

SOUTH AFRICA / JUDGMENT

Nzakayi v S (CA&R: 335/2012)

[2013] ZAECHGC 42 (6 May 2013)

[2013] ZAECHGC 42**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

J. Roberson, E. Revelas

CASE / FILE NUMBER

CA&R: 335/2012

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3

REPORTABLE/NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

Case no: CA&R: 335/2012

Date heard: 24 April 2013

Date delivered: 06 May 2013

In the matter between

THOBILE NZAKAYIAppellant

vs

THE STATERespondent

Nature of matter: Criminal Law- appeal – against the conviction of murder & theft of motor vehicle & sentence

Order: Appeal dismissed

APPEAL JUDGMENT**ROBERSON J:**

The appellant was charged in the Regional court with unrelated counts of murder and theft of a motor vehicle. He was convicted on both counts and sentenced to ten years and five years imprisonment respectively.

Leave to appeal against convictions and sentences was refused by the trial court but leave to appeal against the theft conviction was granted on petition to the Judge President.

It was not in dispute that a red 1983 Daihatsu Charade motor vehicle was stolen from the owner, Maritz van Heerden, during the night of the 15/16 October 2007. Van Heerden last saw it parked outside his house between 11 pm and midnight on 15 October and discovered it missing at 7 am on 16 October. He telephoned the police to report the theft and was told that the vehicle had already been found. He went to the premises where stolen vehicles are kept and identified the vehicle by its colour and dragon stickers on the bonnet, the rear window and above the petrol cap. It was not in the same condition in which he had left it. The engine was damaged and there was a hole in the ignition, as if something had been forced into the ignition. The vehicle's tools were also missing.

Warrant Officer Johan Claassen testified that on 16 October 2007 at about quarter to three in the morning, while on patrol duty, he and his colleague observed two persons, one of whom was the appellant, pushing a red Daihatsu Charade, which was at the side of the road. They stopped and questioned the persons, one of whom told them that the vehicle had stopped because it had run out of fuel, that it had no ignition key, and that they had borrowed it from someone who lived in Missionvale. Claassen and his colleague, accompanied by the appellant and his companion, followed up the address in Missionvale but the people in the area did not know the person alleged to be the owner, or who the owner of the vehicle was. The appellant and his companion gave no further explanation for their possession of the vehicle. The appellant and his companion were then arrested and the vehicle was towed to the premises where stolen vehicles are kept. Claassen confirmed that the vehicle had no ignition key.

Claassen's colleague, Constable Zwelinzima Ndongeni, generally corroborated Claassen's evidence and mentioned some further details. He was the one communicating in isiXhosa with the appellant and his companion. There were wires hanging from the ignition of the vehicle and he asked them for the key to the vehicle and was told that the key had fallen somewhere. It was the appellant who gave them the address in Missionvale and said that the vehicle belonged to one Andile. When they got to Missionvale they were shown a shack which was empty and the appellant said that perhaps Andile had gone out.

The appellant testified that at about a quarter past four in the morning he was walking in the street. There were six or seven people in front of him, waiting for a taxi. He and his companion walked past a vehicle in front of which a police vehicle was parked. When they were about twenty paces from the vehicle the police called them and asked them whose vehicle it was. When they said that they did not know, the police asked them to assist in pushing the vehicle out of the road. The appellant refused and told the police it was their work. The police then said the vehicle was stolen and placed the appellant in the police vehicle. He told the police he was on his way to the doctor to have his disability grant forms completed. The police took these forms away and never returned them to him.

The magistrate accepted the evidence of the two police officers. I am of the view that he was correct in doing so. It is highly improbable that they would have arrested the appellant merely because he was not prepared to assist them in pushing the vehicle off the road, even if they suspected that the vehicle was stolen. It is also highly improbable that in such circumstances they would have travelled to Missionvale to check an address unless it had been provided to them in the course of an explanation for possession of the vehicle. It is far more probable that they arrested the appellant and his companion because they were in possession of the vehicle and their explanation proved to be false.

In convicting the appellant of theft on the basis of his possession of the vehicle, the magistrate had regard to the fact that the appellant was found in possession at quarter to three in the morning, about three hours after it was last seen by Van Heerden. He was of the view that given this short time lapse the vehicle had not changed hands from the original thief, and that the only reasonable inference to draw from the circumstances was that the appellant had stolen the vehicle. I cannot fault this reasoning. In any event no attack was made by the appellant on the magistrate's inferential reasoning. The ground of appeal was that the magistrate should have accepted the appellant's version that he was arrested because he refused to push the vehicle off the road, in other words his version that he was not in possession of the vehicle at all.

We raised with both counsel the question of whether or not the State had proved that the vehicle found in possession of the appellant was the one which was identified by Van Heerden. Claassen and Ndongeni did not mention the model or registration number of the vehicle, or specific features such as the dragon stickers, and they did not testify that they were present when the vehicle was identified by Van Heerden. However, as was submitted by Mr. Engelbrecht, who appeared for the State, it was apparently accepted at the trial that it was the same vehicle. There was also the undisputed evidence that a red Daihatsu Charade with a damaged ignition was taken to the premises where stolen vehicles are kept, and a red Daihatsu Charade with a damaged ignition was identified there only a few hours later by Van Heerden. In these circumstances, I am of the view that there was sufficient proof that the vehicle found in possession of the appellant was the one stolen from Van Heerden.

The appeal is dismissed.

J. ROBERSON

JUDGE OF THE HIGH COURT

I agree and it is so ordered,

E. REVELAS

Appearing on behalf of Appellant: Adv. T. Solani

Instructed by the Legal Aid Board, South Africa

Appearing on behalf of Respondent: Adv. J. Engelbrecht

Instructed by the Director of Public Prosecutions

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