REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

_____ _____
DATE SIGNATURE

Case number: **A176/18**

In the matter between:

Kubheka, Arthur Nhlanhla **First Appellant**

Ngidi, Armstrong **Second Appellant**

and

The State **Respondent**

JUDGMENT

Vally J

Introduction

[1] The appellants were convicted in the Regional Division of North Gauteng, sitting in Randburg, on a charge of theft out of a motor vehicle. The

count of theft related to a cellular phone and an Ipod. The first appellant was sentenced to 4 (four) years imprisonment of which 2 (two) years were suspended for 5 (five) years, whilst the second appellant was sentenced to 4 (four) years imprisonment. The present appeal by the appellants is directed at both conviction and sentence and is with the leave of the court *a quo.*

The facts and findings of the court *a quo*

[2] The count of theft related to the event that occurred on Monday the 20th of October 2014. It was not in dispute that the appellants were at the parking area of the Randburg Regional Court (the Randburg Court) on the day when certain electronic devices were stolen from the complainant's vehicle, which was parked adjacent to the appellants' vehicle. Not much of what followed was in dispute.

[3] It was agreed that the appellants were in a motor vehicle, a Chevrolet Aveo (Chevrolet), when they were arrested. The first appellant hired the motor vehicle from a car rental firm, Hertz. Upon being arrested their vehicle was searched and the following items were found:

> "One grey and black Nokia cell-phone;
> One black Nokia cell-phone;
> One Blackberry cell-phone;
> One black Hauwei cell-phone;
> One white and silver Ipod
> Eleven CD players;
> One white Hauwei wi-fi modem;
> One white Vodacom wi-fi modem with small cable

USB;
One black and silver Garmin sealed in a forensic bag PW 4000542162;
Three keys with remote sealed in the same forensic bag;
Car keys with keyholder; and
One silver-grey Ipod in the Pouch sealed in forensic bag PW 4000542142"

The evidence adduced by the State

[4] Mr. Anthony James Batistich (Mr Batistich), the complainant, testified that he had parked his motor vehicle, a Mercedes Benz, on the sand lot in the vicinity of the parking area of the Court as the parking area was full. He proceeded to the second floor of the court building and later observed from the window of the court that there was a commotion in the parking area. He decided to go and check what was going on there. On his way he came across the security guard who had a piece of paper with his car registration number written on it. The security guard informed him that someone had been caught stealing from the vehicle. On arrival at the parking lot he discovered that his car doors were unlocked and an Ipod, as well as a BlackBerry cell phone, were missing from his car. The police told him to search the appellants' vehicle, a Chevrolet, which was parked adjacent to his vehicle. Upon searching the Chevrolet he found his missing Ipod amongst other electronic devices on the front seat. However, he could not find the Blackberry phone. He further testified that the value of his Ipod was about R3000, 00 whilst that of the Blackberry was about R1000, 00. Thereafter, he immediately went to the police station where he made a

statement. The statement was handed in as evidence and he was cross-examined on it. In his statement he categorically stated that:

> "On Monday 2014/10/20 at about 09h30 I parked my car Mercedes Benz … at Randburg Court at the parking area. I used the remote to lock the door and all windows were closed and I left it with items inside."

[5] During cross examination he testified that the Blackberry belonged to his daughter who had put it in the console in the middle of the vehicle together with the Ipod. He also revealed that the police had handcuffed the two gentlemen who were apprehended. At the police station he was instructed to look for the missing items again in the Chevrolet. He did so and noticed that all the items were now placed on the backseat of the Chevrolet. He was cross-examined about a contemporaneous statement he made and which was admitted as evidence where he said:

> "On Monday 2014/10/20 at about 09h30 I parked my car Mercedes Benz Reg […] GP silver in colour C180 model at Randburg Court at the parking area. I used the remote to lock all the door [sic] and all windows were close [sic] and I left it with items inside."

