

SOUTH AFRICA / JUDGMENT

Nhawa v S (A302/2016) [2017] ZAGPJHC 48 (1 March 2017)

[2017] ZAGPJHC 48

COURT

South Gauteng High Court, Johannesburg

BEFORE

E Theron, L R Adams

CASE / FILE NUMBER

A302/2016

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IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

REVISED

Date: 1st March

2017

CASE

NO: A302/2016

DPP

REF NO: 10/2/5/1-(2016/0464)

DATE:

1st
March 2017
In

the matter between:

NHAWA,
DAVID
Appellant
and
THE
STATE Respondent

JUDGMENT

THERON AJ:

[1]. The appellant was charged in the Kempton Park Regional Court with robbery with aggravating circumstances as intended in Section 1 of the Criminal Procedure Act, Act 51 of 1977 ('the CPA') read with the provisions of Sections 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997 ('Count 1'). He was also charged with the offence of possession of stolen property as contemplated in Section 36 of the General Law Amendment Act 62 of 1955 ('Count 2').

[2]. The Appellant, who was legally represented throughout the trial and on appeal, pleaded not guilty to both charges and gave a short plea explanation as follows:

'Your Worship, I plead not guilty because I was not found in possession of such property'.

[3]. On the 30th December 2015 the appellant was found guilty of an offence as contemplated in section 37 of the General Law Amendment Act 62 of

1955, which is a competent charge on count 1. In his judgment, the Learned Regional Court Magistrate found, in our view correctly so, that the State had not proven the 1st and 2nd charges against the appellant, and he accordingly acquitted him of those counts. The court was however of the view that the elements of the offence in terms of section 37 had been proven against the appellant, and convicted him accordingly. On the same date, the

appellant was sentenced to a term of 4 years imprisonment.

[4]. This appeal by the appellant is against his conviction and sentences and is with the leave of the court a quo.

[5]. The State led the evidence of the owner of a white Toyota Yaris motor vehicle ('the stolen motor vehicle'), who testified that she was robbed at gunpoint of the vehicle, her laptop, her licence, identity document, wallet, money and a jacket. She did not identify the appellant as a perpetrator or one of the perpetrators of the armed robbery and she was not cross-examined.

[6]. The State introduced into evidence a document styled an 'Application for Under-Cover Operation' for authority to set a trap and / or to conduct an undercover operation in terms of Section 252A of the CPA, which application was approved by the North Gauteng Deputy Director of Public Prosecutions. It seems that the Director of Public Prosecutions requires that members of the South African Police Services obtain his/her written permission before setting a trap or engaging in undercover operations in terms of Section 252A(4).

[7]. The defence objected to the application and approval being accepted into evidence as an exhibit. The grounds for the objection were unintelligible, confusing and without substance. The learned Magistrate, correctly in my view, allowed the documents as an exhibit.

[8]. Two undercover policemen testified. The first agent, codenamed CIA1011, testified that on the 10th June 2014 he received what is colloquially termed a 'call-back' from the appellant. He called back and the appellant requested 'airtime'. He then bought the appellant R12,00 worth of airtime and sent it to him. Thereafter the appellant called the agent and offered a Toyota Yaris for sale for the purchase price of R7,000.00.

[9]. In *S v Malinga and Others*, 1963 (1) SA 692 (A), Holmes JA said, at 693 F-G:

'(A) trap is a person who, with the view of securing the conviction of another, proposes certain criminal conduct to him, and himself

ostensibly takes part therein. In other words he creates the occasion for someone else to commit the offence.'

[10]. I am of the view that the conduct of the undercover operatives did not amount to a trap but only constituted an undercover operation. In this regard I find that the buying of airtime in this case cannot be held to amount to the 'providing of an opportunity to commit an offence'.

