IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A445/2009

DATE: 13 AUGUST 2010

In the matter between:

NAZEEM CASSIEM Appellant

and

THE STATE Respondent

J U D G M E N T

SANER, AJ:

In this matter the appellant was charged in the Wynberg Regional Court with the theft of a motor vehicle. In the charge sheet it was alleged that during January 2006 at Athlone, the appellant stole a Nissan Maxima motor vehicle with registration number CA 227146 from Gadija Cronje and Adrian Cronje. The appellant pleaded not guilty to the charge at the start of February 2009. At the plea proceedings, he declined to outline his defence to the court and exercised his right to remain silent. At the conclusion of the trial the appellant was

convicted in late February 2009. The State proved no previous convictions and the appellant was then sentenced on the same day to four years direct imprisonment.

During April 2009, the appellant applied for leave to appeal against his conviction and sentence. The court *a quo* granted leave to appeal against both conviction and sentence. The appellant now comes before this appeal court with regard to both his conviction and sentence. During the trial the State called four witnesses and the appellant testified on his own behalf. As far as the conviction is concerned, I do not intend to analyse the evidence in any great detail, since it is my opinion that the magistrate, in his competent and thorough judgment, correctly summarised the evidence given on behalf of the State and the appellant. Suffice to say that it is clear from the State's evidence that the complainant, one Adrian Cronje (Adrian) left his car with an auto electrician, one Faik Groenewald (Faik), for repairs during 2005. Adrian was thereafter sentenced to a period of imprisonment. The vehicle remained at the auto electrician's premises for approximately a year, as Adrian did not have the financial wherewithal to effect the necessary repairs. Adrian left all of the registration papers of the vehicle in the boot and the appellant was aware of this fact.

Whilst Adrian was still in prison, the appellant formulated what he thought was a clever plan to get his hands on Adrian's vehicle. Consequently, he appeared one day at Faik's premises, where he introduced himself as Faizel, the brother of Adrian. He told Faik that he had authority from Adrian to sell the vehicle and subsequent thereto he removed the registration papers from the boot. Incidentally, he also removed a tape, speakers, tools and a jack sometime prior to removing the papers. The appellant then approached one Mogamat Anthony (Mogamat), with a view to selling the vehicle to Mogamat. The appellant had been referred to Mogamat by Faik, who was keen to get the vehicle off his premises, which were too small to provide a garaging facility for a vehicle such as the one in question for an indeterminate period.

When the appellant introduced himself to Mogamat, he gave his name as Anwar and said he was the brother of Adrian. After negotiations, Mogamat paid R7 500,00 for the vehicle and took possession of the necessary papers from the appellant. It was the appellant who conducted the negotiations and received the money. Sometime thereafter, and before Mogamat was able to sell the vehicle, Adrian asked his wife, Gadija, to recover the vehicle for him from the premises of Faik, as he felt it would be safer at his house whilst he was in

prison. Gadija tracked the vehicle down eventually to the premises of Mogamat, who ran a garage and had wanted the car for resale. She claimed the vehicle back from Mogamat and after intervention by the South African Police Services, the vehicle was taken to the Stikland stolen vehicle facility.

Mogamat was understandably put out by this turn of events and he and Faik later took the appellant to the police station, where he protested his innocence. Later the appellant said he lived in a house at Gardendale, but when he and Faik and Mogamat arrived there, it turned out that it was not his house at all and that the dog that was there clearly did not know him and acted aggressively towards the three of them. The appellant then ran away. The upshot of all of this was that the vehicle was ultimately returned to Adrian's house and Mogamat was left out of pocket to the tune of R7 500,00. After Adrian was freed from prison, he sold the vehicle. He had not been insured at the time of the alleged theft.

The appellant's evidence may be very briefly summarised. He testified that he was asked by Hilary, who was the sister of Adrian, but who died before the trial, to take the papers of the vehicle to Multi-Fitment Centre where Mogamat worked and to receive R7 000,00. He says he handed this amount to Hilary. He said that he obtained the papers for the vehicle one

evening from Hilary and the next morning he went to Anthony and they in turn went to Faik to get the vehicle. He said that he never went back, but did see Faik and Anthony a few months later at the Athlone Police Station. The appellant furthermore confirmed, under cross-examination, that he knew that the car did not belong to Hilary, but rather to Adrian and that he knew that Adrian was in prison. He told the Court that Hilary had died in February 2002. It is worth noting that Hilary's date of death was a considerable period after the appellant was first arrested for the theft in question.

In my view the magistrate did not misdirect himself either in his evaluation of the evidence nor in his rejection of te appellant's version. The evidence of the State witnesses fitted together in a satisfactory manner and they corroborated each other on all of the important points. For example:

(a) It was established by the State that the appellant handed the papers over, that he was present during the negotiations to sell the vehicle to Mogamat and that he received the money.

(b) Mogamat and Faik both supported each other in testifying that the appellant had said he was the brother of Adrian, that he gave different names to each of them and that he

had authority from Adrian to sell the vehicle.

(c) The appellant and Faik arrived together at Mogamat's premises for the purposes of negotiating the sale of the vehicle.

(d) The appellant concluded the transaction and received the money.

(e) The appellant, off his own bat, took Faik to Mogamat and all went to Gardendale. There the appellant was confronted by a dog which clearly did not know him and he then ran away.