The cross-examination focussed on whether he was sure he locked the vehicle. He stated that his vehicle normally makes a beep noise when he locked it, but that he did not verify if it was indeed locked when he left it at the parking lot.

[6] The State also called five other witnesses, namely Ms Winnie Mutavhatsindi (Ms Mutavhatsindi), Mr Elmo Khota (Mr Khota), Constable Theresha Edgar Moloto

(Constable Moloto), Constable Eugene Mahlashela (Constable Mahlashela) and Constable Jane Malinga (Constable Malinga).

[7] The evidence of Ms Mutavhatsindi was that she was employed by the Fidelity Company as a security officer stationed in the Randburg Court premises. On the day in question she was working in the control room operating a CCTV. She was watching the monitors of the CCTV cameras, as members of the public had complained about incidences of cars being "*jammed*" and their cell phones and other devices stolen from their vehicles after they had left believing that their cars were locked. She noticed the appellants' Chevrolet, going into an open veld. It was not the first time she had seen the vehicle and became suspicious. She alerted her colleagues about the suspicious vehicle. While still in the control room and within five minutes of alerting her colleagues, she saw a man alighting from the Chevrolet and opening the Mercedes Benz. Mr Khota and another colleague Ms Zondi were called for backup. Mr Khota and Ms Zondi and a court orderly, named Mr Lebese, arrived at the parking area, where they confronted the appellants. Ms Zondi handcuffed the second appellant. Ms Zondi and Ms Mutavhatsinidi then took him to the security room to observe the CCTV footage of what had happened in the parking area. Thereafter they all returned to the parking area. Ms Mutavhatisnidi met with the owner of the Mercedes Benz which was parked next to the Chevrolet. He pointed out the Ipod on

the back seat of the appellants' vehicle. The remote and other items were taken to the police station together with the appellants who were arrested. Later Ms Mutavhatsindi went to the same police station where she made a statement.

[8] The evidence of Constable Moloto was to the effect that she saw a security lady running towards the overflow parking area. At the parking area they found the Chevrolet with occupants seated inside. The driver of the adjacent Mercedes Benz was also present and he reported that he was missing some items – an Ipod and a Blackberry- from his vehicle. They told him to look in the Chevrolet for the missing items. He did so and recovered the Ipod but not the Blackberry. There were other items on the back seat of the vehicle. He stated that the appellants were asked to demonstrate how they prevented the vehicles from being locked (i.e. "*jammed*" the locks) by the drivers who alighted therefrom. The second appellant took the remote that was found in the Chevrolet and pressed it to show how they could prevent a vehicle from being locked. They took the Chevrolet together with the appellants to the police station and booked the items on the SAP13. Ms Mutavhatsindi, too, made a contemporaneous statement that was admitted as evidence. The following averment is particularly pertinent:

> "I ask the suspect [sic] how did they get the Ipod out and they demonstrated to me how it works and they told me that they used a small remote to unlock the car. I arrested them for possession of stolen property and took them to the

Randburg Crime Intelligence to profile them."

Her statement goes on to record that she found twenty previous reported cases where the crimes were similar to the one in this case but which had not resulted in successful convictions.

[9] Mr. Khota, a security officer stationed at the court's entrance, testified that he received information via radio from the controller about people opening cars at the parking area. He ran and found the two appellants seated in the Chevrolet. He confronted them about what he had heard from the control room. At that moment his colleague, Ms Zondi, arrived at the parking area. He instructed her to take the second appellant to view the CCTV footage showing himself and the first appellant opening the Mercedes Benz after the driver of that Mercedes Benz had left the parking area.

[10] Constable Mahlasela testified that a recording of the footage was downloaded onto a USB stick. He told the court that they had a problem in viewing the footage, and as a result they never brought it to court again.

[11] Constable Jane Malinga's evidence related to the handling and safe keeping of the exhibits.

