IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: CA&R145/2015

In the matter between:

DUMISANI BOOI **Appellant**

And

THE STATE **Respondent**

JUDGMENT

BESHE J:

[1] The appellant and his two co-accused were convicted of theft of a motor vehicle by the Port Elizabeth Regional Court. He was sentenced to imprisonment for eight (8) years. He is now appealing against both the conviction and the sentence, leave to do so having been granted by this court on petition.

[2] The background facts that led to the appellant and his co-accused persons being charged with motor vehicle theft are briefly that: An Isuzu bakkie with registration number [B.....] was stolen in Algoa Park, Port Elizabeth on the 24 March 2012. **Warrant Officer Mdwayingana** who is attached to the Vehicle Identification Section of South African Police

Services and stationed in Queenstown followed up information he had received concerning the vehicle in question. This led him to a dirt road in the outskirts of Engcobo. As he was driving on this road with two colleagues, they came across the Isuzu bakkie in question driving in the opposite direction to theirs. **Mdwayingana** signalled for the Isuzu to stop. After it had stopped, he observed that there were three male persons inside the van whom he identified as the appellant and his co-accused. All three were then arrested for theft of a motor vehicle. **Mdwayingana** observed that accused number one who was driving the vehicle was using a key that belonged to a Toyota motor vehicle to drive the Isuzu van. He denied that appellant was arrested at a certain house and later taken to the Engcobo police station where he met his co-accused for the first time. **Mdwayingana's** evidence was confirmed by the two officers, who were in his company, officers **Pani** and **Masa**.

[3] Appellant, like his co-accused, denied that they were arrested under the circumstances as described by the three policemen. Accused numbers one and three maintained that they were hitchhiking from Mthatha to Port Elizabeth when they were arrested in connection with dagga they had in their possession.

[4] Appellant's version was that he travelled from Port Elizabeth to Engcobo in order for him to get a traditional herb that would cure his chest ailment. He got a lift from a truck that dropped him off in Queenstown. From Queenstown he got a lift from yet another truck which dropped him off at Engcobo. Once at Engcobo, he got into a certain house in order to buy cigarettes. Upon leaving this house, he observed a white sedan with three occupants. One of the occupants spoke to him – asked for his personal details and proceeded to question him about an Isuzu bakkie. He testified that he was taken to the Engcobo police station.

That is where he saw his co-accused persons for the first time. He denied having been one of the three men who were driving in the stolen van.

[5] The Magistrate in the court *a quo* made the following findings:
That the evidence of the three police witnesses was credible. She could not make the same finding about the versions proffered by the appellant and his co-accused persons who were all from Port Elizabeth, were all arrested in the outskirts of Engcobo on the same day albeit at different times according to them. According to accused numbers one and three, they were not arrested at the same time with the appellant. That even though they allege none of them were found inside the stolen van they were arrested in connection with the said van. She found appellant and his former co-accused's versions to be false and rejected them.

[6] The appeal against conviction is premised on the ground that the evidence against the appellant was of a circumstantial nature. Even if the court was correct in its finding that appellant was one of the three men who were driving in the stolen van that is not enough to conclude that the only inference to be drawn is that appellant stole the motor vehicle. It was submitted on behalf of the appellant that the court *a quo* erred in its assessment of the evidence and ultimately erred in finding that the guilt of the appellant had been proved beyond reasonable doubt.

[7] In ***S v Bailey***[1] the principle that the court of appeal is entitled to interfere with the trial court's evaluation of oral evidence or factual findings in exceptional circumstances, was restated. The point was made that for the appellant to succeed, the appeal court must be convinced that the trial court was wrong in accepting the evidence of the state witnesses and in rejecting that of the appellant.

[1] 2007 (2) SACR 1 (C) at paragraph 16.

[8] The learned Magistrate took cognisance of the trite principle that in criminal cases, the onus of proof is discharged by the state if the evidence established the guilt of the accused beyond reasonable doubt.[2] I do not understand the submission on behalf of the appellant that the evidence against him is of a circumstantial nature. The submission would have made sense if appellant had admitted that he was found inside the stolen motor vehicle. But that was not his version. This appears to be a belated concession on his behalf. Throughout the trial he was adamant that the police pounced upon him for no reason. He denied having been anywhere near the Isuzu bakkie in question.

[9] No reason was suggested why the evidence of the three police officials should not been accepted by the court *a quo*. I can find no fault with the Magistrate's finding that the evidence of the three officers is credible.

[10] The evidence of the three policemen establishes that the appellant and his co-accused persons were driving in a vehicle that was stolen two days prior to their arrest. The vehicle was stolen in Port Elizabeth. Appellant and his co-accused are from Port Elizabeth. Their respective versions are that they were not arrested at the same place and time. They also assert that when they were arrested the van in question was not at the scene(s) of their arrest. In my view, the Magistrate did not err by rejecting appellant's version. It is highly improbable that the police would pick on appellant for no reason and decide that he must have two companions or co-perpetrators and choose to ignore the dagga that his former co-acccused had in their possession and falsely implicate them of having driven in the stolen Isuzu bakkie.

[2] S v Van Der Meyden 1999 (1) SACR 447 (W).

[11] As regards the submission that even if the court was correct in finding that the appellant was found inside the stolen vehicle, that evidence does not exclude other reasonable inferences beside the inference that he was complicit in the theft of the motor vehicle in question, the following must be borne in mind:

It has not been suggested what other reasonable inferences can be drawn from the proven facts, apart from the appellant and his co-accused being bent on distancing themselves from the stolen vehicle in the face of strong incriminating evidence by the state witnesses that they were driving in the said vehicle.

The fact that a number of inferences can be drawn from the facts does not mean that in order to discharge the onus that rests upon it, the state must indulge in conjecture and find an answer to every possible inference. The court is also not called upon to seek speculative explanations for conduct which on the face of it is incriminating.[3]

[12] I am not persuaded that the Magistrate erred in finding that the guilt of the appellant had been proven beyond reasonable doubt.

[13] The appeal is also directed at the sentence of eight (8) years imprisonment that was imposed in the court *a quo*. The sentence is assailed on the basis that the Magistrate failed to properly consider the personal circumstances of the appellant and by so doing overemphasized the seriousness of the offence and the interest of justice.

[14] The discretion when it comes to the imposition of a sentence lies with the trial court. The court of appeal can only interfere if the trial court

[3] See Headnote – S v Reddy and Others 1996 (2) SACR 1 (A).

committed a misdirection or imposed a sentence that is so severe as to induce a sense of shock.

[15] In her detailed judgment on sentence, the Magistrate was alive to the need to strike a balance between the crime the accused had been convicted of, the interest of the society and the accused's personal circumstances. She also warned herself against over-emphasising one of the factors against the others. She was also mindful of the purposes that are meant to be served by a sentence.

[16] In my view, the Magistrate succeeded in carefully balancing the seriousness of the offence, the appellant's personal circumstances and the interest of the society. I can find no fault with the Magistrate's exercise of discretion in this regard. I am not persuaded that she misdirected herself in any way. There is no suggestion that the sentence imposed is so severe to induce a sense of shock. The appeal against sentence cannot succeed.

[17] In the result I propose the following order:
The appeal against both conviction and sentence is dismissed.

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NG BESHE
JUDGE OF THE HIGH COURT

ROBERSON J

I agree, it is so ordered.

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JM ROBERSON
JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard	:	18 November 2015

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