On the other hand the version of the appellant was fraught with inconsistencies and problems. For example, it was put to Mogamat that the appellant's instructions were that they first went to inspect the car, the next day the appellant handed the papers over and on the following day he received the money. However, when the appellant testified he said that he received the papers on a certain evening from Hilary and the next morning he went to Anthony and then he went to Mogamat and they then went to Faik. He had then left the papers with Mogamat and had collected the money the next morning. This is but one example of where the version put to State witnesses

did not accord with the appellant's evidence. There were numerous others.

A further glaring example of this aspect is the fact that both the complainant, Adrian, and Faik Groenewald testified that the papers of the vehicle were left in the boot and that the appellant retrieved them from that place. When this evidence was given, it was never put to either of them that the appellant would say that he obtained the papers from Hilary. The inference from this is inescapable that the Hilary story was a recent fabrication. The magistrate also, in my opinion, correctly concluded that the story of the appellant regarding receiving the papers from Hilary, was a fabrication. This appears to me to be undoubtedly correct in view of the fact that firstly, the entire Hilary story was never put in outline, as I have noted, to any of the State witnesses when they were cross-examined on their version.

Secondly, the fact that appellant did not at any stage prior to the trial mention to the investigation officer the fact that he had received the papers from Hilary and that he returned whatever money he received from Mogamat to her, shows that the story was a recent fabrication.

On this second point, I agree entirely with the magistrate in his

approach to the question of the appellant's constitutional right to remain silent and the fact that no adverse inference could be drawn from that. In my opinion the magistrate quite correctly found that the reason why the appellant did not come out with his story about Hilary before, was purely because there was no truth in it. His remaining silent (indistinct) had nothing whatsoever to do with his constitutional right to remain silent.

In the premises I am driven to the ineluctable conclusion that the magistrate in the court *a quo* did not misdirect himself in his approach to the evidence, nor in any other material aspect as far as the conviction is concerned. He correctly rejected the versions of the appellant as not being reasonably possibly true. I would, therefore, dismiss the appeal against the conviction for the reasons set out above and for the reasons given by the magistrate in the court *a quo*.

As far as sentence is concerned, since I am sitting as a court of appeal as regards the sentence in this matter, I am aware that I must approach the question according to the well established principles set out by appeal courts which have become before this one. So it is established law that the sentence in the present matter cannot be altered unless I can come to the conclusion that no reasonable man ought to have

imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial magistrate did not exercise his discretion properly, or that it is simply in the interests of justice to alter the sentence. In this regard see S v Fhetani 2007(2) SACR 590 (SCA) at paragraph 5. Also Director of Public Prosecutions KwaZulu Natal v P 2006(1) SACR 243 (SCA) 254c-f and S v Anderson 1964(3) SA 494 (A) at 495D-E.

Sufficient cause might also exist to intervene where I could come to the conclusion that the sentence imposed was disturbingly inappropriate or sufficiently disparate from that which this Court would otherwise have imposed. See S v Mothibe 1977(3) SA 23 (A) at 830D and S v Naiker 1975(1) SA 583 (A) at 585D and 590A. In assessing whether the sentence imposed is appropriate in all the circumstances, I must bear in mind that the assessment of this Court cannot ever be based on some kind of exact standard. There will always be an area of uncertainty within which a particular court's view about a suitable term of imprisonment may validly differ. See S v Pieters 1987(3) SA 717 (A) and S v Brand 1998(1) SACR 296 (C) 303i.

Consequently even should this Court come to the conclusion that it would have imposed a different sentence, provided the difference between the sentence which this Court might have imposed and which the court *a quo* imposed is not striking, as it has been punt, this Court is not entitled to interfere. In fact to warrant interference in such a case, I would have to find that the trial court did not exercise its sentencing discretion reasonably. See S v Matlala 2003(1) SACR 80 (SCA) 83b-f. The approach to sentence on appeal is perhaps best summed up by Rumpff, JA, as he then was, in S v Anderson above at 495G-H, where he said the following:

> "A court of appeal will not alter a determination arrived at by the exercise of a discretionary power, merely because it would exercise that discretion differently. There must be more than that. The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably and, therefore, improperly, the court of appeal will alter the

sentence. If there is not that degree of difference, the sentence will not be interfered with."

In the present matter I am of the opinion that, taking into account all of the relevant factors, I would have imposed a sentence somewhat more lenient than the four years of direct imprisonment actually imposed by the court *a quo*. However, as the difference in the sentence I would have imposed and that imposed by the magistrate, is one of degree only, it is not sufficient to warrant interference. I am firmly of the view that the sentence indeed imposed by the magistrate in the court *a quo* fell well within the range of sentences which could be described as emanating from the proper exercise of the magistrate's discretion.

Whilst it might be postulated that to imprison a first offender for the theft of one motor vehicle is harsh, I think it should be borne in mind that the theft was perpetrated against a background of a veritable plague of car thefts, not only in Cape Town but throughout the country. In addition, the appellant cynically took advantage of a friend's misfortune and carefully planned and executed the theft. He showed no remorse whatsoever at the trial and never made good on his undertaking to repay the money he had received from Mogamat.

There is the further aspect that the Supreme Court of Appeal has, on a number of occasions, seen fit to confirm direct imprisonment for the theft of a motor vehicle by a first offender, thereby sending a clear message as to the reprehensibility of this particular offence. See S v Sassman 2006 JDR 0702 (SCA) and S v Gerber 2006(1) SACR 618 (SCA). I conclude, therefore, as regards the sentence, that no grounds exist for interference by this Court in the sentence imposed. In the premises, I would dismiss the appeal against the sentence as well.

In conclusion, as set out above, I would, therefore, dismiss both the appeal against the conviction and against that sentence.

SANER, AJ

DLODLO, J: I agree. It is so ordered.

DLODLO, J