

SOUTH AFRICA / JUDGMENT

S v Nomazoza (246/08) [2008] ZASCA 151; [2009] 2 All SA 173 (SCA) (27 November 2008) [2008] ZASCA 151

COURT

Supreme Court of Appeal

BEFORE

Cloete, Maya, Boruchowitz

CASE / FILE NUMBER

246/08

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THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 246/08

No precedential significance

HAROLD NOMAZOZA Appellant

and

THE STATE Respondent

Neutral citation: Nomazoza v S (246/08) [2008] ZASCA 151 (27 November 2008).

Coram: CLOETE, MAYA JJA et BORUCHOWITZ AJA

Heard: 19 NOVEMBER 2008

Delivered: 27 NOVEMBER 2008

Summary: Guilt of accused not proved.

ORDER

On appeal from: High Court, Johannesburg (Horn, Msimeki JJ sitting as court

of appeal).

The following order is made:

The appeal succeeds. The order made by the court below, to the extent that it involves the appellant, is set aside and the following order substituted:

'The appeal by Harold Nomazoza succeeds. His conviction and sentence are set aside.'

CLOETE JA (MAYA JA and BORUCHOWITZ AJA concurring):

[1] The appellant stood trial in the regional court of the Southern Transvaal (Johannesburg) as accused 3 together with four others on a charge of theft of a motor vehicle. He was legally represented and pleaded not guilty but was convicted and sentenced to four years' imprisonment. His co-accused, numbers 1 and 4, were also convicted and accused 2 was acquitted after conclusion of the State

case. The trial magistrate granted leave to appeal to the Witwatersrand Local Division. That appeal was dismissed but leave to

appeal to this court was granted. There is also an application before this court to remit the matter to the regional court to hear further evidence.

[2] The State case was that after the complainant's vehicle had been stolen between 10h50 and 11h15 at the corner of Market and Eloff Streets in the Johannesburg City Centre, the appellant was found in the driver's seat at the Farraday taxi rank where the vehicle was being stripped. Inspector Mokobi said that when he and colleagues arrived at the taxi rank the appellant was in the

driver's seat, accused 1 was in the passenger seat and accused 2 and 4 were at the front of the vehicle by the engine and the bonnet was open. Inspector Serlongo, who arrested the appellant and could therefore be expected to know where he was when the arrest took

place, said that he was unable to identify which accused was where, save by reference to the names as recorded in his statement. However, he claimed to remember that accused 1, who was the only one of the accused who had a light complexion by which he said he recognised him, was sitting in the driver's seat. He was then referred to his statement by the prosecutor and he said that it was the appellant who was seated on the driver's side and accused 1 was in fact on the passenger's side. Then, in further cross-examination, he again said accused 1 was in the driver's seat but immediately thereafter said that Harold Nomazoza, ie the appellant, was sitting there. The only other State witness, Inspector Ramafemo, could not say where either accused 1 or the appellant was when they were arrested.

- [3] The State case against the appellant therefore depends primarily on the evidence of Inspector Mokobi. But both Inspector Serlongo, and Inspector Ramafemo who arrested accused 2, contradicted Inspector Mokobi as to where accused 2 was when they arrived; and the magistrate discharged accused 2 at the end of the State case inter alia on the basis that 'he was not in front of the motor vehicle', where Mokobi said he was.
- [4] The magistrate found that the 'evidence against [the appellant] is absolutely overwhelming'. As the above analysis shows, the State evidence was not as solid as the magistrate made out.
- [5] The appellant's case was that he left Glenanda Primary School, where he was employed as a painter, at about 09h30 with the permission of the headmaster. He went home, collected some documents and took a taxi to the Johannesburg City Centre where he went to the Old Mutual at 11h30; and ten minutes later, he went to Capital Alliance. He said that he had documents to prove all of this but they were not handed in by his legal representative and after an adjournment, the witnesses who could have supported his version were not called to testify on his behalf. He was not, however, asked by the prosecutor to produce the documents and he was accordingly not cross-examined on their contents. The appellant then said that he had gone to the Farrady taxi rank to catch a taxi and that he had been there for a while when a policeman arrested him at a shack a little distance away from the vehicle in question because, according to the policeman, he had been pointed out as the person who had been driving the stolen vehicle.
- [6] The appellant's evidence that he was an innocent bystander and was fetched from a shack near the taxi was corroborated by accused 1 (who said he did not know the appellant) when cross-examined by the prosecutor. The appellant was not shaken in cross-examination in any way whatever. His version is not so improbable that it can be rejected out of hand, as the magistrate did. The record shows that the appellant was in possession of a document reflecting his visit to Old Mutual and the business he transacted there, and another document from Capital Alliance generated as a result of instructions he gave at Old Mutual. I fail to understand why those documents were not handed in as evidence by the appellant's legal representative. They plainly did not constitute hearsay evidence, as the magistrate found they would have done: there is nothing which would offend against the hearsay rule if a witness were to say 'I visited Old Mutual and they gave me this document; in consequence of my visit and the instructions I gave, and my subsequent visit to Capital Alliance, I received that document'. And if the appellant had legitimate business in the Johannesburg Central Business District it is unlikely that he would, before transacting that business, steal a vehicle and after transacting it, assist in stripping the vehicle, particularly because the State failed to prove any connection, social or otherwise, between the appellant and his co-accused; and he would have had an entirely legitimate reason for being at the Farraday taxi rank. I find it unnecessary however to consider the application by the appellant to lead further evidence because I am satisfied that the State did not prove his guilt beyond a reasonable doubt.
- [7] In my view the appeal should succeed. The following order is made:

T D CLOETE

JUDGE OF APPEAL

Appearances:

Counsel for Appellant: S P Janse van Rensburg

Instructed by

David H Botha, Du Plessis & Kruger Inc, Johannesburg

Symington & De Kok, Bloemfontein

Counsel for Respondent: Ms C E Britz

The Director of Public Prosecutions, Johannesburg

The Director of Public Prosecutions, Bloemfontein

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