The appellants' versions

[12] The version of the first appellant was to the effect that he was coming from Durban to attend his cousin's bail hearing in the Magistrates' Court of Randburg. On arriving at OR Tambo airport he hired the Chevrolet from Hertz and picked up the second appellant in Sandton. They waited for the attorney at the parking area of the court's premises. Prior to finding a parking spot they drove around the area twice looking for a parking space. Eventually they ended up parking on the overflow parking on the gravel side. Whilst the second appellant was busy phoning the attorney he jumped out of the vehicle and took some documents from the boot of his car in order to do some work. While working he heard a knock on the window, and noticed that it was a security guard. The security guard asked to see the car keys and he obliged. The security guard accused him of opening the Mercedes Benz. Shortly after the security guard was joined by other people and the police. The appellants were placed at the back of the Chevrolet and handcuffed. In the meanwhile, the police and security personnel searched the Chevrolet. He had two phones on him, a Nokia and Huawei, an Ipad and an Ipod. He observed that the car next to them was a Mercedes Benz and had its left passenger door opened. The complainant was asked to look into the Chevrolet. It was then that the complainant said he saw his Ipod in the Chevrolet. He denied having seen the Ipod before.

[13] The second appellant confirmed the version of the first appellant and denied having seen the complainant's Ipod. He testified that the police informed him about it when they opened the car. He claimed that he had no knowledge of the Ipod being on the back seat of the Chevrolet, even though he was sitting inside it all the time. He further denied stealing the Ipod or playing any role in the theft of the Ipod.

[14] The court *a quo* found that the evidence presented by the State was sound, reliable and uncontradicted in any material respect. It further found that it was highly unlikely that some person other than the appellants could have opened the Mercedes Benz, taken the Ipod, opened the Chevrolet while the appellants were inside and placed it there. The court *a quo* also rejected any suggestion that someone placed the Ipod in the Chevrolet whilst the appellants were outside it and were being placed under arrest. This was on the basis that it was overly speculative, unreasonable and irrational. On this reasoning the court *a quo* convicted the appellants.

The question for this court

[15] The appellants challenged the finding of the court *a quo* on the basis that it failed to give sufficient credence to some contradictions in the evidence of the various witnesses of the State.

[16] The question for determination is whether, in light of all the evidence adduced at the trial, the guilt of the appellants was proved beyond reasonable doubt. To this end, the splitting of the entire evidence into its component parts may serve a useful purpose in trying to make sense of events and in establishing the facts. This is what the appellants did and implored this court to do as well. It is, however, important to remember that in splitting the entire evidence into its component parts, one must guard against a tendency to focus too intently upon a separate and individual aspect of the evidence without regard to the whole. Focus on an individual piece of evidence without regard to the whole may cause doubt to creep in and may result in a failure to establish (a) fact(s) that would otherwise be established when the evidence was evaluated as a whole. For this reason it is important to see the entire evidence as a complex mosaic. The evidence must be assessed in its totality.

[17] A key element of the State's case rests on the direct evidence of the security officer, Ms Mutavhatsindi. She was in the control room 'patrolling' the parking area through CCTV monitors when she noticed the Chevrolet. She observed that the occupants (who she later learnt were the appellants) come out of the Chevrolet and open the Mercedes Benz, which was adjacent to the Chevrolet, and then returned to the Chevrolet. The State's case was advanced further by the uncontested evidence that the Ipod belonged to the complainant; was left by the complainant in his

Mercedes Benz before he exited therefrom to enter the court building; that the Mercedes was locked by the complainant soon after he exited from it; that the appellants were seen on the CCTV monitors opening the doors of the Mercedes Benz and thereafter returning to the Chevrolet; that the Ipod was discovered on the back seat of the Chevrolet, and was there while the appellants were inside it; that a remote was found in their possession; and finally, they utilised the remote to demonstrate to all the security personnel and the police officers present how they used this device to prevent the locking of other vehicles by their drivers upon alighting them. Despite the State establishing all these facts before the court *a quo*, the appellants denied any wrongdoing and pleaded ignorance of how the Ipod came to be on the back seat of the Chevrolet. When confronted with the irrationality of their case both appellants claimed that somebody else placed it there. Their claims are certainly not reasonably possibly true.

