IN THE HIGH COURT OF SWAZILAND

CRIM. APPEAL 46/92

In the matter between:

THE KING

vs

GERMAN DLAMINI

CORAM	Hull, C.J.
FOR THE APPELLANT	Mr. Fine
MR. THE RESPONDENT	Mr. B. Simelane

JUDGMENT

(15/6/93)

The appellant German Dlamini, who was 56 years old at the time of his trial, has operated a transport business at Ezulwini since 1973.

In January of 1992, Detective Sergeants 2333 James Mkhatshwa and 2280 Richard Mngomezulu of the Royal Swazi Police were driving up the Malagwane Hill towards Mbabane. As they did so, their attention was drawn to an apparent discrepancy between a Nissan truck and the registration plate it bore. The numbers on the plate appeared to the detectives to be too old for the truck. They made inquiries which eventually brought them to the business premises of the appellant. In the result, the six motor vehicles to which the present appeal relates were recovered from his possession.

He was subsequently charged in the Principal Magistrate's Court with the theft of the vehicles. These charges became counts 2 to 7 (inclusive) on the charge sheet. The first five of these counts related to vehicles that he allegedly stole in South Africa and brought into Swaziland. The last

(count 7) related to a vehicle allegedly stolen by him in Swaziland. On count 4, he was tried together with one Elman Ntshalintshali of Motsane.

In his final submissions, the prosecutor conceded that the case against Ntshalintshali had not been proved.

The learned Principal Magistrate, in his judgment, acquitted Ntshalintshali on count 4. For reasons given, he acquitted the appellant of theft on all 6 counts, but convicted him of receiving stolen property, well knowing it to be stolen. After hearing submissions on sentence, he proceeded to sentence him on each count to five years imprisonment, of which one year was suspended for a period of three years on condition that he is not convicted of theft during the period of suspension. He ordered that the sentences were to run consecutively.

The appellant has appealed against the convictions and sentences. The original notice of appeal comprised just over four pages. In substance, the grounds of the appeal against conviction on each count were that the Principal Magistrate erred in finding that the appellant knew that the motor vehicles had been stolen, and in not accepting that the appellant's explanation might reasonably have been true. On count 4, the appellant also relied on the ground that Ntshalintshali had corroborated his explanation (which was that he had bought the vehicle to which that count related from a man called Msibi).

Because of the workload and present resources of the High Court, the appeal has taken longer to determine then I would have wished. I have already conveyed my apologies for this to counsel. For my own point however, I also have a concern which I hope counsel will not mind my mentioning.

By the time the appeal came on for hearing, the heads of argument for the appellent ran to some twenty-one and a half pages.

On the question of the convictions they numbered some twenty eight alleged misdirections by the learned Principal Magistrate.

These were serious charges, with serious consequences for the appellant. An appellant is of course entitled to challenge in all respects, on grounds of law and fact, the proceedings whereby he was convicted and sentenced. He is of course entitled, amongst other things, to take points that go to matters of procedure and of admissibility of evidence. In the end, however, the appellate court has also to consider whether any irregularity or defect in the record or proceedings has resulted in a failure of justice or prejudice to the accused. Beyond that, I think it is the experience of most advocates that although it is not difficult to identify, by an exercise of analysis, various points of possible contention, the merits of an appeal usually depend on a narrower range of critical, well-taken points.

I say that because it appears to me that in the way in which it was eventually presented, this appeal has been in many ways something of a "pom-pom gun" aspect about it. A barrage of points has been thrown up in the heads of argument. On the other hand, it is clear from the record that the prosecution case against the appellant was a strong one, that there was ample evidence on which a presiding magistrate might have reached the verdicts that were given, and that the Principal Magistrate clearly addressed his mind to the need to consider whether it was reasonably possible that the appellant's account was true.

Many of the objections that have been taken to the Principal Magistrate's judgment, in my view, have no merit. I find it difficult not to think that they have been drawn up in the hope of doing some damage, and knocking it down. I do not think that such an approach is really in the interests of justice, and I doubt whether it is really in the interests of the appellant either.

