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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A064/2019
DPP REF. NUMBER: 10/2/5/1-(2019/061)
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

MASHITISHO MANAPE WILLIAM	FIRST APPELLANT
KHOZA TUMELO WILLIAM	SECOND APPELLANT
AND	
THE STATE	RESPONDENT

JUDGMENT

COERTSE CJ AJ

1. The Appellants were prosecuted in the Regional Court, Kempton Park, on a schedule of seven charges of Theft of motor vehicle:
 - 1.1. 26 July 2017 a Toyota Corolla with registration number [...]
 - 1.2. 29 July 2017 a V W Polo with registration number [...]

- 1.3. 4 August 2017 a V W Polo with registration number [...]
- 1.4. 6 August 2017 a V W Polo with registration number [...]
- 1.5. 9 August 2017 a V W Polo with registration number [...]
- 1.6. 9 August 2017 a Renault Clio with registration number [...]
- 1.7. 16 August 2017 a Hyundai Accent with registration number [...]
2. Appellant 1 pleaded guilty and handed in a written plea- explanation in terms of section 112(2) of Act 51 of 1977. (Counts 1 — 7).
3. Appellant 2 pleaded guilty and handed in a written plea- explanation in terms of section 112(2) of Act 51 of 1977. (Counts 1-4 6-7)
4. On the 23 July 2018 the Appellants were sentenced as follows:
 - 4.1. Appellant 1, On all seven counts, two years on each count. Total of 14 years imprisonment. The court further ordered that 4 years is totally suspended for a period of 5 years on condition that Appellant 1 is not convicted of theft during the period of suspension. Effective sentence is 10 years direct imprisonment.
 - 4.2. Appellant 2: On all six counts, two years on each count. The court further ordered that 2 years is totally suspended for a period of 5 years on condition that Appellant 2 is not convicted of theft during the period of suspension. Effective sentence is 10 years direct imprisonment.
5. The Appellants were at all relevant times during the proceedings in the Regional Court, Kempton Park represented by Mr. Klippin.
6. The Trial Court granted the Appellant leave to appeal against the sentence only.
7. The essential enquiry in an appeal against sentence is not whether the sentence imposed was right or wrong but whether the trial court exercised its discretion properly and judicially: [See S v De Jager 1965 (2) SA 616 (A) at 629 and S v Steyn 1991(2) SACR 8 (A) at 10C 6].
8. The court of appeal is of the view that the trial court had due regard to the personal circumstances of both of the appellants, the interest of society and the nature and seriousness of the crime when adjudicating an appropriate sentence. None of these factors were over or under emphasized [S v Zinn 1969 SA 537 at 540].
9. The purpose of sentencing is an individual and general deterrence, prevention, reformation and retribution [S v Rabie 1977(4) SA 855 at 862 (A) S v Stephen and Another 1994 (2) SACR 163 (WLD) at 168 F – G]. From the record, it seems that the Appellants were not charged in term of the provisions of the Criminal Law Amendment Act 105 of 1997, hence the Magistrate used his penal jurisdiction to sentence the Appellants.