[18] In our view the evidence presented before the court *a quo* demonstrates beyond any shadow of doubt that both appellants are guilty of stealing from a motor vehicle. There can, therefore, be no quarrel with their respective convictions by the court *a quo*. The convictions are safe and warrant confirmation by this court.

[19] Accordingly, the appellants' appeals against their respective convictions are

dismissed.

Sentence

[20] Prior to sentencing the appellants the court *a quo* entertained evidence from each of them and from an employee of the Department of Correctional Services (the department). The evidence of the latter concentrated on the issue of whether the department is capable of monitoring the two appellants should the court *a quo* decide to impose a sentence of correctional supervision. His testimony was unequivocal in this regard. He stated that should the court *a quo* impose a sentence of correctional supervision the department had the capacity to give effect to it. However, he would remain neutral as to what the appropriate sentence for each of the appellants should be. As far as what an appropriate sentence ought to be in these circumstances, his evidence was of no value.

[21] The first appellant testified. He furnished the court with details of his personal circumstances. These were: he was 44 years old at the time of sentencing. He was married, lived in Durban, had eight children, holds two degrees, a BCom (Marketing) as well as a BSc (Civil Engineering). He owned his own company consisting of a main office in Durban and two satellite offices, one in Pietermaritzburg and one in Umhlanga. He employed seven professional engineers and got contracts from “the

municipalities" and from the Department of Transport in KZN. He had three three-year contracts on the go and drew an annual salary of R1m per annum from the company. He supported his children, with handsome amounts given to the mothers of the children with whom they live, as well as to his own mother who takes care of those children that do not live with their biological mothers. He had fathered children with many women, some of whom are his employees, but he was not specific about each of the children. He informed the court that if he was incarcerated the business would collapse and all his employees would be rendered unemployed. Finally, he maintained that he was innocent and therefore was not able to show any remorse for the deed for which he was convicted.

[22] The second appellant too testified. He informed the court that he was born on 3 March 1971. He was married with two children, one of whom is nine years old and therefore still school-going, while the other is studying psychology at an institution in Cape Town. He lived in the suburb of Northcliff together with his wife and nine year old child. Both he and his wife were responsible for the upkeep of the children. He completed Matric, and presently, together with his wife, owned his own private company, Hapa Productions (Hapa), which sold the services of "*hospitality branding, PR Marketing and catering*". Both he and his wife worked for the company. His wife is also employed as an Executive for Communications and Marketing at Proudly

South African. Hapa employed 30 persons. He drew a gross salary of R69 000.00 per month from Hapa. He was responsible for all the day-to-day activities of Hapa. He has two previous convictions – one of theft which was committed in 2001 and one of fraud, plus eleven counts of "*contravention of Ordinance 92 of 1989*". He paid an admission of guilt fine of R500 for the theft. He claimed that the theft was really a mistake by his daughter who was "*3 or 4*" years old at the time and had accompanied him to a supermarket where "(s)*he happened to find a packet with hair bands and then she picked one or two from there,* (a)*nd then unaware of that when we went to pay we were then stopped by the security that she took something from there*." As the parent he was arrested for her misdemeanour and before being charged agreed to pay an admission of guilt fine of R500. Unfortunately no details were furnished about the conviction and sentence of the other offence, save for saying that it consisted of fraud. He asked that he be required to undergo correctional supervision rather than be imprisoned as his business would suffer should he be imprisoned.

[23] After receiving the aforesaid evidence and hearing the parties the learned magistrate sentenced the first appellant to 4 (four) years imprisonment, two of which were suspended for five years on condition that he was not convicted of theft, and the second appellant to 4 (four) years imprisonment. In terms of s 103(1) of Act 60 of 2000 both appellants were declared unfit to possess a firearm. The difference in the

two sentences was justified on the ground that the first appellant had no previous convictions while the second appellant did.