[11]. The agent and his partner, codenamed CIA1055, made arrangements for the money and met with the investigating officers of the operation authorised in terms of Section 252A. When they were ready, CIA1011 phoned the appellant and asked where they should meet. The appellant set the rendezvous at an Engen filling station close to OR Tambo Airport, where he met up with the agents in their unmarked vehicle and directed them to a BP filling station in Rabie Ridge. Once they arrived in Rabie Ridge, the appellant got out of the vehicle and was seen making a call. Shortly after the call, several men in a Toyota Avanza came to the scene, spoke to the appellant, left and returned with a white Toyota Yaris.

[12]. Agent CIA1011 inspected the car and found that the keys were in the ignition and that it had half a tank of fuel. Agent CIA1011 got back into the unmarked police vehicle and paid the appellant the agreed price. The police let the appellant out of their vehicle and took the stolen vehicle back to the investigating officers.

[13]. The Appellant was not immediately arrested and it was explained by the investigating officer that this was because they needed to preserve the integrity of the wider undercover operation. The vehicle was returned to the complainant.

[14]. Agent 1055 corroborated Agent 1011 in all material respects.

[15]. Despite putting it to Agent 1011 that the appellant would testify and deny all the events at Rabie Ridge, the appellant failed to testify. I therefore find that the State had proven the facts set out supra beyond a reasonable doubt.

[16]. In his judgment, the learned Magistrate correctly found that the State had not proven the charge of robbery against the appellant as he had not been identified by the complainant. He did however convict the appellant of the offence created by Section 37 of Act 62 of 1955. Section 37(1) (a) reads as follows:

‘37. Absence of a reasonable cause for believing goods properly acquired

(1)

- (a) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section 1 of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorised by the owner thereof to deal with or dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except insofar as the imposition of any such penalty may be compulsory.’ (my emphasis)

[17]. In terms of Section 260 of the CPA, a conviction of the offence created by Section 37 is a competent verdict on a charge of robbery.

[18]. It is clear from a reading of the record that the State never proved that the appellant was in physical possession of the motor vehicle robbed from the complainant. Accordingly, we are of the view that the appellant should not have been convicted of the offence in terms of section 37. However, that is not the end of the matter.

[19]. In terms of Section 322(1)(b) of the CPA, the Court of Appeal may give such judgment as ought to have been given at the trial, and in terms of Section 260 of the CPA, a conviction of theft is a competent verdict on a charge of robbery.

[20]. In *S v Naryan*, 1998 (2) SACR 345 (W) at 355 G – 356 H, His Lordship Mr Justice Marais said the following in a case which is factually on all fours with the matter before us in this appeal:

‘As stated, on counts 5 and 9 I have not been able to find that the Appellant assumed any control over or physically handled the stolen cars. The relevant involvement of the appellant therefore consists of giving assistance to the thief in selling the cars. For a person who assists a thief after theft to be found guilty of theft there must be some form of *contrectatio* on his part. This would clearly occur if he actually handles the goods with the necessary intent of continuing or assisting the deprivation of the owner’s possession. The only case in which the ratio *decidendi* goes as far as regarding facts similar to those in this case as constituting a *contrectatio* and therefore theft is *R v Brett and Levy*, 1915 TPD 53. This case is interpreted in *R v Mlooi and Others*, 1925 AD 131 at 153 as visiting the person who assists the thief to dispose of stolen items with theft on the basis that such assistance constitutes the necessary *contrectatio*. In this regard Milton, *South African Criminal Law and Procedure*, Volume 2 (“Common Law Crimes”) suggests that *Brett and Levy*’s case goes rather far, and says of the *contrectatio* found in that case (where the Appellant endeavoured only to sell some stolen wagons on behalf of the thief):

‘It was certainly at most a constructive one, and this view seems to go very far as there is no proof of any sort of constructive delivery by X to a third party.’

But in *R v Van Eling*, Watermeyer CJ, in a persuasive obiter dicta at 239, has the following to say:

‘It will be seen from what I have said if assistance is given to a thief during the period which elapses after he has taken the stolen

property into his possession and before he has disposed himself of it, difficulties may arise in deciding whether such helper is himself guilty of theft or whether he is at most an accessory after the fact to the crime of theft, whatever meaning that term may bear. Such assistance, given after the taking, if it involves handling or dealing with the stolen property, may amount to *fraudulosa contrectatio* by the assistant. If there be such a *fraudulosa contrectatio* by the assistant or if he assists the principal thief in the *fraudulosa contrectatio*, and if his act be accompanied by the necessary intention to deprive the true owner of the benefits of his ownership, then the assistant is guilty of theft.’