10. The trial court duly considered the Appellants, personal circumstances and afforded it due weight.
11. First Appellant is 28 years old, single with 2 children. He is not the primary caregiver to these children as they stay with their respective mothers. He and Second Appellant share a close friendship. First appellant was gainfully employed at Avis-rent-A-car, as a rental agent earning a salary of R12000 per month. He is, however a first offender and has no previous convictions. He was raised in a supportive family structure with the guidance from both his parents. It seems to the court of appeal as if this good upbringing was cast aside when it became apparent that he, with the support of the Second Appellant can benefit from this elaborate scheme to steal motor vehicles.
12. Second Appellant 2 is 32 years old, single with 2 children. He is, however not the primary caregiver to these children as they stay with their respective mothers. The two appellants share a close friendship. He was unemployed during the commission of the offences. He comes from a supportive family from both parents. He is a first offender with no previous convictions. It is submitted that by pleading guilty, he has expressed remorse for the misdeeds he and First Appellant committed. The court of appeal is of the view that the trial court was too lenient in dealing with the matter on sentence, but in light of the fact that the court of appeal did not give warning that it considered increasing the sentence it was thus stuck to the sentence given by the trial court.
13. The court of appeal considered the following to be aggravating: the offence was serious and prevalent not only in the court's jurisdiction but South Africa as a whole, that First Appellant constituted an essential link in this car theft scheme. Without First Appellant's access to the car keys that he was entrusted with by his unsuspecting employer and the willing assistance from the Second Appellant this car theft operation would not have been able to effectively and illegally appropriate and sell off the stolen motor vehicles. First Appellant was the initiator of the theft of the seven vehicles but it does not stop at him being the initiator; he needed more people to effectively get rid of the vehicles. First Appellant, wilfully and intentionally formed a common purpose with Second Appellant and all those faceless people involved in the illegal sale of the stolen motor vehicles.
14. These offences were clearly well planned and premediated and faultlessly executed. The court of appeal finds that these furtive acts were neither impulsive nor committed on the spur of the moment. First Appellant carefully and cunningly took the keys of each and every one of the motor vehicles false creating the impression that he was carrying on his normal course of duties and then simply handed it over to the Second Appellant as a necessary chain in these furtive

acts to appropriate and to on-sell it. This is indicative of a coherent planned course of conduct. The Appellants must have considered the consequences of their actions if being caught nevertheless they proceeded with their unlawful activities. Advocate for the State submitted that it takes a great degree of planning and execution to steal 1 motor vehicle, but on the 9th August 2017, the Appellants were brazening enough to steal 2 motor vehicles.

15. First Appellant flagrantly abused his position of trust whilst he was in the employ at Avis-rent-A-car. He fully and completely understood how the company's system worked and he by-passed the security systems by physically handing over the car keys to Second Appellant. Second Appellant closely worked hand in hand with First Appellant to take possession of the car keys and to drive off with it which were then eventually sold off. It is submitted that the manner in which the crimes were executed was rather sophisticated due to the elaborate planning involved. The Appellants have no respect for other people's possession.
16. These crimes were motivated by pure financial gain and committed in pursuance of a common purpose as set out above. It can be state that Appellants had to work closely together to get this scheme going and the vehicles were then passed onto faceless criminals who couldn't wait to lay their criminal hands on these cars once again for pure financial gain. First Appellant admitted that he received cash payments from Second Appellant whom admitted that he sold the stolen motor vehicles to different persons in Pretoria and Mafikeng with the intention to permanently deprive the owner of its ownership. The court of appeal is of the view that permanent deprivation of ownership did not start when it was on-sold to these faceless criminals in Pretoria and Mafikeng, or where ever. Avis-rent-A-car was deprived of ownership the moment First Appellant took the keys to eventually hand it over to Second Appellant.
17. The effects of car theft cause higher insurance premiums and huge personal expenditure of motorists and companies on security. These faceless criminals who deals "professionally" in stolen cars are extremely hard to detect and bring to book. Counsel for the State informed the court of appeal that those faceless criminals who bought these stolen vehicles has to date not been arrested. It was submitted by the State that car theft have become epidemic in South Africa with the concomitant of huge financial implications not only for Avis-rent-A-car but for the State as well. The law enforcement agencies are at their wits end to track down these faceless criminals and successfully prosecute them.
18. Counsel for the State informed the court of appeal that:
 - 18.1. out of the 7 motor vehicles that were stolen only 4 were recovered and 3 have not yet been recovered to the value of R666 035,00.

18.2. That the financial losses of the 4 motor vehicles which were recovered Avis-rent-A-car experienced massive rental losses which are as follows:

18.2.1. Recovered Toyota Corolla [...] valued at R200 000. 00 with a rental loss of R8171.79

18.2.2. Recovered VW POLO [...]valued at R226 000.00 with a rental loss of R 5341.32.

18.2.3. Recovered V W POLO [...] valued at R226 000.00 with a rental loss at R9040,18;

18.2.4. Recovered Renault Clio [...]with a rental loss at R10 592.47.

18.2.5. Missing and not yet recovered V W POLO [...] value at R226 000.00 with a rental loss R38 586.55.

18.2.6. Missing and not yet recovered V W POLO [...]value at R226 000.00 with a rental loss R38 586.55

18.2.7. Missing and not yet recovered Hyundai Accent [...]value at R214 035.10 with a rental loss R35 221.95.

19. Counsel for the State submitted that the fact that the 4 motor vehicles were recovered, were not due to the initiative or, might I add, with their assistance, but largely due to the astute and quick-witted actions of the police officers to trace and recover the said motor vehicles. It should be put on the record that Counsel for the two Appellants did not put another version before us, in fact he was completely silent about the State's submissions. We are of the view that it is wishful thinking to expect assistance from the Appellants; instead, they lodged an appeal against sentence.