[24] In this Court the appellants were informed that should their convictions be confirmed there was a possibility that their respective sentences would be increased. The matter was postponed to allow them to make submissions as to why their respective sentences should not be increased. They both took full advantage of the opportunity to present further written submissions in this regard.

[25] This Court will interfere, however, where the trial court exercised its discretion improperly or unreasonably or where there is material misdirection on the part of the court *a quo*, or where the disparity between the sentence of the trial court and the sentence which this Court would have imposed had it been the trial court is so marked that it could properly be described as "*shocking, startling or disturbingly inappropriate.*"[1]

[26] In our view, the sentence imposed by the magistrate is firstly, not sufficiently appreciative of the interests of society as well as the gravity of the offence for which the two appellants are guilty; and secondly, unduly and overly generous in assessing

[1] *S v Malgas* 2001 (1) SACR 469 (SCA) at 478d-h.

the interests of the appellants. Accordingly, in our view the sentences imposed are too lenient. We say so for the following reasons:

[26.1] The offence for which the two appellants were convicted is very serious. It involved a carefully planned and executed operation. The two appellants saw an opportunity to steal from unsuspecting individuals attending court who harboured the false consciousness that, as they left their motor vehicles and locked their belongings therein, these were safe. The appellants were aware that such individuals harboured these false beliefs and preyed upon them. And they did so by employing a sophisticated method of jamming the locking mechanisms of the motor vehicles of these unsuspecting persons. It is a grave offence. Yet for the persons who are sophisticated enough to be able to execute it, it is one that can yields substantial rewards. Often the loot that can be obtained from a vehicle is significantly more than that which can be obtained from stealing from a person simply walking in the street.

[26.2] Crime generally is exceptionally rife in our society. Theft, in particular, is an every-day occurrence. It results in a great deal of financial loss to society and to the victims. Victims also suffer greatly in the form of unwarranted grief and anxiety, which affects their mental and at times even their physical health.

So rife is crime in general and crime of theft specifically that society requires the justice system to attend to it firmly and decisively in order to, on the one hand, restore the moral fabric of society, and on the other hand protect the innocent from simply becoming prey to those who have no qualms about engaging in criminal activities. Society is exhausted by the levels of crime it is forced to endure at present. In this particular case, Constable Moloto testified that there were twenty cases of a similar nature at the Randburg Crime Intelligence Centre.

[26.3] Both appellants are educated, own businesses that are successful and have no need to commit crime in order to survive. The first appellant has a civil engineering degree and earns R1m annually. By any standard, this is a substantial earning. He used his technical skill to commit the crime of stealing from a motor vehicle. Similarly, the second appellant earned a salary of R828 000.00 annually. He too, is a sophisticated businessman. Such personal details do not generate any sympathy for them or understanding for their lapse into the world of crime. The second appellant has two previous convictions, thus qualifying him for the status of a recidivist. As for the issue of them being important breadwinners of their respective families, there is no evidence that their families would become impecunious should they be incarcerated.

[27] Taking note of the factors in the three previous sub-paragraphs, We believe that the first appellant should be sentenced to five (5) years imprisonment while the second appellant should be sentenced to eight (8) years imprisonment.

[28] To conclude. The sentences that this Court believes are appropriate are so markedly different from that of the court *a quo* that an interference with the sentences imposed by the court *a quo* is warranted. Consequently the following order is made:

1. The appeal against conviction is dismissed.
2. The sentence imposed by the court *a quo* is set aside and replaced with the following:
    a. The first appellant is sentenced to five (5) years imprisonment.
    b. The second appellant is sentenced to eight (8) years imprisonment ante-dated to 2018/01/23.

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VALLY J

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MALUNGANA AJ

Date of hearing: 22 May 2019
Date of judgment: 20 June 2019
For Appellants: J C Kruger from BDK Attorneys

For the State: Adv EHF Le Roux from the NDPP