

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No: 291/2012

In the review between:

THE STATE

and

TIISETSO HANS MACHOLO

CORAM: HANCKE, AJP *et* KRUGER, J

JUDGMENT BY: KRUGER, J

DELIVERED ON: 13 SEPTEMBER 2012

- [1] A regional magistrate sent this matter for review under section 304A of the Criminal Procedure Act 51 of 1977, which *inter alia* provides that if a regional magistrate after conviction but before sentence is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, the regional magistrate sends the matter for review without sentencing the accused. In this case the accused was charged with the theft of a motor vehicle. He was legally represented and pleaded guilty in terms of a written statement under section 112(2)

signed by him.

[2] The plea explanation reads as follows:

"I the undersigned

Tiisetso Hans Macholo

Do hereby state as follows:

1.

I plead guilty to theft of a motor vehicle as charged to wit, a Toyota Corolla, with registration Letter and Numbers DWF119FS

2.

I admit that:

2.1 upon or near Peet Avenue and within the jurisdiction of the above Honourable Court I did unlawfully and intentionally steal a motor vehicle described in one above;

2.2 the aforesaid vehicle was the property of or in lawful possession of Thabang Thatseng ; and

2.3 I intended to permanently deprive Thabang Thatseng ownership and possession of the said vehicle.

The facts upon which I plead guilty are as follows:

- 3.1 on the date and place mentioned in 2.1 above I was walking along Peet Avenue;
- 3.2 as I was walking along the above said street I passed by a vehicle described in one above;
- 3.3 as I was going pass the above said vehicle I noticed that it was not locked and I opened the door, entered the vehicle and started it using a knife I had earlier bought in town and drove to Cairo Location in Bloemfontein; and
- 3.4 I drove the said vehicle around the above said Location for three days until I was arrested by the police.

4.

No one gave me the permission to take or steal the above-mentioned vehicle and at all material times, I knew that what I was doing was unlawful.

5.

I plead guilty freely and voluntarily and without being influenced to make this plea.

**SIGNED AND DATED AT BLOEMFONTEIN ON THE 12TH DAY
OF APRIL 2012”**

[3] At the outset the plea explanation was read into the record but

the magistrate questioned Mr Buthelezi, the accused's legal representative on the use of the words "unlawful" or "wrongful" in the charge sheet and the section 112(2) statement. Then the magistrate wanted to know how the accused got the vehicle started. After consulting with the accused the words that the accused used a knife to get the vehicle started were added into the section 112(2) statement, but the magistrate was "not satisfied with the appearance of the plea". She said: "It must be drawn up in a more neater fashion so that the court can see what is written in it alright?". She postponed the matter to the next day.

- [4] On the second day the plea explanation was again read into the record. After that, the magistrate asked Mr Buthelezi whether the plea explanation stated that the accused pleaded guilty freely and voluntarily. Mr Buthelezi said it did not and he added the words in paragraph 5 in the manuscript. Amendments to the name of the complainant and the registration number of the vehicle were also made in manuscript at that stage. Thereafter the plea explanation was read into the record for the third time. The magistrate enquired whether the accused signed at the alterations and the accused confirmed:

Court: Alright accused do you find the contents of this statement to be true, to be correct that you agree with it and that...

Accused: Correct Your Worship.

Court: And that you signed it.

Accused: Yes Your Worship."

- [5] Thereafter the court gave judgment and convicted the accused of theft as charged and stated:

"Accordingly the court is satisfied that the accused has correctly pleaded to the elements of the offence of theft and he is convicted as charged."

- [6] The accused testified in mitigation. The following transpired:

COURT: Accused when the court asked you about your plea, whether you confirm the facts to be true, to be correct, do you agree with it, you said you stole the vehicle, you intended to permanently deprive the owner. Is that still the position? --- Yes, correct so.

So you agree that you are still pleading guilty? --- Yes.

Based on the fact that you pleaded to him that plea agreement, in the 112(2) statement? --- Yes.

That you are the one guilty, you stole this vehicle, is that

what you are telling the court? --- Yes.

You do not want to change your plea to one of not guilty? ---
Yes.

You do not want to change it? --- No.

So the plea of guilty must stand because you say you are guilty and the court has accordingly accepted the facts to which you have pleaded guilty? --- Yes.”

[7] During argument the magistrate put to Mr Buthelezi:

COURT: It also is clear to the court that the accused’s parole supervision finished in 2010 when he was released and he committed this offence in 2011. So it seems like he watches very closely when his parole supervision finishes.

...

COURT: The court just want to clarify from the accused, it is very important as to what was the reason for him stealing this car?

MR BUTHELEZI: The court wants my attitude towards that?

