IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

APPEAL CASE
NO.P791/91

MATHOKOZA MANDLA NTSHALINTSHALI — Appellant

and

REX — Respondent

CORAM — Hull, C.J.
FOR APPELLANT — Mr. V. Dlamini
FOR RESPONDENT — Mr. Cele

JUDGMENT
2/6/93

Hull, C.J.

The appellant, who appears to me to be a young man, was convicted by the Principal Magistrate sitting at Manzini on 18th September 1991, on a charge of stealing in Lydenburg in South Africa and thereafter bringing into Swaziland a Toyota Hilux motor-vehicle valued at E30,000, the property of Jacob Breedt. He as sentenced to 5 years imprisonment on the basis, explicitly, that he had a previous conviction for theft of a motor vehicle.

On 16th October 1991, counsel who was then acting for him (and who had represented him at his trial) noted an appeal against conviction and sentence. This appeal was not brought on for hearing until today. In the meantime the appellant has been undergoing his sentence.

The Acting Registrar is directed to enquire into the reasons for the delay and to report to the Court on it, in writing within 14 days.

The grounds of appeal against conviction as advanced by his present counsel today can, I think, he summarised adequately in the following way.

Objection was first, taken to the admission of the testimony of the second police witness, a mechanic to whom the appellant and another man were said to have brought the vehicle to Swaziland for checking, on the ground that this testimony was hearsay.

In essence, it was objected that parts of his testimony related to conversations between himself and his wife, otherwise in the presence of the accused, about matters of which the witness had no direct knowledge. Even if that is a correct intepretation of what the witness was saying, the answer to the objection is that the Principal Magistrate clearly did not rely on the witness'es evidence. He relied directly on the evidence of his wife. This ground of appeal therefore cannot be sustained.

The second ground was that the Principal Magistrate failed to address his mind to the question whether it was reasonably possible that the appellant's own account as to how he came to be in possession of the vehicle was true.

The mechanic's wife, who was a relative of the appellant, testified at the trial that he came to her homestead with another man. He, the appellant, was driving the vehicle and he told her that he wanted to leave it with her husband for safe keeping and to check a mechanical fault.

By the end of the Crown case, it had been admitted by counsel for the appellant at the trial that the vehicle belonged to Mr. Breedt and had been stolen.

This admission was not in itself of course an acknowledgement that the appellant was the thief, though it was contrary to a line of questioning that had earlier been put to the mechanic's wife in cross examination - and at a later date during the trial, defence counsel did attempt to resile from the admission.

The appellant gave evidence in his own behalf at the trial. His explanation was that it was untrue that he had driven the vehicle to the homestead. The other person, David Msomi, had been driving it. Msomi had come to his place of employment and asked him to accompany him to the homestead for repairs.

He was therefore saying that although he did not dispute that the vehicle was stolen, he personally had not known that. He was also saying that he himself was not in possession of the vehicle, but that Msomi was.

The Principal Magistrate believed the evidence of the mechanic's wife that it was the appellant who had driven the vehicle to her homestead, and also her evidence to the effect that the other man in the vehicle never said anything.

By clear implication, he was therefore also accepting her evidence that the appellant asked that her husband should look after the vehicle and check the mechanical fault. The Principal Magistrate went on to say immediately "I then rejected the evidence of the accused and found him guilty of theft as charged".

Crown Counsel drew my attention to the Theft of Motor Vehicles Act 1991, and more particularly to those provisions in it dealing with a presumption of guilt where a person is found in possession of a motor vehicle and with mandatory minimum sentences. This Act, however, had not come under operation by the time of the trial.

Nevertheless I do not consider that this ground of appeal against conviction can be sustained. The mechanic's wife was a relative of the appellant.

While it was not for him to explain why, in those circumstances, she might tell lies against him, that would be one relevant question for the court itself to turn its mind to, when weighing her evidence. In the way in which the appellant's case at trial was presented, there was another apparent inconsistency, because at one stage in her cross examination, defence counsel put it to her that the appellant would say that he had been asked by Msomi to drive the vehicle to her homestead, whereas by the time he came to give evidence, the appellant denied that he had been the driver. It was open to the Principal Magistrate to decide that he believed the mechanic's wife and that he disbelieved the appellant's account. I do not consider that it has been shown that he did not address himself to the question whether the appellant's explanation might reasonably be true. The vehicle was admittedly a stolen one. On the evidence the Principal Magistrate was, in my view, entitled to conclude that the appellant had stolen it.

It was also contended that the Crown and the court below erred in not taking steps to check more fully whether the appellant did not have had the opportunity to go to Lydenburg to steal the vehicle or to ensure the attendance of Msomi as a witness. But if the Crown concluded that it had sufficient evidence on which to bring a prosecution, it was under no obligation to take these steps, at least in the absence of any real reason to suggest either that the appellant could not have been in South Africa at the time of the theft there or that Msomi might have been the person who had the vehicle. It was not put to the police officers who gave evidence for the Crown that the accused had at anytime given them the explanation that he thought that the vehicle belonged to or was in charge of Msomi. In cross examination

Detective Sergeant Mahlalela testified that the appellant was charged because he failed to explain how he came into possession of the motor vehicle. The appellant, who was legally represented, did not call Msomi as a witness and his counsel did not seek the Court's assistance in that regard. The appellant's whereabouts, when the vehicle was stolen in South Africa, and his assertion that it was Msomi who had the vehicle, were matters within his own knowledge, and not that of the police or the prosecutor, at the times of the investigation and the commencement of the trial.

The appeal against conviction is accordingly dismissed and the conviction is affirmed.

On the question of sentence, it is conceded by the Crown that the Principal Magistrate erred in holding that he had a previous conviction for the theft of a motor car. He was not a first offender, but his previous conviction was for stealing something from a motor car.

The sentence actually imposed in September of 1991, i.e. five years imprisonment, was in my view manifestly too heavy and was in any event based on a wrong premise.

The appeal against sentence is allowed, to the extent of reducing the term of imprisonment of five years to one of two years. It is of course still to run from the date originally specified.

D. Hull

DAVID HULL
CHIEF JUSTICE