

PHATUDI J

JUDGMENT: Delivered on

RESPONDENT

THE STATE

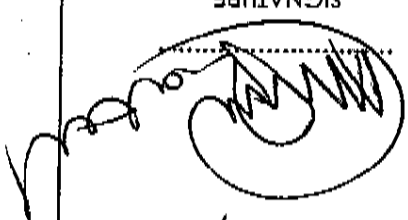
And

APPELLANT

CHESTER MAKHUELE

In the matter between:

CASE NO: A05/2015

DATE		SIGNATURE	
04/10/2015			
(1)	REPORTABLE: YES/NO		
(2)	OF INTEREST TO OTHER JUDGES: YES/NO		
(3)	REVISED.		

(Functioning as Limpopo Division, Polokwane)

GAUTENG DIVISION, PRETORIA

IN THE HIGH COURT OF SOUTH AFRICA



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[1] The Appellant was charged in Giyani Regional Court with one count of theft of a motor vehicle. He was convicted as charged and sentenced to five (5) years imprisonment.

[2] The trial court refused the appellant's application for leave to appeal against both conviction and sentence. He petitioned the Judge President. Leave against both conviction and sentence was granted.

[3] The key witness, Mr Madima Sakoneka (Madima) was an accomplice. He was turned a state witness and warned in terms of section 204 of the Criminal Procedure Act 51 of 1977 (CPA).

[4] The evidence of the state's key witness' examination in chief has not been recorded if not missing. The record only starts with his cross examination. Both the appellant's and state counsel submitted that the matter can be finalised notwithstanding the missing portion of the record.

[5] Both counsel submitted that the key witness' evidence in chief is summarised in the trial court's judgment. They further submitted that this appeal court should accept the summarised version as the true reflection of the evidence in chief.

[6] The summary of Madima's testimony as set out by the trial court was that Madima testified that on 29 June 2011 at approximately 02:00 while on his way home from a beer hall, saw three people pushing a motor vehicle. The appellant was one of the three people. He knew the appellant. The three people asked him to

help them push the vehicle. Two of the said three threatened to kill him should he refuse. The two had firearms with them. The trial court recorded: "*While pushing the car two of the people drove off. They had firearms*".¹

[7] The appellant's counsel submitted that the state failed to prove beyond reasonable doubt that the appellant was among the perpetrators who stole the complainant's motor vehicle. He submitted that the appellant was not one of the two armed perpetrators who drove off. He lastly submitted that the appellant remained behind with Madima.

[8] Counsel for the state disputed the factual submissions forwarded on behalf of the appellant. He submitted that the appellant "drove off" with the other two armed perpetrators.

[9] A person commits theft if he/she unlawfully and intentionally appropriates movable, corporeal property which belongs to, and is in possession of, another 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.² It is trite law that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court, and will only interfere where the trial court materially misdirected itself in so far as it's factually and credibility findings are concerned.³

¹ Trial court judgment-paginated page 69 lines 22-23
² Criminal Law, CR Snyman, 4th Edition reprinted 2007, page 469
³ R v Dhlumayo and Another 1948(2)SA 677(A)
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[10] It is common cause that both counsel accepted the trial court's factual synopsis of events as set out by Madima in examination in chief. Counsel for the state disputed the appellant's counsel's submission that the appellant remained behind when the other two perpetrators drove off. This prompted me to scrutinise the record specifically during Madima's cross examination. This is how the evidence unfolded:

"Adv. Hlungwani: Now were all three pushing the vehicle when you came upon them.

Madima: Yes as I was coming they were pushing the vehicle.

Adv. Hlungwani: The three of them

Madima: Yes the three of them

Adv. Hlungwani: Was there anybody behind the steering wheel when they were pushing.

Madima: Yes there was one who was controlling the steering wheel outside next to the driver's door ... "

[11] It further transpired as follows during cross examination:

"Adv. Hlungwani: Now when the two of them get into the vehicle, the one who was behind the steering wheel?

Madima: The one that was armed with firearms boarded seat and the other one at the back

Court: When you say back, where?

Madima: At the bakete Your Worship."

[12] The state counsel was referred to the cross examination text outlined above coupled with the trial court's wording when it dealt with Madima's evidence especially when it recorded Madima to have said that "*while pushing the car two of the people drove off. They had firearms*". Counsel could not take the matter further after this court enquired if there was any evidence that supported his submissions

vis-a-vis what had been outlined as transpired during cross examination. He further conceded that if the appellant did not "drive off" with the other "two armed" perpetrators, he (the appellant) cannot be said to have committed the offence. He further conceded that there was no other evidence that linked the appellant to the commission of the offence other than that he was among those who pushed the motor vehicle.

[13] Madima's evidence was very clear that the appellant did not leave with the other "two armed" perpetrators. The appellant can thus not be said to have had the intention permanently to deprive the complainant of his motor vehicle. When dealing with the appellant's judgment, the trial court based its findings of fact arrived at after seeing and hearing the witnesses in the case. The trial court's findings of fact would have been presumed correct in the absence of misdirection of fact that the appellant committed the offence as charged. I am satisfied from the record of the evidence, the trial court's judgment and the submissions made by both counsel that the trial court was clearly wrong in finding the appellant guilty as charged hence this appeal court's departure from such findings⁴. The appellant's conviction and sentence fall to be set aside.

[14] I, in the result, make the following order.

14.1 The appellant's appeal is upheld.

14.2 The trial court's judgment is hereby set aside. The accused is found not guilty and must be released.

14.3 The Director of the Correctional Service Centre where the appellant is detained is directed to release the appellant on

⁴ See R v Dhlumayo 1948(2)SA 677(A) at 705

receipt of this order immediately provided the appellant is not
serving any other sentence.

I agree.

AML PHATUDI
JUDGE OF THE HIGH COURT

K MAKHAFOLA
JUDGE OF THE HIGH COURT

APPEARANCES

Heard on : 11 September 2015

For Applicant : Mr LM Manzini
Polokwane Justice Centre

For Respondents : Adv. WKK Mphahlele
Instructed by : State Attorney