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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case No: A183/2017**

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

.....  
**SIGNATURE**

.....  
**DATE**

In the matter between:

**ROBERT NEMABAKA**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**J U D G M E N T**

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**C REYNEKE AJ**

[1] The appellant, Robert Nemabaka and Rotshidzwa Netshiavha were convicted and sentenced in the Regional Court, Johannesburg, on three charges of theft. Both were granted leave to appeal against conviction and sentence. Bail was set pending this appeal against both conviction and sentence, but was not paid. Only the appellant proceeded to appeal.

[2] The appellant and Netshiavha, to whom I will conveniently refer as “N”, were charged with three counts of theft, in that on or about 7 December 2012 and near Belgravia, they unlawfully and intentionally stole one Toyota Corolla with registration number [...] GP, one Opel Astra with registration number [...] GP and one cellular phone handset with IMEI number 35258003428509, all three items being the property of or in the lawful possession of NZR Motor City and/or its employees. They were convicted and sentenced on 29 August 2016. Both were sentenced to six years’ imprisonment, after the three charges were taken together for purposes of sentence.

**The facts*****Common cause***

[3] The common facts given rise to the appeal are the following: Nazier Mohammed (“Nazier”) was the owner of a motor dealer called NZR Motor City, situated at 127 Jules Street, Belgravia. The main line of business was the buying and selling of second hand cars. On Friday, 7 December 2012, Nazier disappeared from the business premises and was never found again. His father, Abdul Aziz Seepye (“Seepye”) used to visit his son often at the premises. At 18h30 a security officer alerted him telephonically about Nazier’s disappearance.

[4] On his arrival at the premises, at 19h00, he found the gates to the premises open. Nazier’s locked vehicle was parked on the pavement outside the premises. He could not find the car keys or the keys for the gates. He left the premises in the care of the

security guard and rushed to the Jeppe Police Station to report that his son was missing.

[5] Nazier used to carry two cellular phones on his person. A third cellular phone was always kept on the business premises. All three cellular phones were missing.

[6] Warrant Officer Malawana Jan Marsha is the investigating officer in the kidnapping case of Nazier. On 11 January 2013 he went to Siloam in Venda, following the signal of one of the stolen cellular phones. He met with Constable Seswadi. They found the Toyota Corolla with registration number [...] GP parked under a tree. N was in the driver's seat, in the company of a lady. They also found the third cellular phone, which is the one that was always kept at the business premises, in the possession of N, with another sim card, belonging to N, inserted.

[7] N explained that he had borrowed the vehicle from the appellant. He accompanied the police officers to the appellant, who was also in Venda. They found the appellant in possession of the Opel Astra with registration number [...] GP. The appellant explained that he had bought the Opel Astra from Nazier but, as he still owed an amount, Nazier kept the registration documents of the vehicle until full payment. He could not produce any receipt to support his claim.

[8] The appellant admitted that he initially had the Toyota Corolla in his possession. He had the registration documents of the Toyota Corolla and a photo copy of Nazier's ID.

### Evidence for the State

#### *Abdul Azis Seepye*

[9] Seepye testified that he visited the business three to four times a week. He last visited the business two weeks before Nazier's disappearance. He did a few sales in the past. He knew the procedure and which documents are supposed to be in the files. There was a purchase or a stock file, a sold file and an invoice or receipt book. He only became aware that two vehicles were missing when the police informed him

about the recovery of the two vehicles. He then conducted a stock check by comparing all the vehicles on the floor with the stock documents.

[10] When a vehicle is sold, the stock document is transferred from the stock file to the sold file. The original documents ought to be given to the buyer. There should be a copy of the identification of the buyer, with his name, address and telephone number, a copy of the registration documents and proof of payment from the bank. If it was a cash sale, Nazier would go to the bank together with the purchaser and deposit the money into his account.

