



**THE HIGH COURT OF SWAZILAND REX**

Vs

**RINGTON FOFO DUBE**

**TIMOTHY TEMA**

Criminal Case No. 38/2003

Coram

S.B. MAP HAL ALA - J MRS M.

DLAMINI - Acting Director of Public

For the Crown For

Prosecutions MR. C. NTIWANE

**JUDGMENT**

**(17/09/2004)**

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The accused having pleaded guilty to Counts 4 and 5, that is, unlawful possession of a pistol and six (6) rounds of ammunitions, respectively and having been discharged on Count 1 under the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended), the court found that the accused person has a case to answer in respect of Counts 2 and 3, being Theft of Motor Vehicle's Offences.

The accused person had pleaded not guilty to these offences. The offences are quashed in the following language.

**In Count 2**

**"In that upon or about 3<sup>rd</sup> July 2002 at or near Delmas - Ogies road in the Republic of South Africa, the said accused each or both acting in common purpose did unlawfully and intentionally steal a motor vehicle registration no. BDN 995 MP the property or in the lawful possession of Christiaan Andreies Cronge valued at E120, 000-00 and that upon or about the 2<sup>nd</sup> August 2002 the said accused did unlawfully and intentionally conveyed the said motor vehicle to Malkerns area in the Kingdom of Swaziland, theft being a continuous crime the accused committed the offence under the jurisdiction of this court".**

### **In Count 3**

**"In that during the month of January 2002 and at or near Sasolburg in the Republic of South Africa the said accused each or both of them acting in common purpose did unlawfully and intentionally steal a motor vehicle registered CBC 129 FS the property or in the lawful possession of Johannes Van Der Merwe valued at E40, 000-00 and that upon or about the 2<sup>nd</sup> August 2002, the said accused each or both did unlawfully and intentionally conveyed the said motor vehicle to Malkerns area in the Kingdom of Swaziland; theft being a continuous offence the accused committed the crime of theft within the jurisdiction of this court".**

There are mainly 3 or 4 Crown witnesses who gave evidence against accused in relation to Counts 2 and 3. These witnesses were; i) Mrs Sithebe, ii) Phumlani Mdluli (PW13), iii) Bheki Maduna (PW14) and iv) Mr. Sithebe (PW12).

The evidence of Mrs Sithebe was to the effect that the accused came to her homestead while her husband (PW12) was in South Africa. He came in the company of another person he introduced as Mr. Sibiya. Accused requested her to keep the motor vehicle and that he will collect it later. She further stated that the accused told her that the motor vehicle belonged to him. This motor vehicle was identified as the truck which is the subject-matter in Count 2 as identified by the complainant, Mr. Christiaan Gronge. She further stated that the said motor vehicle was collected by persons who had indicated that they were sent by accused to come and fetch the truck. This was at night.

In cross-examination the accused flatly denied ever dealing with this witness in so far as the truck was concerned. He stated that he requested her husband to keep the truck

not this witness. He further suggested to the court why this witness stated that she dealt with him. The reason was that the police officers decide<sup>3</sup> to take her for identifying the truck when it was later found. This witness stood her ground and highlighted that her husband was not at home nor did he see the truck as it was taken before his return from South Africa. She only informed her husband about the truck upon his return. Mrs Sithebe further maintained that accused had told her that the motor vehicle belonged to him.

PW12 Mr. Sithebe was called as a witness in order to ascertain whether indeed what the accused had put to Mrs. Sithebe was what actually took place. Mr. Sithebe informed the court that he returned from his children who were in South Africa and was informed by his wife (Mrs Sithebe) that accused had left a truck and later collected it. He confirmed what was said by Mrs. Sithebe that he never saw the truck nor spoke to accused about it.

In cross-examination of this witness nothing of substance came out except that it was revealed that accused was this witness's patient as he was a traditional healer. It was put to this witness that accused came in the company of Mr. Sibiyi and left the truck. This witness replied in the negative. It was never put to this witness that accused informed him that the truck belonged to Sibiyi.

