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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date: 24/03/2017

Case Number: A101/16

Reportable: No

Of Interest to Other Judges: No

In the matter between:

JABU EMELIO KONGOLO

APPELLANT

and

THE STATE

RESPONDENT

Coram: HUGHES *J et C* SHIRI LELE

JUDGMENT

HUGHES J

[1] The appellant in this appeal was charged with theft of a motor vehicle in the regional court, Benoni. He was convicted on 29 April 2013 and sentenced to eight years imprisonment. He was legally represented throughout the trial and pleaded not guilty to the charge. Leave to appeal was refused by the court a quo but granted after he petitioned this Honourable Court in respect of both conviction and sentence.

[2] Briefly, the case against the appellant is that two police officers, Warrant Officers Skhosana and Mkhwanazi, having received a tip off from an informant on 14 July 2010 at 10h20, found the appellant at 10h40 in the driver's seat of a Toyota Venture motor vehicle parked on the side of the road on Payete Street, in the area of Barcelona. The police alleged that when they enquired who the owner of the Venture was, the appellant proclaimed that it was his vehicle.

[3] The said vehicle had been parked off on 13 July 2010 at Mr Wagaba's home, number [...] M. S., Kuma, Stilfontein, Klerksdorp the night before. Mr Wagaba is the owner of the Toyota Venture and he alleges he parked the vehicle off the night before and discovered in the morning that the vehicle was no longer where he had parked it.

[4] He proceeded to Stilfontein police station to report the vehicle stolen and while he was doing so a call was received that the vehicle had been recovered and was at Etwatwa police station. He was also advised that an arrest had been made of those who were in possession of the Toyota Venture.

[5] The Warrant Officers also testified that earlier at about 7h20 on the day of the appellant's arrest during a patrol they had stopped the appellant who was driving a Toyota Hilux at that time. They have seen him drive this vehicle on many occasions. At the back of this Hilux were 'white wall tyres'. Mr Wagaba alleges that his vehicle had white wall tyres but when the vehicle was returned to him they had other tyres and the white wall tyres had been removed.

[6] The Warrant officers testified that at the place where the appellant was apprehended the Hilux was parked in front of the Venture and the Hilux had no occupants. There was also a second occupant in the passenger seat of the Venture with the appellant. This was Mr Lingwati who on enquiring what he was doing in the vehicle responded that he had obtained a lift from the appellant, but he states that they were in the Hilux and not the Venture. He states

that the Venture was parked about 30 metres from the Hilux and it had no occupants. This was also testified by the appellant however he states that the Venture was 60 metres away, instead.

[7] The Warrant Officers testified that they made the necessary enquiries when they noticed that the registration disc depicted North West Province whilst the vehicle licence number of the Venture had a Gauteng Province registration.

[8] The appellant's version is that he was driving his Hilux, he offered Mr Lingwati a lift, whilst doing so he received a call from a friend to come to a place, that being the place where he was apprehended. Whilst at that place and seated in his Hilux with Mr Lingwati in the passenger seat the Warrant Officers in plain clothes appeared from the yard of one of the shacks. They proceeded towards them with firearms and enquired whose Venture was behind them which had no occupants.

[9] He denies that he was stopped by the warrant officers earlier in the day and he further denies that he had anything at the back of his vehicle. He testified that they just passed each other on the road. He contends that there was bad blood between him and the two warrant officers. He further states that warrant officer Skhosana had said that '*...he will fight me, meaning he wants to teach me a lesson*'.

[10] Adv. More for the appellant argued that the state failed to inform the court and the appellant that they would rely on the doctrine of recent possession and the court a quo did not apply the doctrine correctly in the circumstances of this case.

[11] In addressing the issue of failing to inform the court and the appellant that the doctrine of recent possession would be relied upon I must point out that one of the definitions of theft is:

'A person commits theft if he unlawfully and intentionally appropriates movable, corporeal

properly which

(a)...

(b) *belongs to another but is in the perpetrator's own possession; or*

(c) ...

Provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property'. This definition was accepted in Von Elling 1945 AD 234; Sibiya v The State 1955 (4) SA 247 (A) at 250-251; Kotze v The State 1965 (1) SA 118 (A)125

Also see *Criminal Law*, fifth edition by C R Snyman at page 483.

[12] In the appellant's trial he was legally represented and it is evident from the charge sheet and the definition that the appellant had specific particularity of the case that he had to meet. In addressing the application of the doctrine of recent possession one must bear in mind that theft is a *delictum continuum*, a continuing crime. Theft continues as long as the property remains in the hands or possession of the thief or possessor.

[13] Turning to the facts of the case, counsel for the appellant's argued that the court a quo erred when it rejected the appellant's version even in the face of his witness corroborating his evidence to some extent. I am of the view that the court rightfully rejected the version of the appellant. There were just too many improbabilities. Some of these just to mention a few is the fact that white tyres were removed from the Venture and replaced with other tyres. The warrant officers saw the appellant driving his Hilux in the morning with white tyre at the back before being advised of the theft. The Venture that was stolen was blue and the vehicle of Mr Wagaba from North West and it just happened to be in the same area where the appellant was to meet a friend and he was allegedly parked

not far from the Venture, which according to him had no occupants. The appellant give Mr Lingwati a lift, even though he is going in the opposite direction to Daveyton, being the direction in which the Mr Lingwati was going. How would Mr Lingwati who was hiking on the opposite side of the road and who did not know the appellant accept a lift from the appellant who was going in the opposite direction. According to the appellant after Barcelone he was going back in the direction of Daveyton, how would Mr Lingwati know this standing on the opposite side of the road. The appellant testified that there were only two vehicle at the place where he was arrested that being his Hilux and the Venture. The Warrant Officers approached pointing firearms on foot from a nearby yard when he parked his Hilux and attempted to alight. When asked how he was escorted to the police station as his evidence was that immediately after his arrest he was taken to the police station, he now responded that there was in fact another vehicle being a Toyota Condor in the vicinity.

[14] The cherry on the top was that he had bad blood with the Warrant Officers and they had threatened him for no apparent reason. He is not even clear when this threat took place.

[15] Turning to sentence, the argument advanced on the part of the appellant is that the personal circumstances of the appellant were not considered and the sentence imposed is harsh and shocking.

[16] For assistance the court a quo even requested a presentencing report to consider the personal circumstances of the appellant. I find no merit in the argument that these were not considered.

[17] The presiding officer went through all the aspects of the appellant's personal circumstances mention in the pre-sentencing report in great detail. Having gone through

the cases on sentencing in theft matters, the presiding officer emphasis that the appellant was not candid with the court a quo and did not show remorse in any way. The sentence in these circumstance, in my view, balance the interest of all being the crime, the criminal and the community.

[18] Consequently the appeal on both conviction and sentence is dismissed.

[19] The following order is made:

(a) The appeal in respect of both conviction and sentence is dismissed.

It is so ordered

W. Hughes Judge of the High Court

I concur

C Shirilele

Acting Judge of the High Court Gauteng, Pretoria

Appearances:

For the Appellant : Ms Masete

Instructed by : Legal Aid

For the Defendant : Adv K Germishuis

Instructed by : The State Attorney

Date heard : 14 March 2017

Date delivered :