REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PD 61

Case Title: *The State v Barackias Gebhard*	**Case No:** CR 92/2022
	Division of Court: High Court Main Division
Heard before: Honourable Justice Liebenberg Honourable Justice Claasen	**Delivered on:** 01 September 2022
Neutral citation: *S v Gebhard* (CR 92/2022) [2022] NAHCMD 453 (1 September 2022)	

Order:

1. The conviction and sentence is set aside.
2. The conviction is substituted with theft of a motor vehicle, read with the provisions of sections 2, 3, 4, 13(1), 13(2), 14, 15, 20(1), 20(2), 21, 22 and 23 of the Motor Vehicle Theft Act 12 of 1999 as amended.
3. The matter is remitted to the trial court with the direction to invoke section 116 of the Criminal Procedure Act 51 of 1977 and commit the accused for sentence by a regional court having jurisdiction.
4. In the event that the court fine has since been paid, it should be refunded.
5. The regional court magistrate is directed to take into consideration the period of imprisonment already served, when sentencing the accused.

CLAASEN, J (LIEBENBERG J concurring)

[1] This is a review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused was charged in the Magistrate's Court in the district of Gobabis, with the offence of theft of a motor vehicle read with the provisions of sections 2, 3, 4, 13(1), 13(2), 14, 15, 20(1), 20(2), 21, 22 and 23 of the Motor Vehicle Theft Act 12 of 1999, as amended (the Act) in that upon or about the 10th day of October 2020 and at or near Tswana Block Epako in the district of Gobabis, the accused did wrongfully, unlawfully and intentionally steal a motor vehicle, to wit Toyota Corolla, registration number N4398GO and with Engine number 3ZZ1142027 and Chassis number JTDBZ22E90017592, the property of or in lawful possession and control of Gustav Hoveka.

[3] After evidence was heard the court convicted the accused on the competent verdict of the unlawful use of property in contravention of s 8(1) of the General Law Amendment Ordinance 12 of 1956. He was sentenced to pay a fine of N$15 000 or 3 years' imprisonment.

[4] The review court queried the presiding magistrate about the propriety of finalising the matter in the district court. In his reply the magistrate conceded that he had no jurisdiction to do so. He reminded the review court that the accused was not convicted as charged, but on a competent verdict. He requested this court to endorse the conviction and sentence if it is in order, alternatively to set it aside and for the matter to commence *de novo*.

[5] We proceed to consider whether the conviction is in accordance with justice. Most of the evidence is common cause between the parties. On a given night the complainant, Mr Hoveka left his vehicle, a Toyota Corolla, at the rental place of a friend, Mr Paulus. The accused and Mr Paulus reside at the same place. The accused came home and decided to use the vehicle to collect his jersey from a bar in a different location. During the excursion,

the accused bumped the car where after he deserted the vehicle and went to sleep.

[6] The next morning, Mr Hoveka received a telephone call from a certain Nancy about a bumped vehicle in the vicinity of the cemetery that resembles his Toyota Corolla. He went to investigate where he left the vehicle. The vehicle was not there. His friend, Mr Paulus was equally surprised that the vehicle was there. By then, a Police Inspector also telephoned the complainant and repeated the information about the vehicle at the cemetery.

[7] Upon arrival at the scene, Mr Hoveka saw that indeed it was his vehicle. Inside the vehicle he found his identity document as well as a navy blue jacket. The jacket was unknown to him. The landlord of the premises where the accused and Mr Paulus resided recognised it as a piece of clothing that belongs to the accused. Mr Paulus also recognised same. The accused was collected from home and brought to the scene. The police interrogated the accused but he denied knowing anything about it. However, the police noticed that the accused had a knock on the head and glass pieces in his pockets. They continued their questioning and eventually the accused admitted to have driven the vehicle.

[8] During the evidence of the accused, it was clear that he drove the said vehicle and did not have the owner's permission to use the vehicle. He testified that his sole purpose was to collect his jersey. The court a quo found that the accused did not have the intention to permanently deprive the owner of the use of the vehicle and therefore the State failed to prove theft.

