appearance. First appellant had the green Golf registered in his sister's name, apparently to divert the attention from himself. The second appellant produced a false sales document in respect of the white Golf. He thought nothing of dragging his innocent father into the matter by pretending that his father had bought the white Golf and falsely registering the vehicle in his father's name. Each of them is serving a sentence for the same offence, which indicates that the offence for which they are to be sentenced is not a once-off indiscretion. Fortunately for the appellants, due to an oversight by the prosecution during the trial, the evidence

which would have conclusively shown that they were actually operating together and would have led to this Court confirming the conviction on the second count against each of them, was not led. The circumstances surrounding the crimes in my view require that, the appellants ought to be punished longer than the mandatory minimum sentence of 5 years in terms of section 15(1)(c)(i) of the Act. In my view a sentence of seven years imprisonment for each of the appellants is an appropriate sentence. The cumulative effect of this sentence running consecutively after the sentences they are already serving is, in my view, not too harsh.

The order of this Court is set out at the end of the judgment of MAINGA, J.

_____

VAN NIEKERK, J.

ON BEHALF OF THE APPELLANTS	**Mr Boesak**
Instructed by:	***Amicus Curiae***
ON BEHALF OF THE RESPONDENT	**Ms L Dunn**
Instructed by:	**Office of the Prosecutor-General**