[11] Exhibit A is a spread sheet indicating that the Opel Astra was bought for R19 693,50 and registered on 7 November 2012. The sheet shows that it was not sold in October. Exhibit B is a spread sheet indicating that the Toyota Corolla was purchased for R27 000 and registered in NZR's name on 8 November 2012. There were no documents in the sold file to indicate that the Opel Astra or the Toyota Corolla was sold. The Toyota Corolla's original registration document was not in the stock file. The keys for the two vehicles were missing from a plastic container in the office, where all the keys were held. An invoice book for the relevant period was also missing.

[12] On 8 December 2012, that is the day after Nazier's disappearance, Seepye had seen the appellant for the first time. He could not explain the appellant's presence at the premises. The appellant assisted in freeing the steering wheel of Nazier's vehicle and pushing the vehicle into the premises.

[13] Simon Sithole was the only employee at the business, working as a cleaner. Seepye denied that the appellant was working as a full-time employee since October 2012. The appellant informed him on that Saturday, 8 December 2012, that he will come to the premises on the Monday to finish the work on a vehicle that he is busy with. He allowed it. The appellant told him that he was using his own tools. He saw that the appellant used oil from the business stock and also saw when the owner of this vehicle paid the appellant.

[14] He had seen many other people on the premises before, working in the four work bays on the premises on the vehicles that needed repairs. It had never

happened that a mechanic was allowed to take a vehicle to his home to be repaired. He had no knowledge about the Astra, but for what the police had told him.

[15] Seepye knew that Nazier had sent a certain BMW away for repairs to John Mhlanga, where the appellant had been employed. John Mhlanga could not fix the BMW and it was taken to somebody else. The appellant indicated he knew where this BMW was. This BMW was later found and kept at his (Seepye's) house. The engine has been stripped.

*Collin Seswadi*

[16] He is a Constable in the South African Police Service and is stationed at the Limpopo Provincial Tracking Team, in Polokwane. He investigated a case of a vehicle that was stolen in Gauteng. He saw a suspicious looking vehicle with a Gauteng number plate, which was parked in the street. N was in the driver's seat. He circulated the registration number and discovered it belonged to a business.

[17] He found a cellular phone in N's possession. The cell phone's number corresponded with the number of the business. N indicated freely that he had bought it from the appellant. He took them to a house, but the appellant was not there. On their way to the main road N pointed out a green Opel Astra, and said it belonged to the appellant. He also pointed out the appellant. He arrested N and the appellant.

*Malawana Jan Marsha*

[18] He is a Warrant Officer and was investigating the kidnapping of Nazier. He went to the business premises on 10 December 2012. The appellant was busy working on a vehicle. He spoke to Nazier's parents and also to the appellant. The appellant told him that on the day of Nazier's disappearance, Nazier came out of his office and said that he will be coming back. He then left in a black Navara.

[19] Marsha could only track one of the three cellular phones by way of a signal. On 10 January 2013 he went to Polokwane from where other police officers accompanied him to Venda. He was hoping to find Nazier. His evidence is the same

as that of Seswadi. He added that N explained that he had picked the cellular phone up at a taxi rank, called “MTN,” which is situated in Johannesburg.

[20] While he was in Venda he became aware that there were vehicles owned by NZR Motor City that were suspected to be stolen. They found the appellant at his house. When they informed the appellant that N had explained that he had bought the Toyota Corolla from him (appellant), the appellant denied it and said N had borrowed the vehicle from him. The appellant further explained that he (the appellant) had bought the Toyota Corolla from Nazier.

[21] The appellant had the registration documents of the Toyota Corolla and a photo copy of Nazier’s ID. The appellant could not show documents for the Opel Astra. The Opel Astra was not moving properly and needed attention.

*Johan Venter*

[22] He testified that he had a workshop in Newlands, working exclusively on BMW’s. The appellant towed a BMW to his premises for repairs. The engine was already in the boot. The owner made telephonic arrangements with him. Nazier’s father came to collect it.

*Robert Nemabaka*

[23] The appellant testified that he was employed full-time by Nazier as a mechanic since the end of October 2012. He used to do the work on the premises, but occasionally took vehicles to his home in Turffontein, with knowledge of Nazier, to work on it without potential customers seeing what they were doing.

