

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: A293/15

15/11/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

PAULOS MAHLELEBE

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

MOLEFE J

- [1] This is an appeal against both conviction and sentence imposed by the regional court Klerksdorp. The appellant was convicted of theft of a motor vehicle and was sentenced to 10 years imprisonment and was declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000. Leave to appeal was granted by the Court a *quo*.
- [2] The charge against the appellant was that on or about 16 August 2016 at or near Delareyville, North-West Province, the appellant did unlawfully and intentionally steal a Mazda 323 motor vehicle registration numbers HOY 548 NW which was the property of Themba Twala.

Ad Conviction

[3] The evidence on which the appellant was convicted was of three State witnesses.

- 3.1 **Constable Johannes Gumede** and **Constable Mathews Poloholo** testified that on 18 August 2012 they were patrolling the area around Lime Night Club in a marked police vehicle when they saw a Mazda 323 vehicle driving from the direction of the night club, but driving on their lane of travel, facing the oncoming traffic. They stopped the vehicle by putting on the siren and the appellant was the driver of the vehicle. They inspected the said vehicle and noticed that the vehicle had no license disc and no registration numbers in the front but only at the back. They sent the registration numbers through to radio control for investigation and were informed that the registration numbers did not match the Mazda vehicle. Whilst the inspection of the vehicle was being conducted, the appellant ran away but the two police officers apprehended him. The vehicle chassis numbers were also circulated to radio control and it was established that the Mazda vehicle was reported stolen at Delareyville on 18 August 2012. The appellant informed them that the vehicle belonged to his friend who was in the club but when they went to look for the "friend" inside the club, they did not find him.
- 3.2 **Themba Twala** testified that he was the owner of the Mazda 323 vehicle with registration numbers H[...] NW. He confirmed that the vehicle was stolen on 16 August 2012 and was recovered on 18 August 2012. The vehicle was damaged when it was recovered; the ignition, starter and safety belts had to be replaced at a cost of R1200.00.
- 3.3 Appellant testified in his own case and denied that he was the driver of the vehicle when he was arrested. He testified that the vehicle belonged to his friend Thabiso and that on the night in question he was just standing next to the vehicle waiting for Thabiso who had offered him a lift.

- [4] Although appellant's counsel¹ submitted in her heads of argument that the trial court erred in convicting the appellant due to the contradictions in the State witnesses' evidence and that the court *a quo* should have accepted the appellant's version as being reasonably possibly true, she conceded at the hearing of the appeal that the conviction should stand.
- [5] The Court's powers to interfere on appeal with the findings of fact of a trial court are limited. The Court of appeal will be very reluctant to upset the factual findings and evaluation of the evidence by a trial court, and will interfere where the trial court materially misdirects itself insofar as its factual and credibility findings are concerned (See **R v Dlumayo and Another 1948 (2) SA 677 (A) at 705- 706**).
- [6] While there is no *onus* on the appellant to prove his innocence, it is necessary to examine his version against the possibilities of the case in order to ascertain whether his version is reasonably possibly true. Although there are contradictions in the evidence of the two State witnesses, they are not material. In my view the appellant's version was so highly improbable that it could simply not be reasonably possibly true.
- [7] Based on the conspectus of the evidence, I cannot find any fault with the reasoning and the conclusion of the court *a quo*. Consequently, I am satisfied that the appellant's guilt was proved beyond reasonable doubt and that the conviction must stand.

Ad Sentence

- [8] It was submitted by appellant's counsel that the trial court misdirected itself in imposing a sentence of 10 years' imprisonment as the sentence is shockingly inappropriate and harsh. Ms Moloi further submitted that the trial court failed to take into consideration or attached insufficient weight to the appellant's personal circumstances. The appellant was 39 years, was a first offender, has three children, was the sole breadwinner and that the complainant's vehicle was recovered with minimal damages.

¹ Ms M B Moloi

[9] Respondent's counsel² conceded at the hearing of the matter that the 10 years sentence is shockingly inappropriate and harsh.

[10] A court sitting on appeal cannot interfere with the discretionary function of the lower court unless the sentence imposed is unjust or unless there has been a gross misdirection. Having given proper and due consideration to all the circumstances in this case, and having made a comparison with similar cases³, I am of the view that an appropriate sentence is 4 (four) years' imprisonment. This reflects an appropriate balance between giving due regard to the seriousness of the offence, while at the same time ensuring that the appellant does not serve unjustifiably long period of imprisonment. The appellant is not a hardened criminal, does not have previous convictions and in my view can be rehabilitated.

[11] In the circumstances, I make the following order:

1. *The appeal against conviction is dismissed;*
2. *The appeal against sentence is upheld and the sentence imposed by the court a quo is set aside and substituted with the sentence of 4 years' imprisonment;*
3. *In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentence is antedated to 11 August 2013, date of sentencing;*
4. *The appellant is declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000.*

D S MOLEFE
JUDGE OF THE HIGH COURT

² Advocated AJ Fourie.

³ See *S v Gerber* 2006 (1) SACR 618 (SCA)

T J RAULINGA
JUDGE OF THE HIGH COURT

I AGREE. AND IT IS SO ORDERED.

APPEARANCES:

Counsel on behalf of Appellant : Ms. M Moloi
Instructed by : Legal-aid SA

Counsel on behalf of Respondent : Mr. J Fourie
Instructed by : State Attorneys

Date Heard : 07 November 2016
Date Delivered : 15 November 2016