COURT: Do you have anything to say about it?

MR BUTHELEZI: Yes, I wanted to, no I have got nothing to say of that.

COURT: Well, I need to know from him why did he steal the car.

MR BUTHELEZI: Yes, the court may proceed.

COURT: Accused why did you steal this vehicle?

ACCUSED: Your worship actually I was not intending to steal ...

(inaudible) but after noticing it or seeing it then it came to my mind that Thabang has promised me to give me R500 if I can get him somebody who can rent him a taxi. I just ... (inaudible)

COURT: So then he decided to steal a vehicle so that he could give it to Thabang?

ACCUSED: No, after seeing this vehicle I then took it and drove away with it.

MR BUTHELEZI: Your worship may I assist the court (intervenes)

COURT: Thabang is the complainant in this matter?

ACCUSED: Correct your worship.

COURT: You said in your plea explanation you intended to permanently deprive him of this motor vehicle?

ACCUSED: No, I was not taking it permanently. Where it is written like that then it was not read back to me.

COURT: Did your attorney not go through the statement with you?

ACCUSED: No.

COURT: Now Mr Kopa the accused now will have to change his plea?

PROSECUTOR: Your worship then it will mean I will have to call the witnesses to prove that particular point of the intention to deprive.

COURT: No, it also means the court will have to recuse itself because I have already had insight into his previous convictions.

PROSECUTOR: Yes your worship.

COURT: The matter will have to start *de novo* before another magistrate.

PROSECUTOR: I will have to transfer it.

COURT: Draw up a new J.15 so it can be put on that new J.15 and send to another court. Do you not have J15's here?

PROSECUTOR: No, I do not your worship.

COURT: Mr Makopane just check please. Alright accused the court cannot change your plea at this stage to one of not guilty because it cannot hear the evidence led by the state as I have already had insight into your previous convictions. That could be prejudicial to you, so the matter will start *de novo*. The court will firstly recuse itself in this matter and the matter will start *de novo* before another court with you in custody. Where is the J.15? Alright the matter is remanded 7 May 2012, Court 18 for you to appear in the trial court. You are in custody with no bail.

COURT ADJOURNS."

- [8] Section 113 of Act 51 of 1977 provides that if the court at any stage in proceedings under section 112(2), and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty, the court records a plea of not guilty. It was held in **S v MBOTHOMA** 1978 (2) SA 530 (O) that where the court has seen the previous convictions of the accused, it is advisable not to resume the

trial, and in such case the proceedings should be set aside on review and re-convene before another judicial officer.

[9] Every case must be dealt with according to its own facts. When an accused during mitigation says something which is in all the circumstances clearly untruthful, that cannot form the basis for doubt as to his plea of guilty. That is what happened in this case.

[10] I have difficulty to understand on what basis the regional magistrate developed a doubt as to the accused's guilt. He stole the car using a knife. He drove around with the car for three days until the police stopped him. He said in his evidence that he needed money to start a stall. There is no indication that the accused had any intention other than to deprive the owner of possession permanently.

[11] The magistrate does not explain the reason for the delay in sending this case from April 2012 up to September 2012. The state witnesses might by this time have disappeared. It is not in the interests of justice that this matter be further delayed.

[12] The magistrate asked the accused whether he wanted to change his plea, and he said no. Further, it is difficult to understand what evidence will change here. The accused has admitted that he hot-wired the stolen car and that he kept it for three days. The only inference to be drawn from those facts is that the accused intended to steal the car and deprive the owner of possession permanently.

[13] A judicial officer is not expected to be supine (**TAKE AND SAVE TRADING CC AND OTHERS v STANDARD BANK OF SA LTD** 2004 (4) SA (SCA) 1 para [3]). There was no reason for the magistrate to passively, in a submissive manner accept the spurious allegation of the accused that his counsel had not read over the section 112 statement to him. The presiding officer was in court when the statement was read out, in the presence of the accused, three times. She asked him expressly whether he intended to deprive the owner of the car permanently of possession, and the accused said yes.

[14] The accused signed his plea explanation, and it was read out in court in his presence. To the initial question of the magistrate he responded that he intended to steal the car and keep it. His

intention can be inferred from his actions. The inference that the accused intended to deprive the owner permanently of his car is irresistible. There is no basis to interfere with these proceedings.

[15] I am satisfied that these proceedings were in accordance with justice and that it is in the interests of justice that the matter be disposed of and the accused be sentenced.

[16] **ORDER**

The conviction is confirmed and the matter is remitted to regional magistrate Soomaroo for her to sentence the accused.

A. KRUGER, J

I concur.

S.P.B. HANCKE, AJP