

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: 163/2001

In the appeal between:

JOSEPH NDAYI

Appellant

and

THE STATE

Respondent

CORAM: CILLIé et MUSI, JJ

HEARD ON: 9 SEPTEMBER 2002

JUDGMENT BY: MUSI, J

DELIVERED ON: 12 SEPTEMBER 2002

[1] The appellant, a 32 year old man, was on 25 April 2001 convicted by the Regional Court at Kroonstad of theft of a motor vehicle and sentenced to four years imprisonment. He appeals against both the conviction and sentence.

[2] The evidence led on behalf of the State was briefly as set out hereunder. The complainant testified that he and the appellant had been relatively close and on

good terms, the appellant being his ex-pupil and having been on the council of the school at which the appellant was a teacher in Maokeng, Kroonstad. They had often travelled together in the complainant's car and the appellant would sometimes drive but only in the complainant's presence. On a certain day in May 1998 the two had been travelling together when the vehicle stalled. There was something wrong with the petrol pump which they could not fix and because it was late at night they parked it at a Trek filling station and walked to the complainant's home where they both slept. The appellant had indicated that he would go and check on the vehicle the following day to see what the problem was. The following day the complainant went to his school and left the car keys with the appellant. Later that morning at about 10:00 the appellant arrived at the complainant's school driving the car. The complainant then instructed the appellant to take the car to his home, park it there and then he could go around and get quotations for a new petrol pump. That was the last time that the complainant saw the appellant and his car. He had, however, learned from his mother and daughter that the appellant had been there, but then drove away indicating that he would pick up the complainant at a soccer field. The following day when the appellant had still not shown up the complainant laid charges of unauthorised use of the vehicle with the police. As appears from other evidence this was on 13 May 1998. After some time when the appellant failed to turn up the charges were converted to motor car theft. The next that the complainant saw his vehicle was during June 2000 at a scrapyard in Harrismith where he had been taken by the police. It was a scrap. It had apparently capsized.

[3] Sergeant Magadlela's evidence is to the effect that he took over the investigation of the case on 30 May 1998. He confirmed that the complainant had initially laid charges of unauthorised borrowing of the motor vehicle, but that these were later changed to car theft when the appellant could not be traced. He had for a long period unsuccessfully tried to trace the appellant. The appellant only showed up after more than a year. The appellant informed him of the whereabouts of the vehicle and took Sergeant Magadlela to Harrismith where the vehicle was found in the scrapyard. It was a scrap and both the engine and the gearbox had been removed, but these were found. He had also followed up allegations made by the appellant that the vehicle had been stolen at Emilio Hotel in Welkom and that the theft had been reported at the local police station. He could find no trace of such a report and pointed out that the police would have recorded the report and immediately circulated the vehicle as stolen. In the event, this particular motor vehicle was only circulated after a long time when it could not be found. Nor did the complainant ever report to him as investigating officer that the appellant reported the alleged theft to the complainant. On the allegation by the appellant that the police would have told the appellant where the vehicle was, Sergeant Magadlela was adamant that the police did not know

that nor could the appellant give the name of the police who would have had such knowledge. It is the appellant who informed him of the vehicle's whereabouts. Sergeant Magadlela also testified that he had got hold of the register of the accident in which this vehicle was damaged from the police at Harrismith and found that the driver and his occupants had given false addresses and could not be traced.

[4] The version of the appellant was that he had been instructed by the complainant to drive around with the vehicle to look for parts that were needed in order to repair the vehicle for purpose of a roadworthy test; that he had quarrelled with his wife that same day as a result of which he decided to sleep out and booked himself at the Emilio Hotel in Welkom where the complainant's vehicle was stolen that same night; that he had attempted to report the theft to the police but was told to first get hold of the owner; that he had contacted the complainant and informed him telephonically of the theft. He said that he learned from the police at Kroonstad of the whereabouts of the vehicle and denied that he took Sergeant Magadlela to the scrapyard where the vehicle was found. He made contradictory statements as to how he got hold of the vehicle. But then there are so many contradictions and improbabilities in his evidence that the magistrate branded him a consummate liar. The magistrate puts it this way:

"Daar is net een woord om die beskuldigde as getuie te beskryf, en dit is 'n absolute leuenaar, huiwer die Hof nie om sy getuienis van hoe die voertuig weggeraak het in totaliteit te verwerp nie."

That statement is fully justified and there is no need to consider the appellant's evidence any further.

[5] The question remains, however, whether on the evidence of the State theft has been established. The learned magistrate's conclusions in this regard appear in one paragraph in the whole of the judgment:

"Tevrede dat hy die persoon is wat daardie voertuig gesteel het, verwerp ek sy weergawe en bevind die Hof dat op 13 Mei 1998 hy die klaer se voertuig hier te Kroonstad gevat het sonder toestemming en dat hy die voertuig gesteel het, word die beskuldigde SKULDIG BEVIND SOOS AANGEKLA."

[6] In current South African law theft is defined as an unlawful and intentional

appropriation of a movable corporeal property. C.R. Snyman, Criminal Law, 4th Ed. at p.469 *et seq* elaborates on the different components of this basic definition, that is the elements of the crime, in relation to the different types of theft. J.R.L. Milton, South African Criminal Law and Procedure, Vol.2, 3rd Ed. states the following at p.617:

"In South African law it is not sufficient that the accused intentionally effected a *contrectatio* of the property. In order for there to be the *mens rea* of theft the *contrectatio* must be accompanied by an intention permanently to deprive the owner of the benefits of his ownership."

