

SHACKY NDLOVU
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE JP & DUBE-BANDA J
BULAWAYO; 22 January 2024 & 31 October 2024

Criminal appeal

M. Ndlovu for the appellant
A. Khuphe for the respondent

DUBE-BANDA J:

[1] This is an appeal against both conviction and sentence. The appellant, together with a co-accused were arraigned at the Magistrates' Court sitting in Beitbridge on a charge of theft as defined in s 113 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] ("Criminal Law Code"). It being alleged that on 5 December 2020 and at Hertz Car rentals ("Hertz") Johannesburg, South Africa, they stole a Toyota Hilux GD6. In the alternative, they were charged with the crime of being found in possession of property reasonably suspected to be stolen as defined in s 125 of the Criminal Law Code.

[2] The appellant and his co-accused pleaded not guilty to both the main and alternative count. At the end of the State case, after consideration of an application for a discharge in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the co-accused was discharged. The prosecution continued against the appellant, and at the end of the trial he was convicted of the main charge.

[3] A summary of the relevant evidence adduced at the trial is as follows: Thoma Kabelo Tamaris ("Tamaris") a branch manager for Hertz testified that on 30 December 2020 a client by the name of Kubeka Gustaff ("Gustaff") hired a car at Hertz. The rented car was supposed to be returned on 5 December. He received a message that the car had crossed the border into Zimbabwe. He reported it stolen as it was not returned on the appointed date. The vehicle was recovered in Zimbabwe. Under cross examination, Tamaris testified that he had never met the appellant and his co-accused. He told the court that the person who rented the car was not

amongst the accused persons. He reiterated that the car was hired for use in South Africa only and it was not supposed to cross the border to any country.

[4] Tobias Chatikobo testified that he was a member of the Criminal Investigation Department (“CID”) and the investigating officer in this matter. On 5 December 2020 the police received information that a car stolen from South Africa was tracked to be in the Beitbridge area, in Zimbabwe. The witness in the company of other members carried out investigations. They came across the car at the 70km point along Beitbridge-Bulawayo Road. The appellant and co-accused were fueling the car with diesel from containers. Inside the vehicle the police recovered a temporary import permit (“TIP”), registration certificate and an affidavit written by one A. Botha. He tried to contact Botha, but his phone number did not go through. Hertz produced the original documents of the vehicle and investigation revealed that the documents produced by the appellant and co-accused i.e., TIP in the name of the appellant and registration book were fake. The affidavit by Botha stated that the appellant was authorized to travel to Zambia, Malawi and Mozambique. Zimbabwe was not included. Under cross examination, the investigating officer testified that the appellant said he was given the vehicle by Botha to transport his goods to Zimbabwe. The appellant had only provided a cell phone number of Botha, and the investigations conducted by the police and Interpol showed that Botha was non-existent. Everything about Botha i.e., the company and P.O. Box number were fake. The witness testified that the appellant said he was taking his goods to Bulawayo and disputed that he said he was in transit in Zimbabwe. The witness emphasized that the appellant was driving the stolen vehicle, carrying fake documents, and Botha was non-existent. The officer agreed that the TIP was not fake, it was the affidavit by Botha that was fake.

[5] Kleinboi Motato Thubakgale testified that he was a warrant officer in the South African Police Service. At the request of Interpol Harare, he carried out investigations and discovered that the vehicle was reported stolen in South Africa. Hertz using marks and vehicle registration numbers positively identified the vehicle. He noted that the vehicle was hired by one Gustaff for the purpose of transporting furniture from Limpopo to Gauteng. It was not returned to Hertz. Gustav was tracked and arrested in South Africa, he was charged with the crime of theft of motor vehicle and the matter at the time still pending. The documents found in possession of the appellant were fake. The authorization letter found in possession of the appellant was fake. The registration number JG45 MT GP belongs to a vehicle stolen in South Africa. There is no company called CFAO, and the address given does not exist, and A. Botha does not exist.