[24] He referred to the BMW in order to show that it was not out of the ordinary that cars were repaired off-premises. They could not obtain the necessary parts for the BMW. He suggested to Nazier to take the vehicle to Johan Venter who specializes in repairing BMW’s.

[25] On the day of Nazier's disappearance, Nazier locked his office. He saw Nazier speaking in English to a black male who was driving a black Navara. This male was speaking with a Nigerian accent but he could not hear what was said. Nazier then got into his (own) vehicle but did not return. The appellant and Sithole waited a long time until the security officer arrived and they were able to leave. The gates were left slightly ajar. The next morning on his arrival at the premises, he noticed that Nazier's vehicle was parked outside the gate. Nazier's parents were present. As Nazier's vehicle was locked, he disabled some parts in order to push the vehicle into the premises. Sithole and he were later arrested and they were forbidden to make any contact with Seepye.

[26] He used to date N's sister and the two of them remained good friends. He borrowed the Toyota Corolla to N, while he was using and fixing the Opel Astra. In November he bought the Toyota Corolla for R40 000 and paid R38 000. He received the registration papers. Ownership would have been changed on payment of the balance. He received a receipt but has lost it. The price was R38 000.00. He paid this in cash, which he obtained by selling his own BMW<sup>1</sup>.

[27] He took the Opel Astra from the premises with permission, because he was fixing it. He then used it, because he could not return the car to the business as Nazier was not here. He decided to drive it to Venda to test it over a long distance.

[28] N would occasionally pick him up after work. N did not pick him up on the day of the incident, however he did so the next day. He did not know about the particular cellular phone which was found in the possession of N. When he learned about it, he questioned N who explained that he had picked it up at a corner near the business.

### *Rodziwa Letjiba*

[29] In the court a quo he was cited as accused 5. He testified that the appellant is his brother-in-law. In November 2012 he asked the appellant to borrow him his bakkie, but the appellant said that he had just sold it but will lend him his Corolla. He

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<sup>1</sup> Record p 156, line 20.

obtained the vehicle in November already, although he wanted to use the bakkie in Venda during December.

[30] On a certain day the appellant he was a block away from the business premises when his vehicle ran out of petrol. He called that appellant and requested a lift. He alighted and walked around the vehicle to check that it was properly closed. He then noticed a phone on the ground in the grass and picked it up. He called the appellant to come to the vehicle and he found him there on his way back after he had bought the petrol.

### Issues

[31] The question is whether the appellant and N were lawfully and innocently in possession of the two vehicles and the cellular phone.

### Analysing the evidence

[32] It is trite that a trial court's approach should be holistic. In *S v Chabalala*,<sup>2</sup> Heher J enunciated that a court has to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strength and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.

[33] With this holistic approach in mind, I continue to analyse the evidence. I find it convenient to do so under sub-headings.

#### *The cellular phone*

[34] N has two versions about how he came into possession of the cellular phone. Marsha testified that N said that he had picked up the phone near a taxi rank, MTN,

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<sup>2</sup> 2003 (1) SACR 134 (SCA)



in Johannesburg. This evidence by Marsha was not disputed. N testified, without referring to a date, that his Kombi, approximately a block from the premises, ran out of petrol. When he got out he found the cellular phone on the ground.

[35] It was put to Seepye that N went to pick the appellant up on the 8<sup>th</sup>. The appellant denied any knowledge about the cell phone.<sup>3</sup> N picked him up on the Saturday, when he was very aware of the fact that his employer was probably abducted the previous day and that phones were missing.

