

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA**

Case Number: A225/2016

Date: 20/4/2017

In the matter between:

DLAMINI, SIBUSISO

First Appellant

MNISI, SIBUSISO

Second Appellant

And

THE STATE

Respondent

JUDGMENT

MANYATHI AJ

Introduction

(1) Both Appellants were arraigned at Springs Regional Court on one count of theft and one count of attempted theft. They both pleaded not guilty on both counts. Both Appellants were found guilty of theft of a motor vehicle and count 2, on attempted theft. They were both sentenced to an effective 8 years imprisonment on both counts for Appellant 1.

Appellant 2 to effective sentence of 11 years on both counts.

(2) Leave to appeal on conviction and sentence was refused, both petitioned the Judge In chambers, as a result, leave to appeal against conviction and sentence on count 1 was granted and count 2 on sentence only. No appeal launched on behalf of accused 3.

(3) Both Appellant's were legally represented during the trial. The ground of appeal in respect of conviction on count 1, is that the Court erred in convicting the Appellants on the count of theft instead of attempted theft. The question on Appeal is whether, on the facts of the case, the State did manage to prove theft beyond reasonable doubt or the facts reveal attempted theft.

Factual background

(4) The circumstances that gave rise to the Appellants' convictions can be summarised as follows:

(4.1) On the 22 July 2014, Mr and Mrs Le Roux testified that they were at Bush Rakers pub to participate in a pool competition. It was around 18h30 when they parked their vehicle outside in a parking lot. They were travelling in a Mazda Wrestler Bakkie with registration [Y...]. When they parked the vehicle everything was in order, the windows closed and the doors locked.

(4.2) Mrs Le Roux testified that when she was alerted to the fact that someone was trying to steal her car, she went to check and found that someone tampered with the car, the door locks were broken and hanging out. The ignition had been damaged, wires hanging out and the vehicle had been moved away from the original parking lot where she parked the car. The car was standing skew, moved backwards, and stopped at the pavement. There was an amount of R900.00 that was in the ashtray which was stolen and the radio face was also stolen.

(4.3) Mr Woest (who was also participating in the pool competition), testified that he saw a person wearing a reflector jacket walking to the vehicle of Mrs Le Roux, he became suspicious since he was aware of the fact that there are no car guards at the pub. When he checked he noticed that there was someone in Mrs Le Roux's car and the guy with the reflector jacket was pushing the vehicle, when he shouted as to ask what they are doing, Appellant 1, who was inside the vehicle, jumped out and Appellant 2 ran away and

then both Appellants proceeded to get into a red Mazda with registration [Z...], in which they drove off. The matter was reported to the police.

(4.4) After plus-minus forty-five minutes both Appellants were brought to Bush Rakers, by Police, where they were positively identified as the people who were pushing the vehicle of Mrs Le Roux. The radio face stolen from Mrs Le Roux's vehicle was found in the Appellants' vehicle. Constable Mokopodi Mapale testified that while patrolling at Nigel Road, he was stopped by a white male who informed him about what had happened. He informed him that the suspects were driving in a red Mazda with the registration number [Z...], and he managed to locate the said vehicle. He stopped and then saw the two suspects standing between their car, the red Mazda, and a Ford Tracer, with registration [B...].

(4.5) He testified that as he was approaching the scene he noticed the two suspects tampering with vehicle [B...] and he ordered them to immediately raise their hands above their heads. They were busy trying to force open the door of the vehicle. The constable identified the two suspects as Appellant 1 and the 3rd accused. Further that at that stage Appellant 2 was seated in the Red Mazda, he also ordered Appellant 2 to get out of the vehicle. After searching him, he found an Allen key. He noticed a reflector jacket on the back seat of the car. The radio face belonging to Ms Le Rowe's vehicle was also found inside the car. They were all arrested.

(4.6) The Appellants denied all the allegations against them. They agree that they were arrested at Casseldale Spar, they were there to collect the 1st Appellant's girlfriend who was knocking off from work. Both the 1st and 2nd Appellants claim that accused 3 was wearing a reflector jacket. This aspect is disputed by accused 3, who testified that the 2nd Appellant was wearing a reflector jacket on that day.

The 1st and 2nd Appellants, under cross-examination, testified that they don't know why accused 3 says the 2nd Appellant was wearing a reflector jacket.

(4.7) On the reading of the record the proceedings I am satisfied that the State has proved the identity of the Appellants as the people who committed the offence. The Appellants also from their heads of argument, they concede to the identity.

Legal Principles

(5) The definition of theft has been discussed by our Author's and counts as follows:

"Unlawful, appropriation of another's property with the intention of permanently deprive the owner of his ownership"

It is also well established that theft can be committed in various ways. The Court is now concerned only with concept of *"contrectatio"*. The term means the touching or handing of the thing which is the subject of theft. In terms of the concept, the mere unlawful handling of the thing as if you are the owner was sufficient to commit the offence of the theft.

Jonathan Burchel in Principles of Criminal Law, [1]describes appropriation as *"Property is appropriated when the thief behaves as if he or she were the lawful owner of the property and deals with the property as the way an owner would"*. To satisfy the concept of *contrectatio* the thief must assume control of the thing, by handling or grasping it. In items that cannot be handled, the *contrectatio* can be effected constructively. Our Courts recently, due to the definition of the concept of *contrectatio*, held that the term does not cover certain situations in the modern world and have preferred to use the term "appropriation" instead of *contrectatio*.

(6) This means that theft is committed by the assumption of control of property belonging to another. The owner or possessor has also to be deprived of exercising the right of ownership. In the case of **S v Tau**, [2] the court held, that *"the gold was still under the effective control of the owners thereof after the appellant's action"*. Held that the appellant's conduct had not amounted to the executory conduct."