Cellphone number +27634621649 is not in Botha's name, it was answered by a lady who did not provide her details. Everything about the vehicle was just a false creation. Under cross examination, he testified that the appellant did not give the police the exact place he hired the vehicle. Gustav did not report the vehicle stolen in South Africa. He hired the vehicle with intention of stealing it. There is a syndicate involved in hiring cars and stealing them, and the police are investigating to find the role players in this syndicate.

[6] The appellant testified that he is a cross-border trader. He hired the vehicle to do cross border trade. He was given a certified copy of the vehicle registration book and a document authorizing him to cross the border with the vehicle. He got the papers in Kempton Park from Botha who works at the garage where he hired the vehicle. He disputed that Botha does not exist, and testified that he works for a company called CFAO. He testified that he did not know Gustav who hired the vehicle from Hertz. The vehicle was checked at a check point in South Africa and no anomalies were detected. In Zimbabwe he was issued with a TIP. Under cross examination, he confirmed that on 5 December 2020 he was in possession of the vehicle and was found with the documents tendered as exhibits. He testified that it was not his vehicle but hired the vehicle to transport goods. After the police informed him that the vehicle was reported stolen in South Africa, he did not contact the person from whom he hired the vehicle because he thought that would be done by the police. He said all the vehicle documents he had were in order.

[7] The trial court found that the vehicle belonged to Hertz and it was hired by Gustav for use in South Africa. The vehicle was found in Zimbabwe in the possession of the appellant, and all the documents in possession of the appellant were fake. The registration book found in possession of the appellant was fake in that it differed from the original in possession of Hertz. The appellant used fraudulent documents to cross with the car into Zimbabwe. Botha, the person from whom the appellant said he hired the vehicle does not exist, and the address on the papers does not exist. The TIP was generated using fake documents, and this is the TIP the appellant used to cross with the vehicle into Zimbabwe. The trial court found that the State proved its case beyond a reasonable doubt, and the appellant was convicted of the main charge of theft. He was sentenced to 6 years imprisonment with 4 years suspended on the usual conditions.

[8] Aggrieved by this result, the appellant noted an appeal against both conviction and sentence to this court. The grounds of appeal are these:

Ad conviction

- i. "The court a quo erred in holding that appellant was guilty of theft as he had an intention to permanently deprive the owner of their vehicle by crossing into Zimbabwe with it when the vehicle was hired and only temporarily imported into Zimbabwe using a TIP to deliver goods as a *malaicha*.
- ii. The court a quo erred by holding that the appellant was part of a car theft syndicate taking place in South Africa via first hiring the vehicles when the defence of the appellant that he hired the vehicle from a third parties was in light of the State's own evidence reasonably possible true.
- iii. The learned magistrate in the court a quo erred in holding that the vehicle had been stolen based on the testimony of Tamaris who indicated that they reported the vehicle stolen because it had crossed into another country contrary to the hire contract that the vehicle must not leave South Africa. The contract had no such clause and thus the basis was an error on both fact and law.
- iv. The court a quo misdirected itself by relying on a contract between Gustav and Hertz who was not part of the proceedings and imputing its terms to appellant who was not privy to that contract without Gustav coming to court to explain how the vehicle moved from his possession and ended up in the appellant's possession.
- v. The court a quo erred in finding that a case had been proved beyond a reasonable doubt in the absence of a report or evidence by the hirer of the vehicle that it had been stolen and the witness evidence was that the correct person Gustav was not before court.
- vi. The court a quo erred in basing its findings on that fraudulent documents were found in appellant's possession, documents he obtained when hiring the vehicle without evidence that he forged those documents. The court's error was further worsened by the State's evidence via SAPS officer Motatu that one needed expertise and access to the data base to catch the fake documents.
- vii. Court erred and misdirected itself in pronouncing appellant guilty when there was no evidence linking him to the South African syndicate making an unfortunate causality of the actions of persons currently facing theft charges in South Africa.
- viii. Cumulatively, the errors with regards to factual and circumstantial findings and the misdirection on the onus of proof resulted in the court a quo arriving at a decision which any other court acting carefully would not have arrived at.

Wherefore, appellant prays that the appeal be upheld and for the setting aside of the verdict of guilty and in its place that a verdict of not guilty and acquitted be retained.

