IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 360/94

In the matter between:

MFANUZOTHINI MNGOMEZULU — Applicant

and

THE ATTORNEY GENERAL — Respondent

CORAM: Hull, C.J.
FOR APPLICANT Mr. L. Mamba
FOR RESPONDENT

Judgment
(14/10/41/

This is an application for the return of a motor vehicle.

The vehicle, then in the possession of the applicant here, was seized without a warrant by a detective constable in the Royal Swaziland Police Force on an unspecified date in May 1991 on suspicion that it had been stolen. It has since been detained in the physical custody of the police.

On 11th October 1991, another detective constable applied to the Principal Magistrate at Mbabane for an order to pursue and finalise investigation of its suspected theft.

It is not clear from the document produced to me whether that application was made on notice to the present applicant, i.e. the person from whom the vehicle was seized. The document is an affidavit, in a standard form for use according to its tenor in applications to detain motor vehicles that are suspected to have been stolen. The affidavit refers to the present applicant, describing him as the respondent on that occasion. It also refers to an attached notice of application. None is attached. The learned Principal Magistrate endorsed his decision at the end of the affidavit itself.

It says shortly:

"On 11/10/91,

"Above order granted until 11/1/92.

"Principal Magistrate."

There is uncontested evidence that does indicate strongly that - at some point of time - the vehicle had been stolen. On examination, it was found that the original engine and chassis numbers had been removed and new false numbers inserted.

The evidence for the applicant here is that he purchased a Mazda motor vehicle from one Solomon Ngomane. He has annexed to his founding affidavit a document that, according to its tenor, was issued in the Orange Free State to Solomon Ngomane. It is described on its face as a "certificate of issue of document or token" under section 177 of the Road Traffic Ordinance 1966. No very clear explanation has been proffered by either side as to just what this is. As far as I can see, it appears to confirm that a "registration certificate and motor vehicle licence/clearance certificate" were issued to Mr. Ngomane in January 1991 in respect of a Mazda motor vehicle. The specified chassis number is the same as that now appearing on the vehicle detained by the police here. The engine number is also the same except that it has the figure "4" added to the number observed by the police on the vehicle itself. In a line entitled "Date of expiry", the document specifies a number which is the registration number of

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the vehicle that the police have detained and the applicant claims.

The applicant however has never been charged with the theft of the vehicle, though the detective constable who seized it has deposed that the applicant failed to produce documents showing that he owns or is in lawful possession of it, or an agreement to purchase it and that, accordingly, the police continued to detain it under the Theft of Motor Vehicles Act 1991 (Act No. 16 of 1991.)

At the time when the police seized this vehicle, that Act had not come into force. When the Principal Magistrate made his order on 11th October 1991, it had still not come into force. Section 23 of the Act, which contains transitional provisions whereby a vehicle suspected to have been stolen, which was seized and detained by the police for not less than six months because the person lawfully entitled to it could not be traced or was unknown, was forfeited to the Crown after a specified time after the commencement of the Act, has not been demonstrated to be applicable here. It has not been shown that the vehicle was detained for at least six months before the commencement of that Act.

Prior to the commencement of the Act, the power to seize without a warrant a motor vehicle suspected on reasonable grounds to have been stolen was contained in section 47(1) of the Criminal Procedure and Evidence Act 1938 (Act No. 67 of 1938). At the time of the seizure of the vehicle in issue here, that power had to be exercised by a police officer of or above the rank of sub-inspector, which was not done in this case. The officer, under the terms of the section, was not authorised specifically to detain it, but required to take it before a magistrate. By virtue of section 52(1), he had to do so within such time as was in all the circumstances reasonable.

Under subsection (3) of that last section, the magistrate was then to cause it to be detained in such custody as he directed, taking reasonable care for its preservation until the conclusion of a summary trial or of any investigation. Under subsection (5) as it formerly stood the magistrate, if the Director of Public Prosecutions declined to prosecute, was to direct it to be returned to the person from whose possession it was taken.

These provisions are substantially still in force. They have not been repealed or amended directly by the Theft of Motor Vehicles Act 1991. However, on the date on which that Act was assented to, the Criminal Procedure and Evidence Amendment Act, 1991 (Act No. 14 of 1991) also received the Royal Assent. Both Acts were published in the Gazette on 27th November 1991. By section 4 of the amending Act, the power of seizure conferred by section 47 (1) of its principal Act was extended to every police officer.

Section 52 was also amended by replacing subsection (5) with the following subsection:

"(5)(a) At the conclusion of a summary trial or if the Director of Public Prosecutions declines to prosecute, the Magistrate shall, in respect of the property or thing seized, make one of the following orders:-

"(i) that the property or thing be restored to the person from whom it was seized if that person satisfies the Magistrate that he is the lawful owner of the property or thing or that he is lawfully in possession of the property or thing;

"(ii) if that person fails to prove that he is the lawful owner or has lawful possession of the property or thing, that the property or thing be restored to any other person who is lawfully entitled to it upon proof to the Court;

"(iii) if no person claims ownership or possession of the property or thing or if the person lawfully entitled to it cannot be traced or is unknown, that the property or thing be forfeited to the Crown;

"(b) the Court shall for the purposes of an order under paragraph (a) hear such further evidence (whether by affidavit or orally) as it may consider necessary."

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There is, as I say, clearly evidence that gives rise to a strong inference that this vehicle was at some point of time stolen - namely, in the tampering with the engine and chassis numbers. The applicant has not been able to produce documentary evidence that shows clearly that he himself nevertheless acquired it as a bona fide purchaser. The document that he has produced does not demonstrate unequivocally that Solomon Ngomane was the owner, or that he transferred it to the applicant. It does on the other hand on its face disclose false numbers.

In themselves these things may give rise to suspicions even about the applicant himself, but they do not show that he did not come into possession of the vehicle lawfully. Mere suspicion cannot be equated with guilty knowledge. It is of course possible for a genuine purchaser to acquire a vehicle that has been stolen, and it is even possible for him to do so without observing the formalities for the transfer of the vehicle. A failure to do so does not necessarily mean that he has knowingly acquired a stolen vehicle. The applicant has never been charged with stealing this vehicle or receiving stolen property. Nearly three and half years have passed since it was seized. On a correct view of the evidence, I think that it must be said that the authorities have declined to prosecute.

On what basis therefore does the respondent claim to be entitled to retain custody of this vehicle?

There is no power at common law enabling the police lawfully to seize and detain a motor vehicle in the circumstances in which they did so here. At the times when it was seized and when the police went before a magistrate, the matter was governed by the relevant provisions of the Criminal Procedure and Evidence Act 1938 before its amendment in late 1991.

The seizure, by a detective constable, was not authorised under those provisions at the time. The vehicle was not, in my view, brought before a magistrate within a reasonable time.

The 1991 amending Act is not to be construed retrospectively.

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However, section 52(5)(a)(i) of the Criminal Procedure and Evidence Act 1938 as amended by this Act would apply, in my view, on and after the date on which it came into effect, if the vehicle had been validly seized in the first place, i.e. under section 47(1) as it was originally worded. Despite the delay, it does appear that the police still had the ownership of the vehicle under investigation in October 1991 because that was the basis on which they eventually went before the Magistrate, and he purported to authorise its detention until January 1992. The problem, however, is that the vehicle was never seized in accordance with law. the word "seized" in section52(5)(a)(i) in my view must be taken to refer to a lawful seizure.

The Theft of Motor Vehicles Act 1991 does not assist in any event the respondent. The vehicle was not seized under that Act. The Act is not to be construed as having retrospective effect. The transitional provisions in it do not apply here. The Act does not contain provisions authorising the police to simply to seize a vehicle that is suspected of having been stolen, as distinct from seizing it in the course of arresting a person suspected of having stolen it, or of having received it knowing it to have been stolen. Nothing in that Act (other than in the inapplicable transitional provisions) empowers the police to continue to detain a vehicle seized lawfully, before the commencement of the Act - still less a vehicle taken, prior to the Act, otherwise than in accordance with law.

The police have wide powers, under statute and especially under the Theft of Motor Vehicles Act 1991, in respect of vehicles suspected to have been stolen. It is well known that the theft of vehicles is very prevalent and a matter of public concern in the region. Nevertheless the police must act within the limits of the powers granted to them and, where the personal liberty of an individual or property is affected, the courts will construe those powers and the manner in which they are exercised strictly.

The applicant was the person who was in possession of the vehicle in 1991 when the police intervened. It has not been shown that he knew it was a stolen vehicle. I will assume that the learned Principal Magistrate did not make his order of 11th October 1991 without having

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first satisfied himself that the applicant here had due notice then of the application by the police for its continued detention, so that he could have opposed that application if he so desired. That was of course an elementary prerequisite for the making of an order for the detention of property taken from a person.

I will also assume that the application by the police was made in the proper way, namely by a notice of application or motion setting out the order sought and supported by an affidavit, and also on its face indicating that it was made on notice to the other party affected. The document before me, however, does not show clearly that this was so. It is unusual, to say the least, for a judicial officer to endorse his decision on an affidavit. The formalities for preparing and presenting applications are not merely technical. They are intended (inter alia) to serve the practical purpose of ensuring that the principles of natural justice are duly observed.

The supporting affidavit in the police application, at the time when it was made, was deficient in that it did not show that the power of seizure had been exercised by a police officer authorised to do so - namely an officer holding a rank not lower than that of sub-inspector. In consequence of this omission, the Principal Magistrate confirmed an unlawful seizure.

The respondent has not shown any sufficient basis for resisting the application now before me, but I wish to add, in passing in this respect, that in any event on a proper view of the evidence, and bearing in mind that no application has been made to cross-examine the applicant, I think the correct conclusion to come to is that the court should take the view that the applicant was in lawful possession of the vehicle when it was seized from him.

There will accordingly be orders as prayed in paragraphs (a) and (b) of the present applicant's notice of application, i.e. for the return of the motor vehicle to him and that the respondent is to pay his costs on the application.

D. Hull

DAVID HULL
CHIEF JUSTICE