[9] It is evident that the only issue in dispute turns on the intent to permanently deprive the owner of the stolen thing. This matter involves what has become known as the so-called 'reckless abandonment' category of theft cases. Snyman in Criminal Law[1] discusses this type of case and explained that if X uses another's property temporarily and thereafter abandons it, without caring whether the owner will ever get it back, he runs the risk of being convicted of theft. He commits theft if the inference can be drawn that he had foreseen the

[1] Snyman, *Criminal Law*, 5th edition (2008) Lexis Nexis at p 502.

possibility that Y will never get it back and if he had reconciled himself to this possibility. X will then be held to have had the intention to permanently deprive in the form of *dolus eventualis*. Snyman *inter alia* referred to the facts in *La Forte* 1922 CPD 487 where X removed Y's car from his garage without his permission. He went for a drive in the car intending to return it, but on his journey collided with a lamppost. Without notifying anyone, and regardless of whether or not the car was returned to the owner, X abandoned the vehicle at the scene of the accident and he was convicted of theft. These facts are on par with those in the matter before us.

[10] As regards the intention to terminate the owner's enjoyment of his rights to the property, in *R v Sibiya*[2] it was stated that:

'For these reasons I have come to the conclusion that the law requires for the crime of theft, not only that the thing should have been taken without belief that the owner (where it is the owner whose rights have been invaded) had consented or would have consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership. The intention may be inferred from evidence of various kinds and in particular from abandonment of the thing in circumstances showing recklessness as to what becomes of it.'

[11] In returning to the matter before us, the accused claims that his intention was to use the vehicle and then return it. However, that explanation has a hollow ring to it if we consider the evidence prior to him being exposed by the police. Clearly the accused unlawfully drove the vehicle and bumped it. In those circumstances he had a duty to inform the owner of the vehicle what happened. Despite numerous opportunities, he did not do so. Mr Paulus testified that the accused slept in the same room with him, after having removed and bumped the vehicle, but did not disclose that to him. Early that morning, the vehicle's owner searched for the vehicle where he left it. The accused, who had the explanation for the disappearance of the vehicle, failed to inform the owner. Once at the scene, the owner was there. Again, the
accused could have divested himself from a dishonest motive, but did not do so. It was as a result of the accused's landlord and Mr Paulus recognising a piece of clothing that the

[2] *R v Sibiya* 1955(4) SA 247 (A) at 257 B-D.

accused was linked to the wrecked vehicle. When all's said and done, he failed to inform the owner about the removal and the subsequent accident, nor did he care about what happened to the vehicle thereafter. Although the accused initially may have intended to merely use the vehicle, his reckless abandonment thereof translates to theft. In the headnote of *S v Mmolawa*[3] it was stated that whenever the main charge has been proven it is compulsory to convict thereon. The court cannot at its option bring in a lesser verdict. Thus, with respect, we find that the court a quo has misdirected itself when convicting on a competent verdict. In addition we find that the evidence herein is sufficient to convict the accused as charged, i.e. theft of a motor vehicle read with the provisions of the Motor Vehicle Theft Act 12 of 1999, as amended.

[12] As regards an appropriate sentence, it is better to remit the matter for submissions or evidence on sentencing afresh, as the accused is now convicted of a more serious offence.

[13] In the result the following order is made:

1. The conviction and sentence is set aside.
2. The conviction is substituted with theft of a motor vehicle, read with the provisions of sections 2, 3, 4, 13(1), 13(2), 14, 15, 20(1), 20(2), 21, 22 and 23 of the Motor Vehicle Theft Act 12 of 1999 as amended.
3. The matter is remitted to the trial court with the direction to invoke section 116 of the Criminal Procedure Act 51 of 1977 and commit the accused for sentence by a regional court having jurisdiction.
4. In the event that the court fine has since been paid, it should be refunded.
5. The regional court magistrate is directed to take into consideration the period of imprisonment already served, when sentencing the accused.

[3] *S v Mmolamwa* 1979 (2)SA 644(B).

C CLAASEN JUDGE	J C LIEBENBERG JUDGE