CASE NO: SA 05/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

KENNETH SIYAMBANGO **APPELLANT**

AND

THE STATE **RESPONDENT**

CORAM: Strydom, CJ., O'Linn A.J.A, et Chomba A.J.A.
HEARD ON: 1/10/2002
DELIVERED ON: 13/02/2003

APPEAL JUDGMENT

CHOMBA, A.J.A.

This is a second appeal by Kenneth Siyambango (the appellant) against his conviction on two counts of theft and a total sentence of 8 years imprisonment with two years of that sentence having been suspended. He was convicted and sentenced in the Regional Court for the Windhoek District. He then unsuccessfully appealed in the High Court (Maritz and Shivute, J.J.) He now appears before this court with leave.

The convictions were based on counts charging theft of a motor vehicle, namely a Toyota Hilux 4 x 4 , 2.4L pickup, registration number N115-483W, and an ignition key for the same vehicle, both being the property of the Legal Assistance Centre (LAC). In the court of first instance the appellant was jointly charged with one Bernard Kamwandi

(the co-accused). Both of them were convicted as charged and were sentenced as already stated. The co-accused has not appealed.

For the purpose of the present judgment, I find it unnecessary to recapitulate in detail all the evidence as given by the prosecution witnesses as well as by the appellant and his co-accused. It will suffice to summarise only the salient aspects of the said evidence.

The prosecution evidence was given by Linus Neliwa, a Police Constable in the Namibian Police Force stationed at Otjiwarongo, Norman Tjombe, a legal practitioner working for the said LAC and at the material time a co-worker with the appellant. There was then Joseph Kaulika, an Office Assistant at LAC followed by Patricia Claassen, another worker at the same Centre, but whose actual position there was not specified. The last prosecution witness was Thomas Nekete, a Security Guard deployed at the LAC, but employed by Security Force Services.

Both the appellant and his co-accused gave evidence on oath in their defence.

The prosecution case was that in the late afternoon of February 2, 1999, Thomas Nekete was performing guard duties at the LAC. While in the course of duty he saw the appellant drive into the LAC premises in a Jetta VW car. He had a passenger whom Nekete subsequently came to know as the appellant's co-accused. The duo entered the LAC building and remained there for about an hour. This incidentally was after working hours. Subsequently when the appellant emerged from the building he entered the Jetta VW car and drove out of the LAC premises but parked closeby. The appellant re-entered the building and shortly thereafter an alarm system installed in the building

triggered off. The appellant re-appeared to Nekete and invited the latter to go inside the building with the appellant to check whether there was an open window or something else inside which had triggered the alarm system. Nekete declined to go in and while he was outside the building by the gate, which was then ajar, he saw the appellant's co-accused driving the said Toyota Hilux, the subject of the motor vehicle theft charge out of the LAC premises. Being a new person at the LAC who did not know all the LAC employees, Nekete assumed that the appellant's co-accused was one such employee. It was for that reason that Nekete did not raise any alarm when the co-accused drove off.

Norman Tjombe testified that prior to the 2nd of February 1999, the original ignition key of the subject Toyota Hilux was stolen. He consequently feared that whoever had stolen the key might be planning to steal the Toyota Hilux as well. Therefore when he knocked off work on the 2nd of February 1999 Norman Tjombe drove that vehicle to his residence for safekeeping. Then he went out visiting. On his return he learned that the appellant had phoned a couple of times or so and had asked to speak to him Tjombe. Tjombe returned the call and when connected to the appellant the appellant asked Tjombe to let the appellant have the use of the said Toyota Hilux that evening. Tjombe got the impression that the appellant was at LAC offices at the time of the conversation between them. Tjombe was not in a position to drive the Toyota Hilux to the LAC premises immediately because he first watched the 8.00 pm TV News.

When he eventually drove to the LAC offices Tjombe did not find the appellant there. He nevertheless parked the said vehicle in the LAC parking area while he left its ignition key in a drawer in the reception area in the same building. At that time Patricia Claassen was working

late at LAC and Tjombe saw her. Before leaving Tjombe told both the security guard Nekete and Ms. Claassen that only the appellant, Kenneth Siyambongo must be allowed to take the Toyota Hilux.

