

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO: CA 58/2017

In the matter between:

SIMSON ANGHUWO

APPELLANT

v

**THE
RESPONDENT**

STATE

Neutral citation: *Anghuwo v S* (CA 58/2017) [2018] NAHCMD 323 (16 October 2018)

Coram: LIEBENBERG J et SIBOLEKA J

Heard on: 14 September 2018

Delivered on: 16 October 2018

Flynote: Criminal law: Theft from a motor vehicle – Common purpose – appellant acting in common purpose with co-accused, in distracting complainant – Co-accused simultaneously removing property from complainant's vehicle, through open window. Appellant seen walking away from vehicle together with co-accused, getting on same taxi – leaving the scene of crime. – Appellant identified and

confirmed that he was with co- accused at the time of commission of the offence – Co-accused also identified as person who removed the cellphones – The appeal against conviction and sentence dismissed.

Summary: The appellant and his co-accused came and walked around the complainant's car while he stood behind it. The doors were closed but not locked and windows were a bit open. The appellant was asking for time. Although he told him and showed him the watch, he still wanted to see it twice or more, a clear tactic of keeping him busy enabling his co-accused to remove the cellphones from the front of complainant's vehicle. The appellant and his co-accused were credibly identified. Appeal dismissed.

ORDER

In the result we make the following order:

The appeal against conviction and sentence is dismissed

APPEAL JUDGMENT

SIBOLEKA J (LIEBENBERG J concurring):

[1] The appellant, who was unrepresented in the Court *a quo*, was convicted by the Grootfontein Magistrate's Court on a charge of theft from a motor vehicle of two mobile phones, valued at N\$16 000. He was sentenced to 36 months' imprisonment. He is now appealing against both conviction and sentence.

[2] On the date of the appeal hearing, the appellant, through his legal representative conceded that the only possible ground of appeal is that the appellant was not identified as the person who took the complainant's property, the mobile phones, from the vehicle. The remaining assertions do not constitute proper ground of appeal.

[3] The complainant testified that he parked his vehicle and got out, only closing but not locking the doors. The windows were also a bit open. He went to the back of the vehicle to check on the map and while there, the appellant and his co-accused came and walked around his vehicle. The appellant approached him asking for time. He told him and showed him the watch but he nevertheless wanted to see the watch twice or more because he could not see it clearly. At the time of the incident it was only the appellant and his co-accused who were at the complainant's vehicle. When the complainant returned to the front of the vehicle he realized that the driver's side door was not closed anymore and the cellphones were missing. The charger cables were at the floor of the driver's feet. An eyewitness told the complainant that he saw something around the corner. This man accompanied the complainant to the police station where the matter was reported and the case opened.

[4] About one hour and thirty minutes later the police returned to the station with the appellant and his co-accused. They asked the complainant whether he knew them. He recognized them as the only persons who were near his vehicle.

[5] During cross-examination the appellant confirmed the evidence of the complainant that he asked for time. According to the complainant, the appellant and his co-accused were together at the vehicle. He saw them getting into the same taxi leaving the scene. During cross-examination the complainant testified that while the two were walking away leaving the scene the appellant was looking back to see what the complainant was doing at his vehicle.

[6] Jonas Kandenge testified that he already knew the appellant by seeing him around in town. He was sitting on the benches between Nedbank and Meteor Hotel when a Landcruiser stopped and parked at Meteor Hotel. There were two people sitting in front of the bakkie. The one went towards Spar shop and the complainant got out and went behind the bakkie. While the complainant was standing there, rearranging his things, the appellant and another man this witness could not recognize, came to the complainant's vehicle. The appellant walked to the back of the vehicle and started talking to the complainant. This witness could see from their gestures that the complainant was showing his watch to the appellant and the latter was looking thereon. At the same time the other man came to the front of the

complainant's vehicle. He put his hand through the window which was not fully closed and took out something. Kandenge was however unable to identify the object but he could see that he had something in his hands. Hereafter the appellant walked to the other man and they both boarded a taxi and left the scene. According to Kandenge it was only the appellant and the other man who were at the complainant's vehicle at the time of the incident. When the complainant and his friend enquired from him whether he saw the appellant take something out of his vehicle, he told them he did. He rendered help to the complainant to have the matter reported to the police. During cross-examination Kandenge told the court that he was less than fifty meters away from the complainant's vehicle.

[7] Malakia Katanga, a police officer at Grootfontein testified that when he reported on duty at 14h00 on Sunday 8 January 2017 he found a report of theft from a motor vehicle. The complainant and Kandenge were at the police station. Kandenge told the officer it was the appellant and another tall, dark in completion man who were at the complainant's vehicle. Kandenge told the whole story to the police officer. They went to the Single Quarters and found them sitting there. The officer explained to the appellant that he was looking for him in connection with a case of theft from a motor vehicle. His legal rights were appropriately explained to him. The appellant then proceeded to point out his co-accused, telling the officer that he was together with him in town. The officer further started explaining legal rights in the same way to the appellant's co-accused. At the time the appellant pointed out his co-accused as the person who was with him in town the latter did not dispute it. According to the officer the description Kandenge gave him regarding the person who was with the appellant at the complainant's vehicle matched well with the co-accused. According to the officer this match was in addition to the appellant pointing out his co-accused to him saying they were together in town. During cross-examination the appellant did not deny that he was at the back of the complainant's vehicle asking for time. The appellant elected not to testify and to remain silent. He also did not call any witnesses in support of his case.

[8] Petrus Kandara was the appellant's co-accused in the trial court. He testified that on the Sunday that he was arrested he came from the North. He found the appellant and his other friends at the Single Quarters and they started having drinks.

The police came and took him to the police station where he was arrested together with the appellant.

[9] From the facts of the matter it is credibly clear that the appellant and his co-accused acted in common purpose to steal the complainant's cellphone and I-phone. This conduct is displayed by their simultaneous actions ie, when the appellant was asking for time and requesting to be shown the watch twice and more his co-accused was busy removing the properties from the vehicle. After their task has been accomplished, they walked away, the appellant looking back at the complainant to see what he was doing at his vehicle. The two boarded one taxi and left the scene of crime. According to the trial Magistrate the appellant was aware of the fact that while he was busy distracting the complainant's attention, his co-accused would be able to quickly remove the property from the vehicle. We came to the conclusion that the conviction is in order. The appellant's intention to deprive the complainant permanently of his property is clearly apparent in the *modus operandi* they used to execute their plan.

[10] In the matter of *S v Thomas & Others*¹ the court held:

'Further, there is authority that hold that the doctrine of common purpose may be applied where a group of persons pursuant to an agreement, join together to attain a certain goal by some unlawful means, and such agreement need to be express. An agreement may be implied from conduct or words: Synman criminal Law 2nd Ed at 255 onwards'.

[11] In *R v Blom*² 1939 AD 188 at 202-203 the court discussed 'two cardinal rules of logic' which should not be ignored when reasoning by inference:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) 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.

¹ 2007 (1) NR 365 (HC) para 44.

² 1939 AD 188 AT 202- 203.

[12] The proved facts are that appellant and his co-accused were seen as the only person approaching the complainant's vehicle. Each executed his part aimed at removing the cellphone and I-phone from the front of the bakkie. Thereafter they walked away, boarding a taxi to leave the scene.

[13] The appellant's argument that he was not identified as the person who took the property from the vehicle and therefore he is not guilty of the offence does not have merit.

[14] It is clear from the proved facts that the only reasonable inference to be drawn is that the appellant and his co-accused were working together towards a common goal, that is, to deprive the complainant of his property permanently which they did.

[15] In light of the above, the learned magistrate did not commit a misdirection in convicting the appellant and his co-accused. There is therefore no reason for this court to interfere with the conviction.

[16] Although the appellant has indicated that he is also appealing against sentence, he did not relate to it in his Heads of Arguments. This being the case it will suffice to mention that the sentencing discretion is solely the prerogative of the trial court. This court will only interfere if it is shown that a misdirection has been committed during sentencing or the sentencing discretion has not been judiciously exercised. However, nothing of this nature has been placed before us. This court is as a result therefore not entitled to interfere with the sentence of the trial court on this matter.

[17] The following order is made:

The appeal against conviction and sentence is dismissed.

A. M. SIBOLEKA
Judge

J. C. LIEBENBERG
Judge

APPEARANCES:

FOR THE APPELLANT: Mr. M. Siyomunji.
Directorate of Legal Aid, Windhoek

FOR THE RESPONDENT: Ms S. L.Jacobs
Office of the Prosecutor-General, Windhoek