Ad sentence

- i. The sentence imposed by the court a quo is excessive and harsh as to induce a sense of shock and revulsion.
- ii. The court a quo erred by paying lip service to mitigation and not attaching due consideration to appellant's personal circumstances that he was 48 years old, first offender, married with two children who were still under his care one is in university and the other just received matric results and set to go to university as well.
- iii. The vehicle was recovered and returned to its owners and that the appellant was a victim of circumstance and the true culprits are still to be dealt with.
- iv. Further the learned magistrate erred by ignoring the general principle of keeping first offenders out of prison especially if there are no compelling reasons for the imposition of a custodial sentence.
- v. The court a quo erred and misdirected itself by not imposing a fine in a circumstance where the imposition of a fine is a permissible penalty. No facts or circumstances were considered that would render the imposition of a fine as inappropriate.
- vi. The court merely paid lip service to the guiding principles of sentencing and misdirected itself to start off at the deep end and impose imprisonment without giving due weight to the

sentencing options so provided by statute in the absence of clear compelling reasons justifying imprisonment.

Wherefore appellant prays that the appeal be upheld and for the setting aside of the conviction and the custodial sentence.”

[9] At the commencement of the hearing and after the exchange with the members of the court, Mr. *Ndlovu* appellant’s counsel abandoned grounds of appeal against conviction 3 and 4, and abandoned the appeal against sentence. The appeal now lies against the appellant’s conviction only. I now turn to consider the appeal. Under the circumstances, my approach in deciding upon the appeal is to consider whether, on the evidence recorded, there is proof of the appellant’s guilt beyond reasonable doubt.

[10] The salient issue is to answer the question whether the vehicle was stolen. It is common cause that the vehicle belonged to Hertz and it was hired by Gustav. Hertz did not authorise its removal from South Africa to Zimbabwe. In Zimbabwe it was found in the possession of a person who had not hired it from Hertz, i.e., the appellant. It was unlawfully removed from South Africa; I say so because it was removed using forged documents. The TIP was issued on the basis of forged documents, and in fact in Zimbabwe the vehicle was wearing fake documents. It was supposed to be returned to Hertz on 5 December 2020, in fact that was the day it was tracked leaving South Africa enroute to Zimbabwe. It was the day the police found it in the possession of the appellant at the 70km point along Beitbridge Bulawayo Road. It would be taking simplicity too far to say the vehicle would be returned to South Africa and finally to Hertz. The vehicle was permanently removed from South Africa, and Hertz had permanently lost control of it. In the circumstances, the finding by the trial court that the vehicle was stolen cannot be faulted.

[11] There is no direct evidence linking the appellant to the theft of the vehicle or conniving with Gustav to steal the vehicle. The evidence is circumstantial. The ‘cardinal rules’ when it comes to inference to be drawn from circumstantial evidence, are trite, and were laid down in *R v Blom* 1939 AD (1) 188 at page 202-203, namely: that the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn; the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[12] It is a fact that the vehicle was stolen and the appellant was found in possession of it. A new fake registration book was obtained in the name of a non-existent company. The person

to whom the appellant claims he hired the vehicle from, could neither be reached nor located, an indication that it is a fictitious person. The documents used by the appellant to cross to Zimbabwe were fake. Furthermore, the appellant purportedly hired the vehicle to travel to Mozambique, Zambia and Malawi and back to South Africa on 3 January 2021, however, he was arrested in Zimbabwe and his destination was Bulawayo. He was not in transit. Even after his arrest no one, not even this Botha has made a follow up about the vehicle. Each piece of evidence on its own might not be enough to establish the guilt of the appellant but the cumulative effect of all the pieces concludes the puzzle. This leads to only one reasonable inference to wit; the appellant stole the vehicle.

[13] For completeness the appellant was in recent possession of a stolen vehicle. A closer scrutiny of the judgment of the court *a quo* shows that when determining this matter, it had in mind the doctrine of recent possession. In the reply to the notice of appeal the magistrate said the appellant was found in recent possession of a stolen vehicle and failed to explain his possession. It is trite that the doctrine of recent possession is based on an inference being drawn that the possessor of recently stolen property is the thief, if he cannot give an innocent explanation of his possession and the inference that he stole the property is the only reasonable inference that can be drawn from such possession he can be convicted. See *Kawadza v S* HH 5/06; *S v Parrow* 1973 (1) SA 603(A).