Later, around 11.00 pm that very evening, Tjombe returned to LAC to do some work. He met with the appellant there but shortly after that the appellant drove off in the Jetta VW car. Soon afterwards Tjombe noticed that the Toyota Hilux was not where he had parked it. He got worried thinking that his fear that the vehicle may be stolen was vindicated. He then phoned the appellant on the latter's cell phone and asked him if he had used the Toyota Hilux that evening. The appellant replied in the negative. The appellant drove back to the offices where Tjombe instructed him to go and position himself at the Okahandja turn off between Katutura township and the City of Windhoek in order to watch out should the assumed thief drive along that way.

Meanwhile Tjombe linked up with Joseph Kaulika and while driving in the former's car the two headed for Otjiwarongo on the assumption that the vehicle thief had taken that route. That gamble paid off because as they approached Otjiwarongo they spotted the vehicle they were looking for with a police vehicle hot on its heels. When Tjombe and Kaulika eventually caught up with the vehicle it had been stopped by constable Linus Neliwa. Its driver turned out to be the appellant's co-accused. When asked at that point where he had got the vehicle from the co-accused was not forthcoming.

Later the co-accused was taken to Otjiwarongo Police Station and while there he was asked again where he got the stolen vehicle from. The co-accused was reported to have stated that he got it from an Angolan man with instructions to take it to Tsumeb. At one point when the co-

accused was at Otjiwarongo Police Station, Joseph Kaulika found and took from the stolen vehicle a cell phone. Later that cell phone rang. Kaulika answered the phone and the following short conversation took place between the caller and Joseph Kaulika according to the evidence of Joseph Kaulika :

Joseph : "Hallo"
Caller : "Who is this?"
Joseph : "its' me Joseph. We found the bakkie, we are at Otjiwarongo
Police Station".
Caller : "Oh, you found it?", then he immediately dropped the phone.

Joseph Kaulika was adamant both in chief and under cross-examination that he recognized the voice of the caller as that of the appellant. He was one hundred percent sue, he testified under cross-examination. This was because he had talked to the appellant several times before during their common employment at the LAC.

Apart from what has been reproduced hereinbefore, another highlight of the evidence of Thomas Nekete, the security guard, was that at about 5.00 o'clock am on 3rd February, 1999 while he was still on duty at the LAC, the appellant returned to the LAC offices. He asked Nekete whether he had seen Norman Tjombe. In reply Nekete stated that Tjombe had gone in search of the vehicle which the person who had been in the appellant's company earlier on that evening, meaning the appellant's co-accused, had driven away. The appellant replied that his companion could not have driven the stolen motor vehicle away because the appellant had driven away with his companion in the Jetta VW car. Reacting to Nekete's insistence in implicating the appellant's

co-accused, the appellant then said that he, the appellant, was mistaken because his companion had left the LAC offices a good while earlier while the appellant was still working.

In essence the evidence of the appellant's co-accused was that in the morning of 2nd February 1999 he spoke with the appellant on the phone and told the appellant that he, the co-accused, wished to collect a bed and other things from Otjiwarongo. However, he had a problem in that he did not have an appropriate transport in which to fetch those things. The appellant replied that he would assist. To that end the appellant added that he and the co-accused could travel to Otjiwarongo after 4.00 o'clock pm when the appellant would knock off work. Later that afternoon the two met at Windhoek Police Station and from there they drove in the appellant's car to the LAC offices. At the last mentioned place they found that the vehicle which they were to have used for the purpose of travelling to Otjiwarongo as previously arranged was not there.

The appellant and his co-accused entered the office building and while there the appellant phoned the person supposed to have the vehicle concerned. That person was not at home and therefore the appellant having left the message for him, the appellant and the co-accused drove to Katutura township. Later that evening these two drove back to LAC offices and this time found that the vehicle to be used for the Otjiwarongo trip was at the offices. The appellant got the vehicle's ignition key which he handed to the co-accused. The appellant then impressed upon the co-accused that the latter must bring back the vehicle before 7.00 o'clock a.m. the following morning. The appellant showed the co-accused how to operate the alarm system inside the vehicle. The appellant then told the co-accused that he could not

accompany the co-accused to Otjiwarongo because he wished to go and see a sister of his within Windhoek.

It was after the foregoing arrangement that the co-accused drove the subject vehicle away from the LAC premises heading for Otjiwarongo. The co-accused did not dispute the evidence of the prosecution witnesses as to his eventual apprehension in Otjiwarongo. It is significant to record that the co-accused stated under cross examination that as he drove out of the LAC premises he saw the security guard who was then by the gate. The co-accused even waived to the security guard.