In giving his decision, the Principal Magistrate found that it had been proved by the Crown that the six vehicles in question had all been stolen (at various times between October 1985 and September 1991.) There can be no doubt about this. The real defence put forward by the appellant is that he had acquired them in good faith. There is no doubt either that they were all found in his possession. They were also all found to have Swaziland number plates, which were nevertheless not numbers that had been assigned to them on registration. The evidence of the police was that the appellant had been asked for papers in respect of the vehicles, but had not produced any documents to show that they were his.

In those circumstances, if at the close of the prosecution case the appellant had chosen not to give any explanation as to how he had come into possession of the vehicles, it was clearly open to the Principal Magistrate to decide on the Crown's evidence that he was satisfied beyond reasonable doubt that the appellant, in respect of each vehicle, was knowingly in receipt of stolen property.

The appellant did elect to give evidence.

Before he himself testified, however, he called another person, a Mr. Ngwenya, to testify on his behalf how the vehicle that was the subject of count 7 came into the appellant's possession. The witness said that he had taken it there to be repaired and had in the meantime had the loan of the appellant's kombi. It appears from the record that the appellant, having called this witness, then took the position that that was his case in respect of count 7, and that he would not himself testify in respect of that count.

That was in my view a very unusual course. It is the practice in common law jurisdictions, and also as I understand it in civil law jurisdictions, for an accused

person who intends to given evidence on his own behalf to do so before he calls any other witnesses on his behalf - for obvious reasons. Moreover, the notion that an accused person can call evidence by some other person, and then close his case in respect of one count on a charge sheet, and then proceed to give evidence on his own behalf on the remaining counts, is not one that I have ever encountered. It appears to me to be quite wrong.

In his judgment, having reviewed the prosecution evidence, the Principal Magistrate then turned to consider the explanation offered by the appellant. At page 80 of the record, he said explicitly in his judgment, in his consideration of that explanation, that he was well aware that no onus of proof rested on the appellant, and that his evidence needed only to be reasonably true for him to be acquitted. In that last respect, he was clearly saying that if it were reasonably possible that the appellant's account could be true, he was entitled to be acquitted.

The Principal Magistrate rejected the account given by the appellant. In doing so he indicated that he could not accept it as being reasonably possible, and that he regarded it as a fabrication.

He gave reasons for these conclusions. These are set out from page 80 of his judgment, at line 15 to page 83 at line 6.

In the first place, he took the view that because the appellant was found in possession of 6 stolen vehicles, a reasonable explanation would have to be "much higher", in his words, than if there had only been one.

He also found, for reasons given, that documents produced as exhibits T and U for the appellant to show that he had been the bona fide purchaser of the vehicles to which counts

2,3,5 and 6 related were most probably fraudulent. He also accepted the evidence of the police officers that one Mr. Spankie Ndwandwe, from whom the appellant claimed to have bought in 1991 the vehicles to which count 3 and 6 related, had in fact died in 1990. He had regard to the admitted fact that the vehicles, when found in the appellant's possession, had false Swaziland number plates. In doing so, for reasons given, he rejected the appellant's claim that he had not known that they had been put on the vehicles by his employees. He also had regard on the one hand to evidence given by the police officers to the effect that the appellant had told him that he had bought two vehicles from Ndwandwe, one from his brother, one from Ntshalintshali and two other men, and one from a firm in Big Bend, and that he acquired by exchange the kombi with Ngwenya, whereas at the trial he maintained that he had bought four of the vehicles from Ndwandwe, and Ngwenya had said that he only borrowed the kombi while the vehicle to which count 7 related was being repaired.

He, the Magistrate, also drew an adverse inference from the fact that the appellant personally elected to remain silent about count 7.

On page 83 of the judgment at line 7, the Principal Magistrate went on to say that he had listed sufficient reasons to indicate that on the totality of the evidence, the appellant's account was untrue. He then went on, expressly, to consider whether the only reasonable inference, from the fact of the appellant's possession of the vehicles without an explanation that might reasonably be true, was that he had received them knowing them to be stolen. At this point in his judgment it does appear to me that, having put it that way, he then proceeded to contemplate that as long as the inference was reasonable and consistent with the facts proved, that was sufficient. And from there he went on further to have regard to the evidence that the appellant had in fact purchased the vehicles, and

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that it was therefore probable that he had only received them, knowing however that they were stolen. Holding that this inference was reasonably consistent with the facts, and the more favourable inference (i.e., clearly, to the accused) he accordingly acquitted him of theft but found him guilty on all counts of knowingly receiving stolen motor vehicles.