20. In respect of the idea that was put forward by the Appellants, that by pleading guilty they showed remorse, it needs to be addressed strenuously by the court of appeal. Counsel for the state submitted, which submissions were accepted by the court of appeal, that the plea of guilty in itself does not constitute a sign of remorse. It may merely indicate an acceptance of the inevitable. First Appellant stated that he did not comply with his responsibilities and that was the main reason why he was arrested. First Appellant identified weaknesses in the security and was very tempted to steal the motor vehicle. He proceeded to describe how he went about stealing the vehicles – it was set out in this judgement above and will not be repeated again. First Appellant at a later stage received a cash payment from Second Appellant. In these circumstances it is difficult, if not totally impossible, to imagine what reasonable defence the Appellants could have given for their actions. That is why counsel for the State submitted that the plea of guilty as an acceptance of the inevitable.

21. It was stated in *S v Martin* 1996 (1) SACR 172 (W) at 177g-i that:

"The plea [of guilty] does not necessarily imply anything more than that the accused is realistic. The statement in terms of section 112(2) does not state that the accused regrets his actions. For the purposes of sentence, there is a chasm between regret and remorse. The former has no necessarily implication of anything more than simply being sorry that you have committed the deed, perhaps with no deeper roots than the current adverse consequences to yourself. Remorse connotes repentance, an inner sorrow inspired by another's plight or by a feeling of guilt because of breaking the commands of the Higher Authority. There is often no factual basis for a finding that there is true remorse if the accused does not step out to say what is going on in his inner self."

22. Unfortunately, the court of appeal is of the view that the trial court took a very lenient approach to sentencing the Appellants but in light of the fact that the court of appeal did not give notice of its intention to increase the sentence, that opportunity was lost. The sentence was not vitiated by any irregularity or misdirection.

23. In respect of the sentence of the two Appellants, I quote directly from the record in Caselines:

24. In respect of the sentencing of the two appellants, I quote directly from the court record as is found on Caselines:

"In respect of accused 1 on all seven counts, two years on each count. That also applies to accused 2 on all the counts, each count is two years direct imprisonment. In respect of accused 1 the total sentence will be 14 years direct imprisonment. In respect of accused 2 direct imprisonment of 12 years direct imprisonment. In respect of accused 1 on all seven counts, two years on each count. That also applies to accused 2 on all the counts, each count is two years direct imprisonment. In respect of accused 1 the total sentence will be 14 years direct imprisonment. In respect of accused 2 direct imprisonment of 12 years direct imprisonment."

25. Coertse AJ is of the view that the sentence was too lenient but in light of the fact that the court of appeal did not give notice that it is of the intention to increase the sentence, the court of appeal is stuck with the sentence imposed by the magistrate.

26. The court of appeal is not entitled to disturb the imposed sentence, even if it would itself not have imposed it [*S v Holder* 1979(2) SA 70 (A) at 75D and *S v Ramanka* 1949(1)SA 417 (A) at 420 and *S v Chritidoulou* 1979(3)SA 323 (A) at 536 H- 537 A].

27. The appeal against the sentence is dismissed and the sentence imposed by the trial court be and is hereby confirmed.

COERTSE CJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree.

MAKUME JUDGE OF THE
HIGH COURT, GAUTENG LOCAL DIVISION
JOHANNESBURG

FOR THE PARTIES:

FOR THE APPELLANTS: Adv. S. Hlazo on instructions from Legal Aid South Africa Johannesburg Local Office

FOR THE STATE: Advocate L R SURENDRA for the Respondent, Office of the Director of Public Prosecutions