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whn

LUNDI NGXOXO ..... Appellant

and

THE STATE ..... Respondent

JOUBERT ACJ

IN THE SUPREME COURT OF SOUTH AFRICA  
APPELLATE DIVISION

In the matter between:

LUNDI NGXOXO ..... Appellant

and

THE STATE ..... Respondent

Coram: JOUBERT ACJ et SMALBERGER NESTADT JJA.

Date of Hearing: 31 August 1990

Date of Delivery: 21 September 1990

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JUDGMENT

JOUBERT ACJ:

/On .....

On 29 March 1988 the appellant was charged in the Regional Court held at Germiston with the theft of two bags of money containing R4 322-02 out of a parked vehicle in Germiston. It was alleged in the charge sheet that the money belonged to, or was in the lawful possession of, Hendrik Mokoena and/or Karoo Ochse. The appellant pleaded guilty to the charge. His counsel, Mr Witz, handed in a written statement in terms of section 112(2) of the Criminal Procedure Act No 51 of 1977 as Exhibit A which reads as follows:

1. "I, Lundi Ngxoxo, an adult male aged 25 years understand the charge against me.
2. I admit that I am guilty of the offence of theft.
3. I admit further that on or about the 8th of January, 1988 and at Germiston, in the regional division of the Southern Transvaal, I wrongfully and intentionally stole 2 bankbags containing R4 322,02 from a motor vehicle which was the property and in the lawful possession of Hendrik Mokoena and/or Karoo Ochse.

4. I admit further that I took the said money for my own personal use and in doing so I deprived the lawful owners of the possession of same.
  5. I admit further that I know what I was doing was wrong.
  6. I am sorry for what I did.
- (Signed) L Mgxoxo

FACTUAL CONTEXT IN WHICH THE OFFENCE WAS COMMITTED

1. I was in the company of a friend of mine in Germiston. We were approached by a person known as Henry whom I know from the race-course.
2. He then requested us to take the money from the vehicle while he went to the O K Bazaars to look for his friend who was buying meat.
3. He told me that the amount of money which was R4 322,02 was in the front of the car where I could reach it easily.
4. I then pushed open the window of the car and took the bag with the money and I then ran away.
5. I was then apprehended by unknown persons being members of the public.
6. My friend who was in my company managed to get away.

7. I admit that I knew what I was doing was wrong and that I did not have permission to take the money.
  8. When I was arrested I dropped the bag containing the money and it was recovered.
  9. I was promised R1 000,00 share out of the proceeds.
- Dated at Germiston this 29th day of MARCH, 1988.  
(signed) L Ngxoxo."

The prosecutor had nothing to add. The regional magistrate thereupon proceeded to convict the appellant as charged. He was sentenced to 4 years' imprisonment of which 1 year was conditionally suspended for 5 years. He thereafter appealed unsuccessfully against his sentence to the Transvaal Provincial Division. He now appeals to this Court against his sentence with leave of the Court a quo.

The appeal is directed against the sentence imposed by the regional magistrate. In regard to the personal circumstances of the appellant cognizance was taken

of the following aspects:

1. the appellant was 25 years of age and married with two children;
2. he had fixed employment, earning R45 per week;
3. he had pleaded guilty to the charge;
4. he was a first offender;
5. he had shown remorse for what he has done.

In considering the nature of the offence the regional magistrate pointed out that theft was a serious offence. Theft of goods from motor vehicles was a very prevalent crime. The amount of money involved was over R4 000-00. The money was recovered with the assistance of members of the public who apprehended the appellant at the scene of the crime. Such recovery could accordingly not be attributed to any action on the part of the appellant.

In dealing with the circumstances in which

the theft was committed the regional magistrate mentioned "that a window of this vehicle was damaged in order to get entrance into the vehicle". This amounts technically to a misdirection, the true factual position being that the appellant pushed open the window of the motor vehicle.

In my judgment this is a misdirection of an insignificant nature which in the circumstances of this case does not detract from the seriousness of the offence.

There is, however, a very important aspect concerning the circumstances in which the theft was committed, as mentioned in the section 112(2) statement, of which the regional magistrate took no cognizance whatever in sentencing the appellant. It was a certain Henry who prodded the appellant into the perpetration of the theft by giving him the essential information viz that the money bags were in the front of the motor vehicle within easy reach.

The sum of money contained in the two money bags was disclosed to the appellant who was promised a R1 000 share from the stolen money. Henry undertook to absent himself momentarily from the scene of the crime while the appellant committed the theft. Henry would on this version of the appellant have been a socius criminis as well as an instigator of the planning and commission of the theft. Moreover, the probabilities are overwhelming that Henry and Hendrik Mokoena were the same person as may be inferred from the nature of the information furnished by Henry to the appellant. Failure on the part of the regional magistrate in imposing sentence to have considered the role played by Henry, as mentioned above, amounts to a serious misdirection which leaves us at large to impose a suitable sentence. The basis of the magistrate's approach was that the appellant committed the theft entirely



on his own and that the appellant acted like a common thief who usually steals from parked vehicles. He failed to distinguish the unusual circumstances of this case from the prevailing types of theft from parked vehicles.

In the light of the foregoing and having regard to the interests of society as well as the purposes of punishment, I am of the view that in the circumstances of this case the sentence should provide for a fine as an alternative to imprisonment to meet the ends of justice. Payment of the fine which this Court has in mind is according to what counsel for the appellant disclosed to us within the appellant's means.

The sentence imposed by the regional magistrate is accordingly set aside and the following sentence is imposed:

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A fine of R2 000-00 or 2 years imprisonment plus  
an additional 2 years' imprisonment suspended for  
5 years on condition that the appellant is not  
convicted of theft or attempted theft committed  
during the period of suspension.

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C P JOUBERT ACJ.

SMALBERGER JA Concur.  
NESTADT JA