

SOUTH AFRICA / JUDGMENT

De Koker v S (A328/2012) [2013] ZAFSHC 102 (24 May 2013)

[2013] ZAFSHC 102

COURT

Free State High Court, Bloemfontein

BEFORE

Moloi, Phalatsi

CASE / FILE NUMBER

A328/2012

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FREE STATE HIGH
COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH
AFRICA

Appeal No. : A328/2012

In

the appeal between:-

ALFONZO

DE KOKER

.....Appellant

and

THE STATE

.....Respondent

CORAM:

MOLOI, J et PHALATSI, AJ

HEARD ON:

20 MAY 2013

DELIVERED ON:

24 MAY 2013

JUDGMENT

K.J. MOLOI, J

- [1] This is an appeal against the conviction on a charge of motor vehicle theft and the sentence of 6 (six) years imprisonment imposed by the Regional Court, Bloemfontein on 19 June 2012. The trial court granted leave to appeal to this Court.
- [2] The basis of the conviction was that the appellant, a panelbeater by occupation, was found in possession of a motor vehicle belonging to one Hendrik Abram du Plessis, which vehicle was recently stolen from Northridge Mall in Bloemfontein and that the appellant failed to give a reasonable explanation of his possession thereof. The trial court couched this basis in the following terms:

“The prosecutor however submitted strongly that he succeeded in proving the case against you beyond reasonable doubt... That even though there is no direct evidence against you, the fact that you were found in possession of a vehicle that had just been recently stolen, you failing to give a reasonable explanation about the possession thereof... I should then reasonably infer that you are the person who actually stole this vehicle...”

- [3] Briefly the facts of the matter were as follows:

On 10 April 2011 Mr Hendrik Abram du Plessis parked his Nissan 1400 motor vehicle with registration letters and numbers DLM654FS worth R60 000,00 in the parking area of Northridge Mall in Bloemfontein. After doing his business in the mall, he went to where he had parked his motor vehicle. The motor vehicle was no longer there despite the fact that he still had the keys thereof in his possession. He reported the theft of his vehicle to a nearby Bayswater police station. The police, led by Colonel Gerber attached to the organised crime unit, following information received, went to an address given being a house of the Lubbes where they found the complainant's bakkie parked in the backyard covered with some cloth. He further received information that the appellant brought the vehicle there as he usually did as per agreement when his place of business had too many vehicles to accommodate. Colonel Gerber then confronted the appellant about the vehicle concerned and the appellant told him the vehicle was brought to him for spray-painting, but could not tell the name or address of the person who brought it to him. Colonel Gerber went to the appellant's workshop where he found many other vehicles which he inspected and could not find anything untoward. Based on the failure of the appellant to provide the name and address of the person who brought the said vehicle to him for spray-painting and the fact that, according to him, the vehicle was in “pristine” condition and needed no spray-painting, he arrested the appellant. The said vehicle could be started with a modified key that was not its original key. Later the complainant identified the vehicle as his stolen property.

- [4] After arrest the appellant made a warning statement to another police officer to whom he said the person who brought the vehicle to him was known only as KB, but did not know his (KB's) address. The VIN number of the vehicle had been removed. The warning statement was made a day after the arrest. Warrant Officer Mokhethi, who was with Colonel Gerber all the time, could not remember if the name KB was mentioned before the warning statement was made. According to the police a panelbeater, such as the appellant, had to know full particulars of his clients.
- [5] In the plea explanation at the commencement of the trial, the appellant stated that on 11 April 2011 KB brought a white Nissan bakkie to him for repairs. The said bakkie had no registration plate, but a temporary permit. KB had left another vehicle with him two weeks before and this vehicle, a yellow Uno, was parked at the normal storage for excess vehicles, namely the Lubbe's place. The appellant and KB drove the Nissan bakkie to the Lubbe's place where the bakkie was left and the Uno given to KB. The following day the police confronted and eventually arrested him. This was repeated in evidence by the appellant. It was confirmed by Mrs Lubbe who was at home when the bakkie was delivered. The Lubbes agreed to the storage of vehicles at their place by the appellant and even gave him an extra key of the gate to facilitate his access to the place whenever he wanted to. Asked why he did not verify KB's address and gave it to the police, the appellant answered that his legal representative had advised him to have nothing to do with KB, whose name he later learnt to be Godfrey.
- [6] Above the basis of the appellant's conviction was set out. In addition the trial court in its judgment added that

"But in this case I do not have evidence that someone else could have stolen the vehicle"

The judgment further stated::

"There is no direct evidence against you correct, it is only circumstantial but there cannot be any other reasonable inference to be drawn from this circumstances of your possession of the vehicle just two days after it had been stolen than that you were actually the person who stole it. Your failure to bring KB here shows that there is no KB who could have stolen the vehicle elsewhere but only yourself."

- [7] That reasoning is incorrect in that, firstly, where circumstantial evidence is concerned, the cardinal rules of logic enunciated in *R v Bloem* 1939 AD 188 et seq find application, namely
- "(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

Uncontroverted evidence is that the appellant is a panelbeater; that he had an agreement with the Lubbes to store vehicles at their place where he had too many vehicles at his workshop and that he stored the bakkie in question there where it was found; that at the same venue he had stored the said KB's Uno vehicle which he had repaired and the same was taken by KB on the day the bakkie concerned was brought to that place, etc. Secondly, the reference to recent possession, itself is the subject of inferential scrutiny subject to the same cardinal rules as circumstantial evidence. Thirdly, the alleged failure of the appellant to give reasonable explanation cannot take the matter any further because the appellant did give a reasonable explanation of his possession by saying KB (Godfrey) brought the said vehicles to him for repairs only whereafter he would pay the appellant and remove the vehicle as he did the Uno. There was no obligation on the appellant to have given his explanation to Colonel Gerber at his arrest especially if his rights were explained to him. See section 35(1)(a) of the Constitution of South Africa, Act No 108 of 1996. Fourthly, the rejection of the appellant's explanation of his possession of the said vehicle was based on his failure to call KB as a witness and the magistrate's personal knowledge or deduction that

"it looks like theft of motor vehicle by panelbeaters is the order of the day, particularly in the Heidedal area because S v Mombondwana the accused was found in possession of a vehicle that was just stolen the previous night. He is a panelbeater in Heidedal and the vehicle also was not found in his direct premises, but it had been stored at some other person's premises like Mr Lubbe in your case."

The evidence of the accused may only be rejected if "beyond any reasonable doubt it is false" - R v Difford 1937 AD 370 at 373. See also R v Matsoso 1950 (4) SA 178 at 185 and R v M 1946 AD 1023 at 1027 where the following was stated:

"And, I repeat, the Court does not have to believe the defence story; still less has it to believe it in all its details. It is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

- [8] In the heads of argument it was argued that the most the court could convict the appellant of was being found in possession of stolen goods and being unable to give a satisfactory reason/explanation of such possession in contravention of section 36 of the General Law Amendment Act No 62 of 1955. This argument was correctly abandoned at the hearing in view of the fact that a reasonable explanation was given.
- [9] In view of the conclusion reached that the appeal against conviction ought to succeed, it becomes redundant to deal with the appeal against the sentence herein.

ORDER

- [10] The appeal against the conviction succeeds and the sentence of six (6) years imprisonment imposed on 19 June 2012 is set aside.

I concur.

N.W. PHALATSI, AJ

On behalf of appellant: Adv J.S. Makhene Instructed by:

Bloemfontein Justice Centre BLOEMFONTEIN

On behalf of respondent: Adv M. Lencoe

Instructed by:

Director of Public Prosecutions

BLOEMFONTEIN

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