### *The vehicles*

[36] The appellant has various versions about the Astra. He testified that he was working on the Opel Astra at his home to keep it away from preying eyes. Secondly he said that he had kept it because he could not return it to the premises due to the absence of his employer. His third version is that he wanted to test it over a long distance. This long distance would amount to 470 kilometres one way and the same on the return of the vehicle. This was not in accordance with the usual testing range, which was 100 kilometres. The fourth version is that he had an emergency at home and had to rush home.<sup>4</sup> His fifth version was that he was done with fixing the vehicle and decided that he will use the car in the interim and will return it at some point.<sup>5</sup>

[37] The version put to Seepye, concerning the purchase price of the Toyota Corolla, differs from the appellant's testimony. It was said that the vehicle was on sale for R25 000<sup>6</sup>, but the appellant paid R30 000<sup>7</sup> to Nazier and there was a balance of R5 000 owing.<sup>8</sup> These figures do not add up. The appellant testified that the vehicle was bought for R40 000<sup>9</sup>, he had paid R38 000<sup>10</sup>, and the vehicle would be transferred to his name, once the balance (R2 000) have been paid. I agree with the

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<sup>3</sup> Record p 66 line 23.

<sup>4</sup> Record p 152, line 17.

<sup>5</sup> Record p 151 line 20.

<sup>6</sup> Record p 61, line 12.

<sup>7</sup> Record p 61, line 13.

<sup>8</sup> Record, p 62, line 14.

<sup>9</sup> Record p 127, line 24.

<sup>10</sup> Record p 127, line 24.

court a quo that these contradictions in respect to the purchase price went to the very core of the appellant's defence.

[38] The appellant has no proof of purchase. He testified that the receipt was at his residence under his mattress. On his release from custody it was gone, with some of his clothes, as the room which he was renting, was cleaned out in his absence. He testified under cross-examination that the receipt was with the registration papers.<sup>11</sup> It is common cause that he was able to produce the registration papers. N testified that the registration papers of the vehicle were inside the car.<sup>12</sup> The appellant's explanation about the missing receipt is not satisfactory, as it is unlikely that he would have kept the receipt under his mattress but the registration papers and copy of Nazier's ID in two separate locations. The receipt-book, for the relevant period, had also disappeared from the business.

#### *Other*

[39] The appellant testified that he had seen Seepye the very first time on the 8<sup>th</sup>. It is uncontested that Seepye visited the business three to four times a week, albeit that the last time was two weeks before the disappearance. If the appellant was working in the business on a full-time basis Seepye at least must have seen him.

[40] The appellant testified that Nazier left the business with his own vehicle, that the appellant and Sithole left on arrival of the security guard and that he had only seen Nazier's vehicle the following morning where it was parked outside the premises. Seepye said that the security guard came on duty at 18h00. Seepye arrived at 19h00 and Nazier's vehicle was parked outside the premises. On the appellant's version it follows logically that Nazier's vehicle must have been returned between 18h00 and 19h00, while the security officer, who was aware that Nazier had to return, was guarding the premises. Although the security officer did not testify, the appellant's version is highly improbable.

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<sup>11</sup> Record p 144, line 18.

<sup>12</sup> Record p 162, line 19.

[41] Marsha, who testified that the appellant had explained that Nazier had left with a black Navara, was never confronted with the above mentioned version of the appellant. In regards to the R38 000 cash paid by the appellant, the appellant and N differs on the type of vehicle that was sold before the Toyota Corolla was allegedly bought. The appellant said he sold his BMW, while N said he could not borrow the bakkie, as it was sold. These two aspects, individually considered, may seem trivial, but has a significant bearing on the credibility of the appellant, who tended to adapt his version and evidence as the matter proceeded.

[42] N had difficulty to explain how it came about that the police officers were told that he (N) had bought (and not lend) the Toyota Corolla from the appellant. The question was posed to him four times in very direct terms. Eventually, he could only answer that they were lying.

[43] The evidence against appellant and N is closely linked to each other. The coincidence that N on two different occasions innocently came in the possession of a vehicle and later picked up a phone belonging to Nazier is highly improbable.

### The law

[44] The state's case is based on circumstantial evidence. In *R v Blom*<sup>13</sup> it was held that: 'In reasoning by inference there are two cardinal rules of logic: The inference drawn must be consistent with all the proved facts; and (b) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.'

[45] The court in *S v Shabalala*<sup>14</sup> reminded that circumstantial evidence is not necessarily of less value or weaker than direct evidence.