(7) The judgment in Tau's case (*supra*) serves to confirm that the principle that mere assumption of control over the property is not sufficient to constitute theft, but that it should

further be required that the owner is effectively excluded from her property. The principle has been adapted and followed by our courts in the recent decisions. See amongst others, **S v Nkosi**,^[3] where the cattle which were the subject of the theft, were tied to the pole of the farm of the owner, they were not removed from the farm, because the bakkie where the cattle were to be loaded got stuck in the mud. Makogoka J stated that “*the appellant's conduct amounted to an act of execution or consummation of the offence which constituted attempted theft*”. In **S v Mekula**^[4], the Court agreed that the accused assumed control over the bottle of brandy that he concealed under his clothes, but concealing the brandy did not mean that the owner of the shop no longer exercised control over it.

(8) It is now clear from the abovementioned cases that mere assuming of right of the owner is not sufficient to bring conviction on the basis of the principle of *contrectatio*. To satisfy the principle of "appropriation" there must be an assumption of the rights of ownership and a concomitant exclusion of the owner from the enjoyment of his or her rights to the property of thing. The thief must deal with the thing in a way that terminates the owner's ability to derive benefit from it.

Evaluation of Evidence

(9) I now turn to the facts before me. There is undisputed evidence that the Appellants had pushed the vehicle out of the parking bay where it was parked by the owner, but could not take it away because they were disrupted by Mr Woest.

As to whether appropriation did take place or not is a question of fact. The Appellants damaged the door locks, ignition of the vehicle and some of the items inside the vehicle belonging to the owner were stolen. Some of the items, specifically the radio **face was** found in their possession. The vehicle was only moved for a short distance.

(10) I am of the view that the facts in this case are totally distinguishable from the facts in both Nkosi and Tau's cases. In these cases there was insufficient evidence that

appropriation in the full sense of excluding the owner of his/her benefit to the property or thing has been proved, while *in casu*, the analogy would have been appropriate if the Appellants had not entered into the vehicle of the complainant and started moving it. The difference between count 1 and count 2, is that in count 2 the Appellants did not move the vehicle, it was still in the same place where the owner left it. In count 1 they moved the vehicle. The distance is totally irrelevant.

(11) I am satisfied that the Appellants dealt with the vehicle in a way that terminates the owner's ability to derive benefit from it and therefore appropriation has taken place. I am further satisfied that the court *a quo* correctly convicted them of theft. In the result the appeal against conviction is dismissed.

Sentence

(12) Both Appellants were found guilty of serious offences. The courts view theft in a serious light. On the reading of the record, the court *a quo* did take the Appellants personal circumstances into account. Appellant 1 was sentenced to 5 (five) years of theft of a motor vehicle and 3 (three) years on attempted theft. Appellant 2 count 1, theft of a motor vehicle 7 (seven) years, count 2 attempted theft 4 (four) years imprisonment.

(13) Leave to appeal was granted on sentence of both counts: the Appellant's grounds of Appeal are as follows:

(1) That the learned Magistrate erred in not putting due weight on the Appellant's personal circumstances.

(2) That the sentences of 8 and 11 years respectively are shocking and harsh.

(14) The proper approach in an appeal against sentence has been crisply formulated by Holmes J.A in **S v Rabie**^[5] as follows:

"1. In every' appeal against sentence, whether imposed by a Magistrate or a Judge, the Court hearing the appeal:

a) should be guided by the principle that punishment is “pre-eminently” a matter for the discretion of the trial court; and

b) should be careful not to erode such discretion, hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised.”

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”

(15) These principles have been affirmed by the Constitutional Court in **S v Shalk & Others**,^[6] it was held *“that the question is not what sentence the Court of Appeal would have imposed, but rather whether the sentence is shockingly inappropriate or whether an irregularity or misdirection occurred”*. The Court is fully aware that the sentence pre-eminently falls squarely within the purview of the trial court's discretion, which should not be lightly interfered with. This Court accepts that the Appellant 1 is a first offender, Appellant 2 does have previous convictions of theft. The last conviction was in the year 2000 and 6 years imprisonment was imposed. On a proper reading of the record it is clear that the court *a quo* did take all the Appellant's personal circumstances into account. The Court also *did* not lose sight of the fact that Appellant 2 has previous convictions of both theft and attempted theft. The last sentence imposed on him was in the was in the 2000 and sentence was 6 years direct imprisonment. Clearly one cannot expect that the same sentence would be imposed for the same offence 16 years later.

(16) From the record it is clear that the Appellants planned in advance to steal a car. The fact that they were chased from the first scene, did not deter them from going on to try and steal another vehicle from thereafter. This fact is corroborated by the presence of the self-made Allen key in their possession. The only inference to be drawn is that they were dead set on stealing a motor vehicle that evening.

(17) Taking all the factors as mentioned above and the facts of the case, I am of the view

that the court a quo took everything into account, there was no misdirection. In the result appeal against sentence is dismissed.

MANYATHI AJ

ACTING JUDGE OF HIGH COURT

I concur.

JANSE VAN NIEUWENHUIZEN J

JUDGE OF HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

For the Appellants: Advocate LA Van Wyk Legal Aid South Africa

For the Respondent: Annalie Coetzee

Director of Public Prosecutions Office

[1] 4th Edition p678

[2] 1986 (2) SACR 97 (T)

[3] 2012 (1) SACR 87 (GNP)

[4] 2012 (2) SACR 521(ECG) par 6-7

[5] 1975 (4) SA 855 (A)

[6] 2008 (2) SA 208 (CC) par 72