It was contended that the Principal Magistrate misdirected himself in holding that a higher degree of "proof" was needed in weighing the appellent's explanation because he was found in possession of 6 cars. I do not think that that was what the Magistrate was saying at all. What he obviously meant was that if a man is seeking to give an innocent explanation for the possession of stolen cars, a court is less likely, in weighing the evidence, to think that his explanation is reasonably possible when he has six stolen vehicles than in the case where he has had one (especially, I think, where the six are acquired over a period of time). That is a matter of common sense, not of misdirection.

It was also contended that the Magistrate did not consider each of the counts separately. He was of course bound to do so, but in my view the record shows clearly enough that he did have regard specifically to each count.

It was also said that he wrongly accepted, as undisputed, the testimony of the police officers that Ndwandwe had died in 1990, and that their evidence in that respect was in any event hearsay, so that the inferences drawn by the Magistrate against the appellant on the basis that Ndwandwe was not alive in 1991 were unjustified. In their evidence, the officers had each mentioned that Ndwandwe had died in 1990. One said that he had known him. The other said that he was shot. They were not challenged in cross-examination on these statements. I think that the Principal Magistrate was entitled to take that evidence into account. In any event however, this was by no means the only reason why he disbelieved the appellant as a witness.

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I also consider that, having regard to the other features of the so-called receipts produced by the appellant - at the trial - the Magistrate was entitled to have taken the view that they were probably bogus, and I also consider that he was entitled to draw an adverse inference from the way in which the defence dealt with count 7.

Another complaint by the appellant was that, having acquitted Ntshalintshali on count 4, the Principal Magistrate then wrongly decided to accept his evidence as corroborating that of the appellant on that count. That does not follow at all. The test, in considering the charge against the second accused on count 4, was whether it was proved beyond doubt to have been proved. He was acquitted because it was not shown that he had played any role other than by way of introduction. It does not follow at all that because he was acquitted, the allegations against the appellant on count 4 should not have been accepted as proven.

I do not consider that there is any merit in any of the other grounds of appeal against conviction. Having considered the possibility that the appellant's explanation might reasonably be true, it was clearly open to the Principal Magistrate on the evidence to dismiss that as a possibility.

Having done so, he then had to consider independently whether the only reasonable inference on the whole of the evidence was that the appellant had either stolen the vehicles, or had received them knowing that they were stolen. Ironically, it is this part of his judgment that does in my view raise at least questions as to whether he was applying the right approach at that point. The appellant, however, did not take issue on this. My own view is that reading the judgment in context, it is clear enough that the Principal Magistrate was quite conscious as to who

had to prove what, and that in this particular portion of the judgment, what he was in fact doing was not to ask himself whether one reasonable conclusion was that the appellant had stolen or received the vehicles, but which of these inferences was more favourable to the appellant. In any event, I am in no doubt that the only reasonable inference was that he had received them knowing them to be stolen, and that no failure of justice has occurred.

For these reasons the appeal against convictions is dismissed.

On the appeal against sentence, the appellent was a 56 year old man with no previous convictions. He is a man of some prominence, with several wives and a large family. Nevertheless I agree with the Principal Magistrate's view that these were serious offences over a period of time in the course of his business. I also take the view, globally, that a total term of 6 years imprisonment in respect of them is appropriate.

With respect, I differ from the learned Principal Magistrate in one regard. Having reached a decision that a substantial term of imprisonment was warranted, I do not think it was appropriate to also impose additional suspended terms. I think it was inappropriate too for reasons of the appellent's age and his station in life.

The appeal against sentence is allowed to the following extent only:

(a) On counts 2 and 5, terms of two years imprisonment each are subtituted respectively, to run concurrently as between themselves.

(b) On counts 6 and 7, terms of two years actual imprisonment each are substituted respectively, to run concurrently to the sentences on counts 2 and 5.

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(c) On counts 3 and 4 terms of two years actual imprisonment are substituted each, to run concurrently as between themselves but consecutively to the sentences on counts 6 and 7 -

to the overall effect that he shall serve a total of six years actual imprisonment, that will be calculated from the time he first went into custody on the charges.

In all other respects the appeal is dismissed and the convictions and sentences are affirmed.

D. Hull

DAVID HULL
CHIEF JUSTICE