[46] In *Rex v De Villiers*<sup>15</sup> the court quoted with approval from Best, Evidence (5<sup>th</sup> ed., sec 298): 'Not to speak of greater numbers; even two articles of circumstantial

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<sup>13</sup> 1939 AD 188 at 202.

<sup>14</sup> 1966 (2) SA 297 (A).

<sup>15</sup> 1944 AD 493 at 508.

evidence – though taken by itself weigh but as a feather – join them together, you will find them pressing on the delinquent with the weight of a millstone. ... It is of the utmost importance to bear in mind that, where a number of *independent* circumstances point to the same conclusion the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them.'

[47] The circumstantial evidence is overwhelming. In addition, there are many contradictions and improbabilities contained in the appellant's and N's versions, so much so, that it can safely be said that the appellant's version is not reasonably possibly true. I agree with the court a quo, that in the present case there are just too many circumstances pointing to the same conclusion, namely that the appellant and N were jointly involved in the theft of the two cars and the cellular phone.

### Sentence

[48] The triad of Zinn, as abbreviated<sup>16</sup> is repeated as follow by mouth of Heher JA, in *S v RO*<sup>17</sup>:

'Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality). The elements at play are the crime, the offender and the interest of society or, with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.'

[49] The court a quo considered the appellant's personal circumstances. A pre-sentencing report in this regard was presented. The appellant was born on 4 June 1984. He is married and have four children, born on 14 November 2006, 20 January 2010, 5 December 2010 and 28 February 2012 respectively. His wife is employed at Shoprite retail.

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<sup>16</sup> *S v Zinn* 1969 (2) SA 537 (A).

<sup>17</sup> 2010 (2) SACR 248 (SCA).

[50] He repeated grade 11 twice and then left school. He has been employed as a motor mechanic most of his adulthood and managed to obtain a Certificate in Motor Mechanics from a college. Prior to his arrest he had opened his own work shop with three employees. He made approximately R11 000 per month. The appellant has no previous convictions. The probation officer recommended that the appellant, as bread winner, should not serve direct imprisonment.

[51] Mr Seepye was called to give evidence in aggravation of the sentence. Most of his evidence related to the business falling apart and finally being closed due to Nazier's absence. The court a quo correctly remarked that the court cannot consider his kidnapping, disappearance, or even killing if applicable, in sentencing the two accused.

[52] The court a quo concluded that the appellant did not show any true remorse.<sup>18</sup> They have not provided an answer for "Why did you do it". The seriousness of the crimes were considered and that the value of the vehicles were R27 000 and R20 000, not being luxurious vehicles. The court a quo held that these crimes were not perpetrated on the spur of the moment as there was obviously some planning involved. The appellant had misused his position in order to gain access the other vehicles and the cellular phone.

[53] An appeal court should be mindful that the power to interfere with the trial court's discretion in imposing a sentence is limited unless the trial court's discretion was exercised wrongly. The essential enquiry is whether the trial court exercised its discretion properly and judicially. Only if the answer is no, will this court interfere with the sentence imposed. If the sentence imposed is disturbingly inappropriate and/or where there is a gross disparity between the sentence which the appeal court would have imposed, had it been the trial court, this court can interfere.<sup>19</sup>

[54] I cannot fault the trial court for its approach regarding sentence. Counsel for the appellant in court conceded that the sentence imposed does not induce a sense of

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<sup>18</sup> Record p 298 line 6.

<sup>19</sup> *S v Nyaki* 2014 JDR 0461 (GSJ), *S v Salzwedel and others* 1999 (2) SACR 5; 86 at 588A-B).

shock and that it is not disturbingly inappropriate. Therefore I propose not to interfere with the sentence of the trial court.

### ORDER

[55] I therefore make the following order:

“The appeal against both conviction and sentence is dismissed.”

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**C. REYNEKE**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

I concur.

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**B. VALLY**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Counsel for the Appellant: Adv M Nemaunzeni

Instructed by: Thulo TT Attorneys

Counsel for the Respondent: Adv PT Mpekana

Instructed by: Office of the Director of Public Prosecutions

Date of Hearing: 6 September 2018

Date of Judgment: 20 September 2018