IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CRIM. APP. NO. 11/09 (A)**

In the matter between:

MBONGENI KHABA **1st Appellant**

MUSA MAGONGO **2nd Appellant**

And

REX **Respondent**

Date of hearing: 17 August, 2009

Date of judgment: 11 September, 2009

CORAM:

MASUKU J.

MAMBA J.

Mr. Attorney B.S. Dlamini for the Appellants

Mr. Attorney Tholi Vilakati for the Respondent

J U D G M E N T

MASUKU J.

[1] The above-named Appellants and to whom I shall henceforth refer as such or alternatively as the "accused persons", were convicted by the Nhlangano Magistrate's Court for the offence of theft of a motor vehicle. The allegation was that on or about 11 November, 2008, in Belfast, in the Republic of South Africa, the said accused persons wrongfully and unlawfully and intentionally stole a Mazda 323, bearing registration number CBC 742 MP, which was the property of or in the possession of Jacob Boy Shoba. It was alleged further that the accused persons thereafter conveyed the said motor vehicle to Mbondzela are in the Shiselweni District. The Magistrate's Court's jurisdiction to try the offence was allegedly based on the principle that theft is a continuous offence.

[2] The 2nd Accused was, in addition, found guilty of the contravention of section 11 of the Theft of Motor Vehicles Act, 16 of 1991, it being alleged that on 11 November, 2008, the said accused person was found to wrongfully and unlawfully and intentionally possess a false key (Zigoca) at the place mentioned in the first count. Notwithstanding their respective pleas of not guilty, both

were convicted and sentenced to two years' imprisonment without the option of a fine, on count 1 and which sentence was backdated. The second accused was sentenced to a fine of E1000 or 6 months' imprisonment on count 2 and which was ordered to run concurrently with the sentence in count 1.

[3] Dissatisfied with the conviction on both counts, the appellants have noted an appeal against the judgment of the Court *a quo* on the following grounds:

- That the Court below erred by convicting the appellants on the basis of uncorroborated evidence of a single witness;
- The Court *a quo* erred in convicting the 2nd appellant in count 2 in the absence of the false key alleged;
- The Court *a quo* erred in dispensing with the need for an *inspectio in loco* as that would have assisted in determining whether the said vehicle was indeed stolen; and
- The Court *a quo* erred in convicting the appellants after the Crown failed to prove its case beyond reasonable doubt.

[4] It must be mentioned that Mr. Vilakati, who appeared for the Crown, indicated that the Crown did not support the conviction, and consequently, the sentence on both counts. In particular,

the Crown conceded that the certitude of guilt returned was marred by irregularity for the reasons mentioned in the notice of appeal, particularly that the exhibits were not brought to Court; the trial Court dispensing with the inspection *in loco,* and failure to allege common purpose on the first count.

[5] I shall briefly recount the salient facts on which the conviction was predicated. It is common cause that the vehicle mentioned in the charge sheet was stolen when it was in the possession of one Jacob Boy Shoba on 11 November, 2008. Shoba testified to the effect that the vehicle was owned by him and he tendered registration documents in Court. I must mention, however, that the said documents do not reflect him as the owner, but one Featherstone Y. This discrepancy was not cleared by the Crown.

[6] It was his further evidence that a few days after the vehicle went missing from his home, he was called and told that it had been discovered in this country. He accordingly proceeded to Gege police station where he identified the vehicle as his. It had, in the intervening period sustained some dents on the left side and could not start. At this stage, the Court dispensed with the

need to inspect the vehicle testified about ostensibly on the ground that the appellants claimed not to know anything about it. This, it would seem, was a decision taken by the Court even before the appellants had put their version to this witness in cross-examination, an issue I revert to in the due course of time.

[7] The mainstay of the Crown's case, is to be found in the evidence of the investigator, 3716 Detective Constable Dumsane Zwane, who testified as PW2. His evidence was that on 11 November, 2008, whilst on duty at Nhlangano police station, he received a report to the effect that the Gege police had seen a vehicle which they suspected had been stolen and which was being driven from Gege towards Nhlangano. He, in the company of Inspector Fakudze intercepted the vehicle along the road.