(my emphasis)

Watermeyer CJ then goes on, at 241, to comment on *Brett and Levy*’s case and says:

‘There it was determined that persons who assisted the principal thief to sell stolen property were themselves guilty of theft, not that they were guilty of taking the stolen property.’

It seems to me that the Appellate Division approved the proposition that where somebody knowingly assists a thief to deprive the true owner of his rights by assisting the thief in disposing of the goods, the assistant himself commits the necessary *contrectatio* to render him guilty of theft.

I am of the view that Mr Broodryk is therefore correct when he contends that actual possession is not required for the *contrectatio* and necessary to convict the Appellant of theft.’

[21]. I agree with this reasoning. It is also clear from a reading of the judgment in *R v Brett and Levy*, 1915 TPD 53, a judgment of the Full Bench of the Transvaal Provincial Division, that the seller of stolen goods, knowing that it is stolen, need not be in possession to be found guilty of theft.

[22]. It is trite that *contrectatio* and the knowledge of the theft need not be proven by direct evidence. Their existence can be inferred from the facts and circumstances of the case.

[23]. The uncontroverted proven facts in this matter show that the appellant facilitated the sale of a motor vehicle that had been hijacked the day before. The appellant determined the price, a price which was on the low side for the type of vehicle offered for sale. The vehicle was sold without any formal documents of title or transfer in a surreptitious fashion and in circumstances designed to ensure that the appellant was not found in possession of the vehicle. The appellant’s knowledge of the fact that the vehicle was stolen is consistent with all the proven facts and the only reasonable conclusion to be drawn from the facts proven.

[24]. In the circumstances, I find the court a quo was wrong in convicting the appellant of the offence in terms of the provisions of section 37. The Learned Magistrate misdirected himself in that there was no evidence that the appellant was at any stage in physical possession of the stolen vehicle. However, applying the principles enunciated in the authorities cited supra, I am of the view that the appellant should have been convicted of theft of the vehicle in question. Theft, as I indicated above, is a competent verdict on the charge of robbery.

[25]. The conviction of the appellant of the offence created by Section 37 of the General Law Amendment Act 62 of 1955 therefore stands to be set aside and replaced with a conviction of theft of a motor vehicle.

[26]. I now turn briefly to deal with the issue of sentence.

[27]. In the light of my finding that the appellant should have been convicted of a more serious offence, I am not of a mind to interfere with the sentence imposed by the Learned Magistrate. If anything, the appellant should probably be sentence to a longer period of incarceration. The State has however not counter – appealed against the sentence. In our view, there is no conceivable

reason for us to interfere with sentence, and in that regard we are guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court. An appeal court should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been ‘judicially and properly exercised’. In casu, we are satisfied that there has been no misdirection on the part of the sentencing court.

[28]. The appeal against sentence therefore stands to be dismissed.

[29]. In the result, the order that I would make is the following:-

1. The appeal against conviction is dismissed.
2. The conviction of the appellant of the offence in terms of section 37 of the General Law Amendment Act 62 of 1955, and the order granted by the court a quo to that effect, are set aside, and substituted with the following order:

‘The accused is found guilty of theft of the Toyota Yaris motor vehicle’.

[30]. The appeal against sentence is dismissed.

E THERON AJ

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

I agree, and it is so ordered,

L R ADAMS J

Judge of the High Court

HEARD ON: 21st February 2017

JUDGMENT

DATE: 1st March 2017 FOR THE APPELLANT: Ms Koos – Monyakane INSTRUCTED BY: The Johannesburg Justice Centre FOR THE RESPONDENT: Adv Maharaj INSTRUCTED BY: Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg.

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