PW13 Bheki Maduna told the court that accused came to him driving a BMW and requested that he fix the BMW (subject matter in Count 3) for him (accused). He stated that he would collect it later. On this day of delivery of the BMW accused also indicated that there is a truck at Nhlngano and asked him to find a buyer for it. This witness fixed the BMW and drove it until accused in the company of other men including PW14 Mdluli came to fetch it.

In cross-examination it was put to this witness that the BMW was brought to him by accused so that the accused would find a buyer. However, this witness maintained that the BMW was not for sale but that accused requested him to fix it for him.

PW14 Mdluli told that court that he had seen PW13 Maduna driving the BMW which was exhibited in court. He stated that his brother informed him that the motor vehicle

waj left by accused so as to repair it for him. He stated further that on the night of the 2<sup>nd</sup> August 2002, accused came in the company of others he did not know. He requested him to accompany him to PW13 so as to collect his BMW. He obliged. The BMW was collected and accused then asked him to accompany his friends to the Sithebe's homestead to fetch the truck which is the subject-matter in Count 2. He proceeded to Nhlangano where he found Mrs Sithebe. Nothing much turned upon the cross-examination of this witness save that it was disputed that he was related to accused and that when he went to PW14 Maduna with accused was so that he would call PW13.

The accused when he was put to his defence in terms of the provisions of the Criminal Procedure and Evidence Act (per Section 174 (4)) gave a lengthy account of his version of events. He stated that a certain Sibiya man came to his home at Manzini and requested him to find a buyer for exhibit "C 1" (the BMW). He looked for a buyer but in vain. He then took the vehicle for safe keeping to PW14 (Maduna). He later called Sibiya to fetch his BMW. Sibiya obliged. They proceeded to PW14's workplace where they took the BMW. While he was taken back home, Sibiya suggested that they also go to Nhlangano to fetch a truck. He declined to go because he wanted to sleep and then suggested that PW14 (Mdluli) accompany them.

He stated that the truck had been left with Mrs Sithebe. He had prior met Sibiya at Nhlangano and requested that he find parking for the truck. It is then that they went and spoke with Mr. Sithebe. He stated that he would have taken the truck to his inlaw's home but it was too far. He stated that he explained to Mr. Sithebe (PW12) that the truck belonged to Sibiya.

On his arrest, accused informed the investigators that the motor vehicles in issue belonged to Sibiya. He stated that the police took his diary and telephoned Sibiya who promised to come. He stated that Sibiya admitted that the motor vehicles belonged to him whilst speaking to the investigator, Ndlangamandla. He asked to meet them at Nhlangano. They all proceeded to Nhlangano and waited until morning but Sibiya never turned up. They then called Sibiya's nephew one Lubisi who told them that Sibiya had called him but did not come. They tried to call again at his number but it was engaged. PW16 Ndlangamandla went to Mahamba Border Post

where he telephoned him and said he had arrested some people. He enquired from accused whether those were the people. He gave a negative response. On another day, the investigator PW16 introduced two (2) officers saying they were from Springs in South Africa. He was asked to give particulars of the address for Sibiya. They would then inform him of the outcome. PW16 failed to tell him of the outcome although he waited in anticipation. He later read in the newspaper that PW16 failed to come with Sibiya. He then requested PW16 to come to him but he never did so.

The accused person was cross-examined at great length by the Crown as represented by the Acting Director of Public Prosecutions.

When the matter came for arguments it was contended for the Crown that the accused version of events was not put to crucial Crown witnesses and therefore such defence ought to be rejected as false. The court was referred to the cases *o f R v M 1946 A.D. 1023, R vs P 1947 (1) S.A. 581 at 582* and the *locus classicus* being *The King vs Dominic Mngomezulu and 9 others, Criminal Case No. 94/90 (unreported)*.

