IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A358/2010

DATE: 3 SEPTEMBER 2010

In the matter between:

FIKILE MDINGI Appellant

and

THE STATE Respondent

J U D G M E N T

DUMINY, AJ:

The appellant was convicted on 26 May 2009 in the Wynberg Regional Court of theft of a motor vehicle and sentenced to 54 months imprisonment. He appeals against both the conviction and sentence.

The case concerns an event on 14 July 2008 when the appellant was encountered by one Mr Njaba, while he and apparently two other persons were pushing a minibus in Fish Hoek with the intention of trying to start it. According to Mr Njaba's evidence, the alarm of the minibus was blaring and its hazard lights were flashing. Mr Njaba suspected that the vehicle was being stolen and reported his observations to the

police. He returned to the scene in his own vehicle and the police followed in theirs.

On Mr Njaba coming upon the scene, the minibus sped away, but fortunately not too far. It ended up in a collision with what is described in the record as a yard, but apparently that is either with a wall or a fence that surrounded a nearby property. The evidence of Mr Njaba was that when he returned to the scene, he found the appellant in the driver's seat of the minibus. After the collision with the wall or the fence, the appellant emerged from the driver's side of the vehicle and fled into a nearby house. Mr Njaba followed him and found him hiding under a bed. He hauled him out from under the bed and in the process apparently assaulted him with a flashlight which he obtained from a member of the police service.

It transpired that the minibus was the property of an organisation that used it for the transport of handicapped children. It was confirmed in the evidence of Mr Luiters, the person in whose charge the vehicle was left, that it had been locked the previous night with its steering lock engaged. On examination it was found that the electrical wiring of the minibus was disturbed in such a way that it would indicate that there was an attempt to start the engine according to a method, colloquially known as "hot-wiring".

The appellant's response to this evidence which I have summarised very briefly, was that he was indeed engaged in pushing the minibus vehicle in order to get it started, that he was indeed an occupant of the vehicle when the police and Mr Njaba returned, but that he was not in the driver's seat. He also explained that it is correct that he emerged from the driver's side of the vehicle after it came to a standstill and that he ran away, trying to hide in the nearby house where he was found. He essentially confirmed the evidence of Mr Njaba in these respects.

The appellant's version, however, is that he was involved in this incident purely by accident. He lives in Khayelitsha, but was in Fish Hoek, when he saw that some people were trying to get the vehicle started. They were pushing it in reverse. He offered his assistance in return for a lift to Khayelitsha, and lo and behold, the next thing is the police arrive and because he is a man who smokes dagga and had a knife on him, he thought it best to vacate the scene as rapidly as possible and to hide under the nearest bed.

The essential issue is whether or not Mr Njaba was correct or not in testifying that the appellant was observed in the driver's seat of the vehicle. Before I proceed to deal with that issue, I

record that it is clear from the evidence and the facts that are common cause, that the minibus was removed from the lawful possession and control of Mr Luiters, and that it was stolen. The only issue in the case is whether the appellant was a party to the theft of the vehicle or not. This requires scrutiny of the appellant's version and the question whether it satisfies the test of being reasonably possibly true.

On behalf of the appellant, the Court was referred to the case of S v Van der Meyden 1999(1) SACR 447 (W) at 449c-450b. The reference is appropriate. In essence it confirms the approach that the question is not whether the appellant's version is true on a speculative basis or is merely possibly true, but whether it is reasonably possibly true. This is another way of expressing the practical application of the onus being on the State to prove all the elements of the charge beyond a reasonable doubt; not beyond all doubt, but beyond a reasonable doubt.

The consideration of this case requires one factual finding to be made, the circumstantial evidence to be weighed up and the appellant's version to be considered in the light of that. The factual question, as I have said, is whether the appellant was in the driver's seat of the vehicle. If so, that is a very strong indication that he associated himself with the theft of the

vehicle. If not, it leaves the possibility that he was an innocent bystander who was unwillingly implicated in the crime. To answer that question, the evidence of the appellant must be weighed against that of Mr Njaba.

