IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CRI. APPEAL No.45/97

In the matter between:

GEORGE KHOZA APPELLANT

And

THE KING RESPONDENT

CORAM: DUNN J. MAPHALALA A J.

FOR THE APPELLANT: MR SIMELANE.

FOR THE RESPONDENT: MR. WACHIRA.

JUDGMENT

19TH MARCH 1998

The appellant to whom I shall continue to refer to as the accused was charged before the senior magistrate in the following terms -

Count 1

The accused is guilty of the offence of contravening section 3(1) Of the Theft of Motor Vehicles Act No. 16/1991.

In that upon or about the 15th December 1994 and at or near Weg 10 Groeneweide street Boksburg, in the Republic of South Africa, the said accused did wrongfully and unlawfully steal a white Toyota Sprinter, registration KKB 405 T, the property or in the possession of Maria Elizabeth Strydom valued at E 10 000. And that upon or about the 29th March 1996, the said accused did unlawfully and intentionally convey the said motor vehicle into Mliba area in the district of Manzini, within the

Kingdom of Swaziland and theft being a continuous offence. the said accused did commit the crime of theft of the motor vehicle under the jurisdiction of this court.

Alternatively -

The accused is guilty of contravening section 3(1) of the Theft of Motor Vehicles Act No. 16/1991 (receiving a motor vehicle knowing it to have been stolen)

In that upon or about the 29th March 1996 and at or near Mliba area in the district of Manzini, the said accused did wrongfully, unlawfully and intentionally receive into his possession a motor vehicle to wit a Toyota Sprinter, registered KKB 405 T, well knowing it to be stolen or having reasons to suspect it to have been stolen, the same being the property of or in the lawful possesssion Maria Elizabeth Strydom.

Count 2.

The accused is guilty of the offence of contravening section 10 of the Theft of Motor Vehicles Act No 16/1991.

In that upon or about the 29th March 1996 and at or near Mliba area in the district of Manzini, the said accused did wrongfully and unlawfully have in control a motor vehicle to wit, a Toyota Sprinter motor vehicle bearing registration marks JMB698 T, which reistration marks were false the true and original marks being KKB 405 T.

The accused pleaded not guilty to the charges.

At the conclusion of the trial, the accused was convicted of common law theft on count 1. This was in line with the decision of this court in the case of MDUDUZI SIPHO DLAMINI v. THE KING CRI. APPEAL No. 26/95

(unreported) to the effect that section 3(1) of the Theft of Motor Vehicles Act was not of extra-territorial application. The accused was convicted as charged on count 2. He was sentenced to three years imprisonment on count 1 and to six months imprisonment on count 2. It was ordered that the sentences should run concurrently with effect from the 8th May 1996.

The present appeal is against both the conviction and the sentence.

The evidence led by the crown fully established the commission of the offence as charged on count 1. The vehicle was found in the possession of the accused at the beginning of April 1996, by the Mliba police. The accused claimed ownership of the motor vehicle. The question which the court a quo was to consider, was the accused's explanation for possession of the stolen motor

vehicle. The senior magistrate, in a fairly lengthy judgment, dealt with the circumstances under which the vehicle was recovered. Reference was made by the senior magistrate to certain documents which the accused exhibited in the course of his evidence in support of his contention that he purchased the

vehicle from one Doctor Vilakati. Neither the identity nor the whereabouts of Doctor Vilakati could be established by the accused. For reasons which are set out in the record, the senior magistrate rejected the accused's evidence of how he came into possession of the vehicle, as false.

I can find no fault with the senior magistrate's assessment of the evidence and his reasons for rejecting the accused's evidence. The accused's defence rested entirely on the evidence he gave about Doctor Vilakati, a person he did not mention to the police when he was questioned about his ownership of the vehicle. Neither Doctor Vilakati nor the person who allegedly introduced the accused to Doctor Vilakati were called by the accused as witnesses.

The appeal against the conviction on count 1, is dismissed.

Turning to count 2 the crown conceded for the reasons that follow, that the conviction cannot be allowed to stand Section 10 of the Theft of Motor Vehicles Act reads as follows -

Any person who, on any road, drives or is in control of a motor vehicle which bears false or no

registration marks commits an offence and is liable on conviction to a fine not exceeding five thousand Emalangeni or imprisonment not exceeding two years.

The evidence at the trial did not establish that the vehicle was found on a road. There was direct evidence that the vehicle was found parked at the homestead of the witness Modison Magagula, in the Mliba area. It was incumbent upon the crown to prove that the accused drove or was in control of the motor vehicle, on a road.

The conviction and sentence on count 2 are in the circumstances set aside.

There is no merit in the appeal against the sentence. The accused complains that his personal circumstances were not taken into account when the custodial sentence, without the option of a fine, was imposed. The senior magistrate indicated in his reasons for judgment, the factors which he took into account, including the personal circumstances of the accused. He made specific reference to the gravity and prevalence of this type of offence in Swaziland. He also referred to pronouncements of the High Court on the question of sentence in such cases. The sentence imposed in the present case is within the range of