IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A87/08

In the matter of:

MOHAMMED DE JONGH Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 31 OCTOBER 2008

GAMBLE AJ:

[1] In February 2007 the Appellant appeared before the Regional Magistrate, Wynberg, on a charge of theft of a motor vehicle. On 22 May 2007 he was duly convicted as charged and sentenced to 5 years imprisonment.

[2] The Appellant appeals now against both conviction and sentence with the leave of the trial court. The State has indicated in its heads of argument that it concedes the appeal.

[3] At the trial, the State called two witnesses, the owner of the car in question and the police officer who arrested the Appellant. The Appellant testified in his defence.

[4] Omar Sait, the owner of the motor vehicle, testified that at about 02h00 on 28 August 2006 he parked his Honda Ballade in the street outside his home in Lavender Hill in the suburb of Retreat. He awoke the next morning to find it gone. The car was returned to him by the police a month later.

[5] Captain Larkin testified that he was a member of the police Dog Unit with 21 years experience. At about 02h35 on 29 August 2006, and while on duty, he received a call from radio control informing him that the police were involved in a car chase in Retreat.

[6] Captain Larkin hastened to the scene where he encountered a certain Inspector Erasmus and Constable Gordon standing next to the white Honda Ballade belonging to the complainant. They informed him that a suspect had run into a yard nearby.

[7] Captain Larkin searched the yard and found the Appellant hiding in an outside toilet a mere 25 metres from the vehicle. He appeared nervous and his heart was beating fast. The police officer arrested the Appellant and took him back to the car where Erasmus and Gordon allegedly identified the Appellant "as the one who jumped out of the vehicle and ran."

[8] Under cross-examination, Captain Larkin conceded that he could not himself identify the Appellant as the driver of the stolen motor vehicle and relied on the say-so of the other police officers in this regard. He was also unable to deny the Appellant's version that he had been a passenger in the car and that he had jumped out and run away because he was in possession of drugs.

[9] After the completion of Captain Larkin's evidence the State requested a postponement to enable it to properly subpoena Erasmus and Gordon. (The prosecutor informed the Court that the subpoenas that had in fact been issued had only been served a week before and she did not consider it appropriate to request arrest warrants in those circumstances).

[10] The Appellant's legal representative strenuously opposed any further postponement, citing earlier delays in the matter which were not of the Appellant's making and noting that he had been in custody since August 2006. The Court refused the postponement and since the State was not in a position to proceed, the Court deemed its case to have been closed.

[11] The Appellant then gave evidence and told the Court that he earned a living as a pimp and drug-dealer. On the evening in question he took a lift with two friends (Wonky and Ougat) in the white Honda Ballade for the purposes of purchasing drugs in Claremont so as to augment his stocks. On the way the car was chased by the police and eventually brought to a halt. While they were being chased the driver of the Honda told the Appellant that the vehicle was stolen.

[12] When the car came to a stop in a dead-end street the Appellant said he jumped out and ran, throwing away a packet of drugs in the process, his concern being that he would be found in possession thereof. He confirmed that he was apprehended in the toilet by Captain Larkin.

[13] The learned Regional Magistrate rejected the Appellant's evidence as unreliable and false and went on to find that the circumstantial evidence was sufficient to justify his conviction.

[14] I have considered the evidence and with respect I am unable to agree with the learned Magistrate. In the absence of the testimony of Erasmus and Gordon there was simply not enough evidence before the Court to gain-say the Appellant's version that he was not the driver of the vehicle. His evidence that he was a passenger and that he only learned that the vehicle had been stolen once the car-chase began can also not be refuted. The State, in my view, therefore correctly conceded the appeal.

[15] In such circumstances, I am of the view that it cannot be said that the Appellant's version before the learned Magistrate was not reasonably true and that he was entitled to his acquittal.

[16] It is indeed regrettable that the learned Magistrate did not afford the State a postponement to enable it to place all of the relevant evidence before the Court. If one has regard to the Appellant's long list of previous convictions one sees that he is a person who has a definite predilection for motor theft. The

Magistrate's refusal of an indulgence in the present case may well have the result that a serial offender is permitted to return to his old ways.

[17] In my view the conviction cannot stand and I would accordingly uphold the appeal and set aside the conviction and sentence.

P A L GAMBLE

MOOSA J: I agree, it is so ordered.

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