It was further argued for the Crown that the crucial question to be addressed in the present case is whether accused story is reconcilable with proven facts as provided. To whom do the two motor vehicles belong? Is it Sibiya or accused? The issue is not whether Sibiya exist or not. In this regard *Mrs. Dlamini* for the Crown argued at length in her Heads of Arguments to support the Crown's contention. It was contended that the accused stated two different reasons for taking the BMW, i.e. when PW14 was cross-examined, it was so that he would find a buyer for the BMW. However in his evidence-in-chief and under cross-examination, he had taken it for security. In this regard the court was referred to the case of *R vs Petersen 1956 (1) S.A. 544* at 545 where Grindly Feris J stated the following:

"Even **if** the evidence **of** Ross taken by itself **did** not amount to sufficient proof of ownership such evidence taken **in** conjunction with the false explanation of the Appellant was, **I** think, sufficient to justify the conclusion that the Crown's allegation of "theft" **had** been established".

The thrust of the Crown's argument in this regard is that "the giving by an accused of a false explanation of his possession of goods alleged to have been stolen is a relevant factor which may properly be taken into account in deciding the question whether the property was stolen or not".

*Mr. Ntiwane's* arguments stand on three legs. First, the determination of whether it is the accused or Sibiya who stole these two motor vehicles. Secondly, that the charge sheet was not properly framed and thus common purpose has not been proved. Thirdly, that the accused explanation of his involvement is clear and cannot be said to be false. For the latter proposition the court was referred to the *dictum* by Greenberg J in the celebrated case of *R vs Difford 1937A.D. 370* at 373 where the following was propounded; and I quote:

"...No *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable, but beyond any reasonable doubt is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal".

Further reliance was placed on the *dicta* in *R vs M (supra)* where it was held that "the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true".

The thrust of *Mr. Ntiwane's* argument in this regard is that the fact that Sibiya is alive and dealt with the accused in the manner alleged by the accused cannot be said to be false. In the premises the court ought to give the accused the benefit of doubt and acquit him.

It appears to me that the crux of this case is whether the court ought to accept the Crown's case and reject the accused evidence. The Crown case is that it is the accused person who stole the said motor vehicles and on the other hand it is the accused case that the motor vehicles belonged to Sibiya.

The test to be applied in such cases has been laid out in a plethora of decided cases in South Africa starting with the case of *R vs Difford (supra)*, *R vs M*. In *S vs Sinch 1975 (1) S.A. 227 N Leon J* held that in criminal cases, where there is a conflict between the evidence of the Crown witnesses and that of the accused, **"it would be quite impermissible to approach the case on the basis that, because the court is satisfied as to the reliability of the Crown witnesses, it therefore must reject the accused evidence"**.

In *S vs Munya 1986 (4) S.A. 712 at 715 F* the following was said:

**"Even if the state case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view of discerning whether it is demonstrably false or inherently so improbable as to be rejected as false, (my emphasis).**

Slomawitz A.J in the case of *S vs Kubeka 1982 (1) S.A. 534 W at 537* made the following remarks:

**"Whether I subjectively disbelieve the accused is, however, not the test. I need not even reject the state case in order to acquit him. It is not enough that he contradicts other acceptable evidence. I am bound to acquit him if there exist a reasonable possibility that his evidence may be true. Such is the nature of the *onus* on the state".**

I have assessed the evidence before me against the test propounded in the above cited cases and in the final analysis there exists in my mind, a reasonable possibility that his explanation is true. His evidence concerning Sibiya and what transpired in Nhlngano creates a lingering doubt in my mind that this elusive Sibiya may well be the perpetrator of these crimes. Crown witnesses all mentioned Sibiya i.e. PW3, PW14, PW13 and also the police officer who was investigating the case PW16, Khethokwakhe Ndlangamandla. Under cross-examination PW16 testified that Sibiya was telephoned and that they proceeded to Nhlngano and went to the border to meet with him but he never turned up.

**In the circumstances of the case I give the accused person the benefit of the doubt and I find him not guilty.**

**He is acquitted forthwith.**

  
S.B. MAPHALALA  
JUDGE