[8] After passing Mbondzela along the said road, they found the appellants seated next to the road. The officers introduced themselves to the appellants and told the appellants of their mission. Having cautioned the appellants in terms of the Judges' Rules, the appellants volunteered certain information. They also conducted a body search on the appellants. They

found car keys on the 1st Appellant and he gave the police certain information regarding the said car keys. A side cutter was also found on the said appellant's person, specifically hidden in his underwear.

[9] On the 2nd appellant, he testified further, a false key was found in his underwear. This appellant also said something about this false key to the police. In a bag belonging to this appellant, they found a Sony car radio and 10 compact discs, which the said appellant said something about. Accused 1 then took the police to a nearby place where he handed to the police a tool box and two speakers. The accused persons thereafter took the police to a place which was about 500 metres away and there they found a red Mazda 322, bearing a registration number of the Mpumalanga Province.

[10] The accused persons were then taken to Gege police station where they were formally charged and the vehicle was detained at the said police station. It was this witness' further evidence that on arrival at the Gege police station, the accused persons led the police to Singeni area where they showed the police the fence which they

had cut in order to drive the stolen vehicle into the country. A few days later, he further testified, PW1 came to Gege police station and positively identified the vehicle as his and also identified the tool box, speakers, compact discs and the car radio as his.

[11] In cross-examination, both accused persons denied the evidence adduced by the police officer. In particular, they denied being found in possession of the items attributed to. them by the police officer. They also put to him that the items like the radio, side cutter and *ligoca* were found in the vehicle. They denied having pointed out the place where the fence was cut and further denied pointing out the vehicle to the police. The Crown then closed its case.

[12] The 1st accused gave evidence on oath. His evidence was that on the day in question, he was travelling with his co-accused from Nhlangano in the morning. They got a lift in a vehicle on their way to Magubheleni to see a herbalist. Next to Mbondzela area, the driver of the vehicle dropped them and returned to Nhlangano. It was at that point that the police confronted them about a vehicle that had been stolen in the Republic of South

Africa. They denied any knowledge of this vehicle. The police began to assault them, forcing them to admit knowledge of the said vehicle.

[13] The police, after the arrival of other officers from Gege, saw some tyre marks on the road and told them to follow same, which led into a bush. These marks led to a vehicle, a red Mazda sedan. The officers assaulted the accused persons telling them to admit complicity in the theft of the said vehicle and leaving it there. The vehicle was later towed to Gege police station. After that, the police took the two to the border and directed them to a spot where the fence had been cut and told them that that is where they had driven the vehicle into this country. The story advanced by the 2nd Accused in his sworn evidence was substantially similar.

[14] In his judgment, the learned Magistrate believed the evidence of the police officer but not that of the accused persons. This is what he said at p3-4 of the judgment:

> "Upon carefully evaluating the evidence before it, the court found the evidence of PW2 to be compelling as the officer gave his evidence with refreshing candour even though no other officers were called to buttress his evidence. Furthermore, the court was of the view that the testimony of the accused especially Accused 1 was and *(sic)* afterthought and deliberately tailored to get the accused persons off the hook. . . The only probable explanation that the court could find as to why the car was abandoned in the forest near Mbondzela area is that it developed mechanical faults hence PW1 could not get its engine started when he came to identify the motor vehicle. At the end of the day the court had no manner of doubt about the guilt of the accused hence they were found guilty."

The question to determine is whether the learned Magistrate was correct in his findings and conclusions, particularly regarding the certitude of guilt he returned in respect of both accused persons.

[15] The first and primary issue raised in favour of the accused persons relates to whether it was correct on the facts to charge the accused persons and particularly to find them guilty of the offence of theft in the circumstances. I think not. I say so for the reason that the charge sheet alleged that the accused persons stole the vehicle from Belfast. There was simply no evidence to prove this aspect of the charge. Furthermore, the charge sheet alleged that the accused persons conveyed the vehicle into this country. There is again no admissible evidence in this regard. I deal with the alleged pointing

out relating to the place where the vehicle was allegedly smuggled into this country later in this judgment.