[14] The appellant in an attempt to explain his possession of the stolen vehicle, he said he hired it from one Botha. The meticulous investigations including by Interpol concluded that the vehicle documents found in possession of the appellant were fake. The authorization letter found in possession of the appellant was fake, the address on the letterhead did not exist. The registration number JG45 MT GP on the vehicle belonged to a vehicle stolen in South Africa. There was no company called CFAO, and the address given does not exist, and A. Botha does not exist. He is a fictitious person. Cellphone number +27634621649 is not in Botha's name, it was answered by a lady who did not provide her details. Everything about the vehicle was just a false creation. He did not give the police the exact place he hired the vehicle, nor after arrest make an effort to contact this Botha because he says he thought that would be done by the police. It was his duty to contact this Botha and help police to locate him. The appellant dismally failed to give a reasonable explanation for his possession of a stolen vehicle.

[15] In ground 1 it is contended that the vehicle was temporarily imported into Zimbabwe using a TIP. The evidence shows that the TIP was obtained on the strength of a host of fake

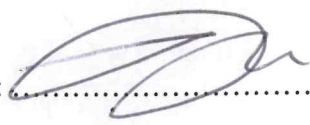
documents, this is so because the vehicle was not owned by CFAO automative, a non-existent company. Therefore, the ITP itself was a false document standing on a façade of false documents. The TIP was a nullity. The appellant was in possession of these fake documents. The trial court cannot be faulted in finding that the vehicle was not going to be returned to South Africa and to Hertz. In ground 2 it is contended that in the light of the case for the State, the appellant's version is reasonably possibly true. His principal defence is that he hired the vehicle from one Botha. This defence cannot withstand closer scrutiny, I say so because it is the appellant who knew this Botha, it is him who hired a vehicle from him, it is him who knew where to locate him, it was his duty to help the police locate him. It was disingenuous for him to say it was the duty of the police to locate this Botha. The appellant's version is not possibly true on the proven facts and the court *a quo* cannot be faulted for rejecting it as false. Ground 5 raises no cogent issue, I say so because the absence of a report or evidence from Gustav is inconsequential. It is of no moment. It was not Gustav who was on trial, but the appellant. The answer to ground 6 is that it was the appellant who was in possession of fake documents. Ground 7 and 8 raise no issues requiring serious determination, this is so because there is evidence, *albeit* circumstantial linking the appellant to the theft of the vehicle. No *onus* was placed on the appellant, he had a duty give information about the circumstances turning on his alleged hiring of the vehicle, he had to give correct information about this Botha *etc.* This is not casting the *onus* or burden of proof on the appellant, but that he discharges an evidential burden on him. It is important to distinguish *onus* or burden of proof from evidential burden. *Onus* or burden of proof refers to the obligation of a party to persuade the court at the end of the case of the truth of certain propositions. But evidential burden refers to a litigant's duty to produce sufficient evidence for a court to call on the other party to answer or the duty cast on a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. See Schwikkard P.J and Van Der Merwe S.E *Principles of Evidence* (Juta 2002 2nd Ed) 525. In the circumstances, it is incorrect to contend that the *onus* was placed on the appellant. It was not. The *onus* to prove the guilty of the appellant in terms of the requirements of the law was on the State, and it discharged it.

[16] In all circumstances, the evidence as a whole as recorded established the appellant's guilt beyond reasonable doubt. The appellant's version is improbable, not possibly true on the proven facts and falls to be rejected as false. The appellant was correctly convicted.

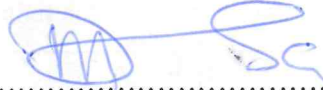
I therefore make the following order:

The appeal is dismissed.

DUBE BANDA J:

 28/10/2024

DUBE JP:



Agrees

Ndlovu Mehluli & Partners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners