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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES

**Case number: A795/2016
1/8/2018**

In the matter between:

JIMMY MATLHAKE

And

THE STATE

JUDGMENT

KUBUSHI, J

[1] The appellant was convicted on one count of theft of a motor vehicle in the regional court of Gauteng held in Pretoria. He was sentenced to a period of five years imprisonment. The appellant was accused 1 at the trial and accused 2 was found not guilty and discharged.

[2] The appellant applied and was granted leave to appeal the conviction by the trial court. He is thus before us appealing the conviction only.

[3] The evidence of the complainant, Y B, before the trial court, which appeared not to be in dispute, is that she was the owner of a Honda 130 ballade

1985 model with registration number [...] (" the Honda"). On 16 October 2012 she went to a friend's house at Premier Street , Waterkloof in Pretoria. She parked the motor vehicle on the side walk and entered the premises. The doors of the motor vehicle were locked and she had the key with her, the windows were closed and the gear was locked at reverse mode. She was later informed that her motor vehicle has been stolen. She went outside to look and indeed found the motor vehicle not where she had left it. She reported the motor vehicle to the police and to her insurers. About four to five days later she was called to the police station to identify the motor vehicle which had been recovered by the police. She was able to identify the motor vehicle by its registration number, the seat covers and particular scratches on its body. She found that the radio had been removed, the front console broken, the speakers taken out, the ignition was damaged and the gear lock was pushed forward and still locked. There was a rope attached to the back bumper of the motor vehicle.

[4] There were no eye witnesses to the theft of the motor vehicle. The appellant together with accused 2 were linked to the commission of the offence by the evidence of Sergeant Solly Padiyachi (" Sgt Padiyachi") and Warrant Officer Hendrik Johannes Lourens ("W/O Lourens "). Their evidence is alleged to have placed the appellant in recent possession of the stolen motor vehicle. The motor vehicle was stolen at approximately at 9h00 and was recovered at around 21h00 of the same day.

[5] The evidence of Sgt Padiyachi was that on the day in question he arrested the appellant and accused 2. He was in the company of W/O Lourens who was a passenger in the motor vehicle. Both of them were in full police uniform and were driving in a marked police motor vehicle. They received information that a stolen motor vehicle, a beige Honda Ballade with registration number [...] (" the Honda"), was on its way to Mamelodi East. At the time of receiving that information they were in the area of Mamelodi. They proceeded to the area where the motor vehicle was spotted. Whilst so driving, they came across the Honda which was stationary but the engine was running. There were two occupants in the said motor vehicle busy talking to each other. He stopped the police motor vehicle right in front of the Honda and immediately approached it. Sgt Padayachi approached the passenger side of the Honda and W/O Lourens approached the

driver's side.

[6] The two occupants were ordered out of the Honda. Sgt Padiyachi identified the two occupants of the Honda as the two accused, that is, the appellant and accused 2, before the trial court . W/O Lourens tested the Honda by radio control and it came positive stolen in Brooklyn . W/O Lourens then searched the motor vehicle and the two accused were handcuffed and taken to the Mamelodi Police Station. The appellant was behind the steering wheel of the Honda at the time the police confronted them.

[7] The evidence of the appellant and his co-accused was that they were not arrested anywhere near the Honda but were arrested whilst in a green BMW and taken to the Honda which was parked in another street. Apparently the appellant was on his way to the shop to buy bread and he came across accused 2 driving a green BMW. He asked accused 2 for a lift as he was driving in the direction of the shop . The police stopped them and ordered them to alight from the motor vehicle with their hands raised. The police asked them about the Honda. They did not know anything about the Honda. They were placed in the boot of the BMW and driven off. The drive took about 2 to 3 minutes and the motor vehicle stopped . The appellant was removed from the boot of the BM W, un-cuffed and ordered to drive the Honda. According to the appellant he could not drive the Honda as it did not have keys, the gear lock was locked and there were no loose wires which he could use to start it. The police slapped him several times and placed him back in the boot of the BMW. The police drove around with them still in the boot of the BMW and eventually took them to the police station. At the police station W/O Lourens opened the boot and took them out. The BMW was kept at the police station and only released to accused 2 by the magistrate, during their bail application, at the request of the accused 2's attorney who testified to that effect.

[8] Their evidence is further that at the time of their arrest they were approached by a number of police motor vehicles. According to the appellant they were stopped by two Golf 6 police motor vehicles. The first motor vehicle had its siren on and it approached them from behind. This motor vehicle was driven by a tall Indian police officer. There were many police officers who stopped

them.

[9] At the end of the trial the court was faced with two conflicting versions. Based on the factual and credibility findings the trial court accepted the evidence of Sgt Padiyachi and W/O Lourens as the truth of what happened and rejected the evidence of the appellant and his co-accused as not reasonably possibly true.

[10] The appellant in his heads of argument attacks the trial court 's judgment on its credibility findings. The submission is that the trial court should not have relied on the evidence of Sgt Padiyachi and that of W/O Lourens. Sgt Padiyachi, it is argued, had no independent recollection of what happened on the night in question and/or had a highly selective memory. This, according to the appellant, was indicated by the fact that Sgt Padiyachi had to refresh his memory using his statement in his evidence in chief; his failure to answer questions put to him in cross examination was calculated to avoid contradictions. W/O Lourens testimony, on the other hand, is said not to have corroborated Sgt Padiyachi's testimony .

[11] It is established law that a court of appeal rarely interferes with the credibility findings of a trial court. The powers of a court of appeal to interfere with the credibility findings of a trial court are limited. In the absence of any misdirection the trial court' s conclusion, including the acceptance of a witness' evidence, is presumed to be correct on the basis that the trial court had the advantage of seeing, hearing and appraising a witness.¹

[12] On perusal of the judgment of the trial court I could find no misdirection in its credibility findings. When accepting the respondent's version the trial court 's conclusion was that it could find the evidence of the respondent's witnesses not to be marked by any noticeable contradictions or inconsistencies. The evidence was found to be clear and told in sequence. To the contrary the appellant's evidence was found by the trial court to be strange and made no sense at all.

[13] The appellant's contention that Sgt Padiyachi had no independent recollection of the events of that night cannot be true. The record shows that he could clearly remember what happened at the scene. This is also the finding of the trial court. It is true that he could not remember the names of the accused

¹ See S v Francis 1991(1) SACR 198 (A).

persons and had to look them up in his affidavit . This in my view strengthens his reliability as a witness for if he was not honest with the court he could have easily told the court that the persons in the dock were the same persons he arrested for stealing the Honda. But, as an honest and reliable witness, he had to be sure and looked the names up. He could also not remember how the Honda was removed from where they found it and whether besides W/O Lourens and himself, there were other police officers present at the time of arrest. In my mind such aspects are not material but are a further indication that Sgt Padiyachi was an honest witness. The incident occurred on 16 October 2012 and Sgt Padiyachi testified a year or so after the incident. It is possible that he might have forgotten some of the insignificant details. But that does not make him an untruthful witness or make the totality of his evidence unreliable.

[14] I could find no material contradictions in the evidence of the respondent's witnesses. In my view, it cannot be said that when one of the two witnesses remembered and testified on the details that the other could not remember, that it means there are contradictions in their evidence or that they are not telling the truth.

[15] On the contrary, the appellant's version is not reasonably possibly true and the trial court was correct to have rejected it. The trial court's finding, which is correct in my view, is the coincidental manner in which the appellant and accused 2 met. In their own evidence they did not know that they will meet each other that day. The police officers could not, as well, have known that the two were going to meet that night in order to implicate them in the commission of the offence. The trial court also found it a strange coincidence that the police officers would go for the specific BMW when there are many other motor vehicles in Mamelodi. The appellant also failed to prove the existence of the green BMW and the fact that there was a court order which released it .

[16] In the circumstances, I am satisfied that the trial court was correct to have accepted the version of the respondent and rejected that of the appellant. The appeal cannot succeed.

[17] I make the following order:

1. The appeal on conviction is dismissed .

2. The conviction and sentence are confirmed.

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

I concur

D. NAIR
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant: Mr M .B. Kgagara

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