[16] Furthermore, it is clear on the evidence that the accused persons were not found in possession of the vehicle allegedly stolen from Shoba. The inference sought to be drawn from the pointing out alleged and the effect thereof is dealt with later in this judgment. In my view, the evidence did not show that the accused persons were found in possession of the vehicle in the district of Shiselweni and the pointing out, as indicated later in this judgment cannot be said to have been freely and voluntarily made, an issue I again deal with more fully later.

[17] In the case of *R v George Dlamini* 1970-76 S.L.R. 282 at 286 F, the Court said of theft as a continuous offence:

> . . where property has been stolen in a foreign country by some person unknown and brought into Swaziland by some person unknown an accused who has thereafter had dealings with that property well knowing it to have been stolen can be convicted in a Swaziland court of theft or any lesser offence competent on the charge."

As indicated above, there is no evidence regarding the accused persons stealing the vehicle in the Republic of South Africa and there

is further no admissible evidence that they conveyed the said vehicle into this Kingdom. More importantly, they were not found in possession of the said vehicle nor was there admissible evidence that they had any dealing with the said vehicle, particularly knowing it to have been stolen. They could not, in the circumstances, be properly found guilty of theft or any other lesser.

[18] In *R v Sambo* 1970.76 S.L.R. 133, Hill C.J. said the following regarding the offence of theft as a continuous crime at 134:

> "Therefore if the stolen goats were proved to have been in the possession of the accused in Swaziland, the theft would be regarded as having been committed in Swaziland although the *contrectatio* took place in the Republic of South Africa."

I am of the considered view, in the circumstances, that it was not proper for the trial Court to have found the accused persons guilty of the offence of theft. I venture to say that on the evidence, it would not be proper for the said Court to have found them guilty of any other lesser offence, given the entire matrix of the admissible evidence before the trial Court. The proper approach would be to quash the conviction in the circumstances as I hereby do.

[19] The next issue raised by the Appellants' attorney relates to the decision by the Magistrate not to conduct an inspection of the vehicle in question. The Court was referred to the judgment of S *v* *Msane* 1977 (4) S.A. 758 (N) at 759, where Hoexter J. said:

"In recent months I have had occasion to consider on review several cases in which the prosecutor has failed (for no stated or apparent reason) to produce as an exhibit at the trial the real evidence (the dagga alleged to have been involved) mentioned by the State witness. Such failure does not, of course, render inadmissible the oral evidence of the witness concerned. But non-production by a State witness of a physical object, which might conveniently be produced for inspection by a trial court, may afford a valid ground for criticism of the witness' evidence. In my opinion that failure in the instant case reduces the cogency of Mfusi's evidence (a State witness). It is the duty of a trial court in a criminal case to treat the evidence of a single witness with caution. Among other things this duty implies, so I consider, that the veracity of the witness and the consistency of his or her story should be tested where this can be easily done. . . The tendency of prosecutors to take short cuts by not adducing all available evidence should be discouraged by magistrates. The feckless presentation of the case for the prosecution is subversive of proper criminal justice. It increased alike the risk of the acquittal of guilty persons and the conviction of innocent ones. Either result is unfortunate. But the possibility of the latter, is of course, particularly a disturbing one in a case hinging a single witness, acceptance of whose testimony must result in the removal from society of the accused for a period of not less than five years".

[20] It will be seen that in the instant case the decision not to physically inspect the vehicle was taken by the Magistrate and not the prosecutor. This was, as the trial Court said, for the reason that the said accused persons distanced themselves from the vehicle in question, a reason that cannot be supported by the record at that stage for the reason that their version was

not then before Court. At any rate, that is not, in my opinion, a valid or cogent reason for not bringing exhibits before Court or where appropriate or convenient, for the Court to adjourn in order to view the same and have its description of the items noted for the record.

[21] As matters presently stand, one cannot be satisfied that the vehicle testified about by PW1 is actually the vehicle PW2 saw and testified about himself. The marks by which it was identified and its avowed state of mechanical faults was not confirmed by the Court independently. The vehicle testified about by PW2 may actually be a totally different one, considering that there was no evidence before the Court *a quo* regarding its engine, chassis or even registration number. This is more so considering that in his evidence, PW2 testified about a Mazda 322, whereas PWl's testimony was in relation to a Mazda 323. This becomes increasingly significant considering the fact that PW2 testified as a single witness regarding the vehicle allegedly found and which the accused persons were alleged to have stolen.

[22] The possibility of a conviction based on what can be regarded as tenuous evidence is forever lurking, not to mention the worse possibility of convicting the wrong persons of the offence altogether. The need to bring the vehicle and to have it inspected by the Court in the presence of the accused persons was particularly important as this would have afforded the accused persons an opportunity to put questions regarding their association, if any, with the vehicle in question. The failure to bring the real evidence in the instant case was fatal to the prosecution's case.

[23] The other disconcerting aspects of the case relate to the alleged pointing out of both the vehicle and the place whereat it was allegedly smuggled into this country. What is particularly disturbing is that there is no mention that the accused persons were cautioned before the pointing out of their rights in that particular regard and of the consequences of them so pointing out what they allegedly did. In this regard, it cannot be said that the pointings out were freely and voluntarily made. See *July Petros Mhlongo and Others v Rex* Cri. App. Case No. 185/92 (C.A.) and *Alfred Shekwa v Rex* App. Case 21/1994 (C.A.) This must be seen particularly in the light of the cross-examination by the accused that it was the police who led them to the said places. A trial-within-a-trial may have had to be conducted by

the Court *a quo* regarding the admissibility of the alleged pointings out in the circumstances.

[24] There is, in the circumstances, no independent evidence regarding this issue, nor were independent witnesses called by the police before the alleged pointings out. Furthermore, PW2 was a single witness in this regard, whose uncorroborated evidence has necessarily to be treated with caution. The pointings out formed the bedrock of the prosecution's case and with the doubt presently lingering in my mind about the freeness and voluntariness thereof, it is my considered opinion that this Court may not safely rely thereon to confirm the certitude of guilt returned by the trial Court.

[25] I may also mention that PW2 adduced testimony about certain items which were later tendered in evidence, including a tool box, car radio and compact discs. There is no evidence that links these items to the present offence for PW1 never made any mention of them in his evidence. The same holds for the car keys allegedly found in accused I's possession. There was no evidence linking them in any way to the offence.

[26] I must state that I deplore the tendency by police officers to lead the Court to a possibility of it finding that an accused person may have given them incriminating information if not made an outright confession by hiding behind the facade of the accused "saying something" when the provisions of section 226 (1) of the Criminal Procedure and Evidence Act, 1938, have not been followed. PW2, in a number of instances alleged that the accused persons were asked about some items and they said something or gave certain information about the same. This is a subtle but unacceptable way of telling the Court without following the provisions of the law that the accused confessed or gave incriminating information.

[27] The allegation by PW2 that the said accused person "said something about them" does not mean that he admitted their knowledge or confessed that they belonged to the vehicle mentioned in the charge sheet. For that conclusion to be properly reached, the police would have had to follow the provisions of section 226 and have a confession properly recorded in terms of the law. In this case, for instance, where the evidence of PW2 as happens to be the case, was that upon conducting a search on their persons, he found certain items,

there is no need in my view to tell the Court that they said "something" about the said items for the impression sought to be created in the mind of the Court by what is not said by the officer but which was allegedly said by the accused person is plain.

[28] I should mention in this regard that although the learned Magistrate found that PW2 had adduced his evidence with "refreshing candour", there is one issue that leaves a bitter aftertaste in my mouth about his evidence. He testified that they were told by the Gege police about the vehicle believed to have been stolen which they proceeded to "intercept". It is clear on his evidence that intercept it they did not do. They merely found the accused persons sitting next to the road and confronted them about the said vehicle. This seems very curious indeed.

[29] I say so for the reason that it was not PW2's evidence that he was informed by the Gege police about the identity of the person (s) who were driving the vehicle such that he could be able to identify them either by their apparel or their facial and/or bodily features. In the circumstances, it would seem very odd indeed for him and his colleague to then confront the

accused persons, who from the evidence adduced at that stage were not driving the vehicle reported stolen or anywhere near it. They were actually sitting next to the road and were later to point it out to the police about 500 metres away. This evidence by PW2 in my mind raises more questions than answers and appears to point inexorably in the direction of evidence adduced devoid of candour, refreshing or otherwise.