The pertinent question is whether it has been shown that the appellant had the requisite intention to permanently deprive the complainant of his motor vehicle.

[7] There is no evidence that when the appellant initially drove away in the vehicle contrary to the complainant's instructions he had any intention to appropriate it for himself. Nor can such an intention be inferred from the circumstances of this case. The probability is that his aim was only to use it and he drove it to Harrismith with the intention to return it later, but then the unexpected happened and he capsized with it. The fact that he thereafter failed to contact the complainant and abandoned it does not take the matter further. He would have had a guilty conscience knowing that he had no permission to use the vehicle and that would explain why he avoided the complainant. If he had any intention to deprive the owner permanently of the vehicle, he could have sold the engine and the gearbox. There was no basis for a verdict of theft.

[8] Ms Caarsten, who argued the appeal on behalf of the appellant, contended that the competent verdict of unauthorised borrowing in contravention of section 1(1) of the General Law Amendment Act No.50 of 1956 could not be returned in this case and she cited **R v DUNYUA 1961 (3) SA 644 (O)**. Now **DUNYUA** is on the facts distinguishable from the instant case. There the accused had obtained permission to go to Glen but instead of returning he undertook a five day visiting trip to Bloemfontein. His appeal was upheld because it was found he had permission to use the bicycle. In the instant case the appellant had no permission to use the vehicle. The evidence of the complainant was direct on this point, namely that the appellant was to leave the vehicle at his place.

[9] The problem, however, lies in another element of the offence created by section 1(1) aforesaid, namely interpretation of the phrase "removal of the

property from the control of the owner". **DUNYUA** interpreted the word "control" to mean physical control or possession. The offence could therefore not be committed if having removed the property with consent the accused later decides to put it to his own use without permission. See Milton, South African Criminal Law and Procedure Vol.3 Chapter J4 at p.3-4 and the cases cited there. In terms of this interpretation of section 1 aforesaid, the appellant could not be convicted since he had removed the vehicle from the control of the complainant with consent and only applied it to his own use later when it was no longer under the control of the owner.

[10] The Supreme Court of Appeal has, however, said the last word on the matter. It has held in **S v RHEEDER 2001 (1) SA 348 (SCA)** that the word "control" has a wider connotation than just physical detention or possession. The position was stated as follows at **358F-H**:

"Dit vereis volkome beheer, dws liggaamlike besit met gepaardgaande geoorloofde seggenskap oor die voertuig ingeslote (in die geval van iemand anders as die eienaar) die reg of vergunning om dit te kan gebruik of te kan laat gebruik, hetsy vir 'n bepaalde doel of na goeë dunde. Waar iemand anders as die eienaar dus 'n artikel in sy liggaamlike besit het, is die aard van die artikel en die omstandighede rakende sodanige besit ligsbepalend of daar beheer oor die artikel is soos in art 1(1) beoog. Tensy anders ooreengekom, sou die werktuigkundige aan wie ek my voertuig toevertrou om te versien word alleenlik "beheer" daaroor hê vir soverre dit nodig mag wees om die versiening te doen en vir aangeleenthede redelik bykomend daartoe. Sy "beheer" sou hom nie toelaat om die voertuig vir sy eie doeleindes te gebruik nie of om ander te veroorloof om dit te gebruik nie. Enige ongeoorloofde gebruik buite die omvang van sy ooreengekome "beheer" sou myns insiens op 'n oortreding van art 1(1) neerkom."

I hold therefore that by entrusting his vehicle to the appellant for purpose of its being taken home, the complainant did not thereby relinquish his overall control over the vehicle. The appellant's control was only for the purpose of delivering it to the complainant's home. The requirements of the section have therefore been met and the appellant was guilty of the competent verdict of unauthorised use.

[11] Regarding sentence section 1(1) aforesaid empowers the court to impose "any penalty which may lawfully be imposed for theft". The conduct of the appellant was reprehensible throughout. Not only did he breach the trust that the

complainant had in him as an ex-pupil of his, he also showed no remorse at all and went about fabricating lies to conceal his wrongdoing. He even tried to drag the police into the mud by imputing negligence to them when he claimed that they failed to attend to such a serious complaint as car theft. He caused the complainant loss of the vehicle that he had recently bought so that the complainant's R7 000,00 went down the drain and yet he has no regrets about it. I note also that although the appellant had no record of previous convictions when he was sentenced, he was in fact not a first offender for he was serving a term of correctional supervision. Having taken into account all the relevant factors, I am of the view that three years imprisonment would be an appropriate sentence.

[12] In the result the appeal succeeds in part and the conviction and sentence imposed are set aside and replaced with the following:

The accused is found guilty of contravention of section 1(1) of Act 50 of 1956 and is sentenced to three (3) years imprisonment. The sentence shall be deemed to have been imposed on 25 April 2001.

H.M. MUSI, J

I CONCUR

C.B. CILLIÉ, J

On behalf of Appellant: Adv. T. Caarsten instructed by UFS Legal Aid Clinic

On behalf of Respondent: Adv. C.A. van der Merwe instructed by The Director:
Public Prosecution