The magistrate in the regional court found Mr Njaba to be a direct, accurate and reliable witness. In my view, that evaluation of Mr Njaba's evidence is fully justified by the record. His evidence was clear and logical. There was no disputing his description of the events and he clearly understood exactly what he had seen and relayed that in a way which, on my part, I found convincing. There was no doubt in his mind that he had correctly identified the appellant as the person sitting behind the steering wheel of the vehicle when he returned to the scene with the police. He was asked about his opportunities for observation and he explained that he was very close to the driver's side. I am not going to repeat the estimates of distances, as they are notoriously inaccurate, but he did indicate that he was within a vehicle width of the appellant where he was sitting in the driver's seat and that he could clearly identify him.

Weighed against that, one must take the appellant's version and the circumstantial evidence, which is common cause. The appellant contradicted himself in a number of material

respects. The one concerned the number of people who were involved in the incident. An important aspect concerns the question whether or not the hazard lights of the vehicle were on and the alarm was blaring. When Mr Njaba gave that evidence, it was not contested; however when the appellant testified, he said the alarm was silent and the hazard lights were off.

The next issue is what Mr Njaba's explanation was for being in the vehicle at all. If one tests that against the standard of reasonableness, much is left to be desired. He was in Fish Hoek, where he encountered a vehicle that would not start unless it was pushed in reverse. Mr Njaba's evidence that the hazard lights were on and the alarm was blaring, was not contested and it must be accepted. The appellant's explanation is that he associated himself with this effort because he hoped for a lift from there to Khayelitsha. The explanation stretches credulity beyond any reasonable bounds.

The appellant's explanation for fleeing the scene is equally incredulous. The excuse he gave was that he was in fact perpetrating another crime, namely unlawful possession of drugs and a dangerous weapon and that he was afraid of being caught with them in his possession. That is why he ran away. No drugs were found anywhere near the scene and in my view

his conduct is consistent only with the fact that he was a guilty participant in the theft of the motor vehicle.

I have no hesitation in accepting the evidence of Mr Njaba in preference to that of the appellant and I find that the learned magistrate's approach to the evidence and his acceptance of Mr Njaba's evidence in preference to that of the appellant, was entirely justified. For these reasons the appeal against the conviction should, in my opinion, be dismissed.

As far as the sentence is concerned, the usual well known triad of considerations was taken into account. The appellant's personal particulars and circumstances were placed on record. He was 27 years old at the time of his conviction. He was unmarried with three minor children. He had a job and importantly, he had a good standard of education and no previous convictions. He had been in custody for 11 months preceding the trial. On the other hand the magistrate took into account the prevalence of the crime, the interests of the community and in this particular case the fact that the vehicle had been used for the transport of handicapped children. It was clearly marked, it bore the logo of the welfare organisation and it was very clear to anyone seeing it that this was a vehicle that was used for special purposes and that stealing it, or putting it out of service for

any time, would be prejudicial to the neediest of the needy in our society.

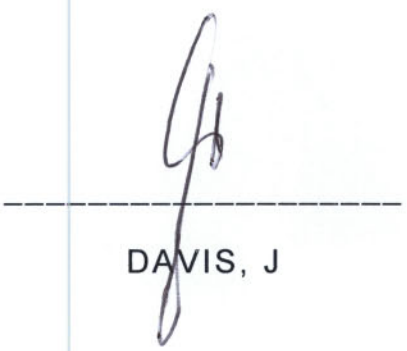
Given these circumstances, the magistrate imposed a sentence of 54 months imprisonment. Whilst it may be said that this is a strict sentence, in my opinion it is not disturbingly inappropriate and gives expression to the requirements of the law in respect of sentencing, including taking into account the personal circumstances of the appellant and approaching the matter with a sense of mercy.

For these reasons, I would also not interfere with the sentence.

In my view the appeal against both the conviction and sentence should fail.

DUMINY, AJ

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



DAVIS, J

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