[30] Another issue that requires mention relates to the fact that the charge sheet was conspicuously silent about the allegation relating to common purpose. It is only on the basis of this allegation that two persons can properly be married to an offence and be consequently found guilty of having committed the same offence. In the absence of this all-important allegation in the charge sheet, it is my considered opinion that the trial Court could not have properly arrived at the decision it did that both accused persons were guilty in respect of the first count as common purpose was not only not alleged but it was also not proved at all.

[31] On the second count, the 2nd accused stated his version right from the onset that the said *ligoca* was found, not on his person, but in the vehicle in question. He put this squarely to PW2. As indicated, PW2 was a single witness. His version was that he was not alone when the events he testified about were taking place. Strangely, none of the other witnesses were called to confirm his evidence regarding the place where the said *ligoca* was found. It was literally the evidence of PW2 versus that of the accused persons. I mention in particular that no reasons are furnished by the trial Court as to why it found that the said accused person's evidence on the second count was beyond doubt false.

[32] It should be mentioned in this regard that accused 2 not only put his version to PW2 in cross-examination regarding where the said instrument was found. His version was subsequently confirmed by his co-accused. When accused 2 subsequently adduced his evidence on oath, if I should add, he stated clearly and categorically where the Zigoca was found. This was consistent with what had been put to PW2 and with the evidence of his co-accused.

[33] More importantly, accused 2 was not cross-examined on his version by the prosecution. In my view, his version should therefore be allowed to stand. I am of the considered opinion that his explanation regarding where this particular item was found by the police meets the standard carefully captured and consistently applied as stated in *R v Difford* 1937 A.D. 370, namely that his evidence need not be true or less still believable in all its details. It suffices if there is a reasonable possibility that it may be substantially possibly true, which on the matrix of the evidence, I find it is.

[34] There is one thing that I need to point regarding the treatment by the trial Court of the exhibits handed in by the prosecution in this matter. The police officer should have fully and properly described the items he allegedly found in the possession of the accused persons before these were tendered as exhibits in Court. This, he evidently did not do. If necessary, he could have made reference to these by the marks that he would have put thereon for his own identification. Worse still, the PW2 testified that he was handing in "all the items that I have mentioned in my testimony which are before court (shows them to court) as

exhibit *(sic)* save for the car which was released to the complainant". See p 8 of the record.

[35] The exact particulars of these items is not stated nor is their number and description given for the benefit of this Court which sits on appeal and which it is common cause, does not ordinarily have the time or opportunity to view the real exhibits tendered before the Court *a quo.* In this regard, the trial Court must always be mindful and sensitive to the fact that it may not be the only or the last Court that will be seized with the matter. In this regard, the items tendered to it must be specifically and properly identified, described and marked for the record. As a result, the question whether the *ligoca* formed part of the exhibits remains moot and which should not be.

[36] I am also of the considered opinion that the collective marking of a number of items introduced in Court as exhibits should, as far as possible, be avoided. Items allegedly seized from accused persons should be separately identified and marked unless they form part of a large consignment e.g. cash, in coins and notes or books of account or records. The appellate

Court must be left in no doubt about the nature, number and description of any items handed in as exhibits during the trial.

[37] It would appear to me in the circumstances that the decision by the Crown not to support the conviction on both counts was well considered and appropriate. In the premises, there is only one verdict that can properly be returned and which I accordingly hereby do:

[37.1] The conviction of both accused persons on count 1 be and is hereby quashed.

[37.2] The sentence imposed by the trial Court in respect of this conviction be and is hereby set aside.

[37.3] The conviction of accused 2 on count 2 be and is hereby quashed.

[37.4] The sentence imposed on accused 2 in relation to count 2 be and is hereby set aside.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE

11th DAY OF SEPTEMBER, 2009.

T.S. Masuku
Judge

I agree.

D.M. Mamba

Judge

Messrs. B. S. Dlamini & Associates for the Appellants

Directorate of Public Prosecution for the Respondent