The appellant's testimony was essentially one of denying being concerned in the removal of the subject vehicle from the LAC offices on the material date. He testified that on that day in the afternoon he had a chancy meeting with the co-accused who was an old friend. The meeting by the two persons occurred at Windhoek Police Station. The appellant gave the co-accused a lift in the appellant's vehicle. They first drove back to the LAC offices. The appellant stated that he had himself some furniture which he wanted to move and to that effect he tried to request Norman Tjombe by phone to make the subject vehicle available by bringing it to the LAC offices. Unfortunately Tjombe was not at home and so the appellant left a message for him to return the call.

When eventually that evening Tjombe returned the call, the appellant told him that it was then too late in evening for him to move the furniture and he would therefore not require the vehicle, but would do so the following day. However Tjombe said that he had already left the vehicle at the LAC offices. The appellant conceded that later that evening he did drive to the LAC offices in the company of the co-

accused, but he said that the purpose of so doing was to go and do some work at the offices. He denied that he was the one who gave the co-accused the subject vehicle, let alone the key thereof. He suggested that the co-accused could have furtively taken the ignition key from the reception area inside the LAC offices since the said reception area was easily accessible to anyone.

Suffice it to state that the trial magistrate accepted the prosecution case while rejecting that of the defence. As regards the appellant, he found that the evidence against him was circumstantial. He found that evidence to have inferentially pointed overwhelmingly to the appellant as being a co-perpetrator of the two crimes charged. The magistrate summarily dismissed the co-accused's version implicating the appellant. He gave one reason for doing so. This was that the co-accused's evidence lacked credibility because when first stopped by the police on the Otjiwarongo road the co-accused had failed to explain how he had come into the possession of the subject vehicle. On the other hand at the Otjiwarongo Police Station he made a statement in which he stated that he had been given the subject vehicle by an Angolan man. The magistrate observed that by his testimony in court the co-accused had shifted ground and therefore that his evidence could not be taken seriously.

It is an entrenched principle of evidence that an appellate court must be slow in interfering with a trial judge's findings of fact and those findings relating to the credibility of witnesses. This is because the trial judge has the advantage of having seen and heard the witnesses, which advantage is not enjoyed by appellate judges. However in the cause celebre of Watt, also known as Thomas vs Thomas (1947) AC. 484, Lord Thankerton had this to say in regard to the only occasion

when an appellate court may feel justified to interfere with findings of fact by the trial court. (see at page 487) ;

> “Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge’s conclusion;
>
> The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
> The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court”.

In the current case the trial magistrate came to the conclusion that the appellant’s co-accused was not to be believed because of what he had done or said prior to the occasion when he gave his sworn testimony at the trial. The conclusion was a finding of fact with which ordinarily this appellate court should not lightly differ.

However, as Lord Thankerton states in Thomas, Supra, if this court considers that the reasons given by the trial judge for coming to the finding of a fact is unsatisfactory, or that it unmistakably appears from

the evidence that he has not taken proper advantage of his having seen and heard the witnesses, the matter will then become at large for the appellate court.

In *casu*, the appellant's co-accused incriminated the appellant in his testimony. However that incriminating evidence was caught by the principle of practice which states that it is dangerous to convict a person solely on the strength of the uncorroborated evidence of an accomplice. Therefore a trial judge should be alive to that danger and in jury cases the judge is under a duty to warn the jury of such danger, while at the same time telling them that it is competent to convict on such evidence provided that the jury is satisfied that the evidence is credible.

It was reasonable for the trial magistrate to doubt the evidence of the co-accused incriminating the appellant if it was uncorroborated. But in my considered opinion the co-accused's evidence was discounted on an improper ground. Had the trial magistrate looked for corroborating evidence, he might have found that such evidence was in fact available.

In the light of the evidence which has been reviewed in the preceding paragraph of this judgment it cannot be gainsaid that the appellant was at locus in quo at the time the theft charged occurred. That evidence was given by the co-accused and corroborated by that of the security guard Thomas Nekete. There was then the evidence of Joseph Kaulika regarding the phone call received on the co-accused's telephone at Otjiwarongo. I have already reproduced it hereinbefore. Despite the appellant's protestation, that evidence was found credible by the trial court and by the court a quo. We equally attach credence to it in as far as it implicates the appellant. Not only did Joseph

Kaulika recognize the caller's voice as that of the appellant, but he explained that he was able to do so because in the course of their joint employment with the LAC Joseph Kaulika had spoken to the appellant on the phone on several occasions. Moreover the nature of the conversation itself between the caller and the receiver showed that the caller knew Joseph Kaulika, knew about the disappearance of the vehicle and also that some persons had gone in hot pursuit of that vehicle. In the circumstances obtaining at the time of the phone call the only person who fitted into the caller's description was the appellant. To this end Joseph Kaulika's evidence on this point was also corroborative of the co-accused's story.

Another piece of evidence which is of interest in this regard is that in relation to the conversation which the security guard Nekete narrated as having taken place between him and the appellant at 5.00 o'clock am at LAC offices on the morning of 3rd February 1999. That conversation was provoked by Nekete's mention that the subject vehicle was driven away by the person with whom the appellant was accompanied when he got to the LAC offices the previous evening. It is common cause that the appellant's companion that evening was the co-accused. At first the appellant lied by saying that his companion had left with him by Jetta VW car, but in the face of the unwavering and insistent statement of Nekete that it was the appellant's co-accused who took and drove away the subject vehicle, the appellant retracted his claim that his co-accused had in fact left the LAC offices at the same time as him. Nekete's evidence on this point was, in my opinion, equally corroborative of the co-accused's evidence. This is because it implied guilty knowledge on the appellant's part.

Flowing from the foregoing, it is my considered view in keeping with Lord Thankerton's dictum in the Thomas case earlier referred to, that

the trial magistrate did not take proper advantage of his having seen and heard the witnesses especially those who gave evidence which was supportive and corroborative of the co-accused. In this connection I would hold that the trial magistrate misdirected himself and therefore I find justification in departing from his finding of fact to the extent that he disbelieved the co-accused.

The co-accused's evidence was further that the plan between him and the appellant was merely for him to use the Toyota Hilux for the purpose of enabling him to travel to Otjiwarongo to fetch his bed and other things and then drive back to Windhoek. He had to return the vehicle to its owner before 7.00 o'clock a.m. the following day. That evidence appears to be true since the co-accused was apprehended as he was on the approach to Otjiwarongo.

The offence of theft implies that the thief must have taken the thing stolen with an *animus furandi*, that is to say an intent to permanently deprive the owner of the thing stolen. It was incumbent in this case that the prosecution should prove that intent beyond reasonable doubt. In my judgment the prosecution neither directly nor circumstantially succeeded in proving that intent. In the event I am left with no choice except to either believe the co-accused's story or give him the benefit of doubt. I give him the latter.

The evidence of the co-accused can be reasonably possibly true in this regard. His evidence can consequently not be rejected as false. Although the appellant's denial of any complicity must be rejected as false, his conviction of theft cannot stand in the light of the evidence of his co-accused and the surrounding circumstances which are common cause. The appellant as well as his co-accused however, knew at all times that the owner of the vehicle had not consented to the particular

use of its vehicle by either the co-accused or the appellant and would not have consented thereto if he had known about it. The co-accused and the appellant as co-perpetrator had therefore contravened sec.8 of Ord. 12 of 1956 in that they unlawfully appropriated the use of the vehicle in question without the permission of the owner thereof and without grounds for believing that the owner, or person in control thereof, would have consented to such use if he had known about it.

The above conviction is a competent verdict on a charge of theft. See sec.264(1)(d) of Act 51 of 1977.

On the foregoing premise I would, and do, hold that the appellant, having been a co-perpetrator of the offence committed in relation to both the subject vehicle and its ignition key, was, and stands, guilty of the offence of taking and driving away the subject vehicle without the consent of the owner thereof, such taking and driving away not amounting to theft. I would convict him accordingly on both counts.

In the light of the outcome of the appeal against conviction I consider that this court should equally interfere with the sentences by way of reducing them.

I would in the circumstances make the following orders:

1. The appeal against conviction succeeds on both counts.
2. The conviction of theft on the two counts is consequently quashed.
3. A conviction of contravening sec. 8(1) of Ord. 12 of 1956 is substituted on both counts.
4. The offences are taken together for the purpose of sentence and the following sentence is imposed:

(i) N$5000 fine, in default 2 years imprisonment;

(ii) In addition: 1 year imprisonment suspended for 3 years on condition that the appellant is not again convicted of a contravention of sec. 8(1) of Ord. 12 of 1956 committed during the period of suspension.

CHOMBA, A.J.A.

I agree

STRYDOM, C.J.

I agree

O’LINN A.J.A.

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