IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.

In the matter between:

DUMSANE GAMEDZE	**1ST APPELLANT**
NGUDZENI MAMBA	**2ND APPELLANT**
SIBUSISO SIMELANE	**3RD APPELLANT**
VS	
REX	
CORAM	**BROWDE JA** **STEYN JA** **ZIETSMAN JA**

JUDGMENT

Browde JA:

During the night of 7th April 2000 one Nyarenda was robbed at gun-point of a Nissan motor vehicle SD686LG a 4x4 LDV. The three appellants were charged in the High Court, together with one Khumalo, with having committed the robbery but were found guilty by Annandale J of theft of the vehicle. The three appellants were each sentenced to a term of imprisonment of 5 years of which one year was suspended for 4 years on condition that they were not convicted of theft or of a competent verdict on a charge of theft during the period of suspension.

The appellants have all appealed to this Court against their convictions and sentences.

The second appellant was also charged with the offence of contravening Section 3(1) of the Theft of Motor Vehicle Act 16/1991, it being alleged that he did "unlawfully steal and/or receive" a winch valued at E9 000.00 of motor vehicle SD739KM the property of Gidane Vilakati. He was found guilty and sentenced to 2 years imprisonment of which 18 months were ordered to run concurrently with the sentence on the theft conviction. He has appealed to this Court also against this conviction and sentence.

In his judgment in the ***court a quo*** the learned judge set out all the facts of the matter in careful detail and also dealt in the most thorough manner with every point raised by the various attorneys who appeared on behalf of the appellants. I do not propose, therefore, to traverse all the facts but will confine myself to a bare outline thereof and to the arguments addressed to us.

<u>The Robbery Count</u>

In his evidence the complainant Nyarenda described how he was woken up in the early hours of 7th April 2000. He opened the door of his house and saw what he believed to be a gun pointed at him. He was then threatened that if he did not hand over the keys of the vehicle, which he said was a green Nissan LDV 4x4 with registration SD686LG, he would be shot. He tossed the keys out of the house and then heard the vehicle being driven away.

Thereafter the Crown called the witness Ngozo (PW3) who told the Court that one morning the said Khumalo and the third appellant arrived at his home in a green LDV motor vehicle and left it there until the evening, when they returned and drove it away.

Then followed the evidence of David Sithole (PW4 whose evidence came in for a great deal of criticism before the learned judge in the High Court and also before us. In essence, his evidence was to the effect that at about 6am on the 7th April 2000 Khumalo woke him up and asked for a jack

as his car had a puncture and was stuck in the mud. It transpired that the vehicle was a green Nissan 4x4 LDV. Several persons were called to help extricate the car from where it was stuck, including the third appellant. Once the car was free from the mud, and the punctured wheel replaced, Khumalo and the third appellant drove it away with the intention of leaving it for the day at the home of Ngozo (PW3). He also stated that in the presence of the third appellant Khumalo told him PW4 - that the Nissan 4x4 had been acquired unlawfully.

As he knew that the car was to be stripped and apparently to be disposed of in parts, PW4 asked that his part of the loot should be the battery of the motor vehicle. He then went on to describe how he participated with the first and second appellants in stripping the vehicle at the home of the third appellant who gave them a candle to provide light for the operation. According to his evidence the third appellant at first did not want the stripping to take place at his homestead. He later gave consent however but did not participate in the stripping of the vehicle. He left the scene ostensibly to visit a friend. After the stripping of the vehicle, so the evidence of PW4 went, the parts were loaded on to a red van. These parts were an engine, gearbox, differential, two propshafts, a bonnet, two mudguards, and a grill.

As a result of police investigations many parts of the vehicle were recovered and were ultimately inspected, during the course of the trial, at the court. Some of these parts were identified by the complainant Nyarenda, who, according to the evidence, was in possession and control of the vehicle on behalf of the owner one Glohm who had died prior to the commencement of the trial.

Nyarenda deposed to the fact that he and Glohm had identified what he called ‘the vehicle’, but which appears to have been the component parts of the vehicle, at the police station. When asked about the engine and by what particular feature he identified it as belonging to the motor vehicle of which he had been robbed, he stated that he and Glohm had compared the numbers on the engine with those recorded in the “blue book” which was the service manual of the vehicle concerned. Although a great deal of time was spent in canvassing the question as to whether the parts had been properly identified, I agree unhesitatingly with the following finding of Annandale J, namely:

> "As presiding officer, I cannot come to any other conclusion, however remote, that beyond any reasonable doubt it is indeed the vehicle taken from Nyarenda that ended up in numerous pieces in the court yard when viewed in the ***inspection in loco.*** The combination of engine, chassis, body, suspension, seats, tailgate, rear window, wheels, battery, exhaust, fenders, steering wheel, interior fittings, drive train, gearbox, cab and loadbay, up to a number plate reading SD686LG constitute a previously whole and complete Nissan 4x4 2.4 petrol-engined LDV as was described by Nyarenda and supplemented by Dlamini. It will border on the ludicrous to find that it is remotely possible that two different vehicles are the subject matter. None of the mentioned discrepancies, either in isolation or as a whole, militate against this final factual finding. Thus, it is the factual finding of this court that the vehicle which was robbed from Nyarenda is substantially the same as the one exhibited in its bits and pieces, collectively depicted in the photographs marked H2 to H13 and H16 to H19".

PW4, as I have said, described how he participated in the stripping of the vehicle. He then went on to relate to the court what happened and what he observed at the police station when he was arrested. He saw the three appellants there together with Khumalo. He stated that he saw some of them being assaulted. He described the assault by a police officer with a sjambok on the second appellant and Khumalo. He said, "I saw them fisted". According to PW4 the first appellant was a sorry sight, his clothes were soiled and torn and he was crying.

Although he was not named as an accomplice, it is clear that PW4 was involved in the commission of the offence charged as were the first and second appellants.

In the circumstances, it is clear that what was required of the trial Judge was to approach the evidence of PW4 with caution. It is quite obvious from his judgment that Annandale J did just that. He analysed the evidence meticulously and was quite aware of some of the shortcomings in it. He made allowances, quite rightly in my opinion, for the fact that PW4 is a person with hardly any formal education who was subjected to a gruelling and often rude and aggressive cross-examination particularly by the attorney who appeared for the first appellant. It has been said before in this Court but it warrants repetition that any witness, no matter how inimical his or her evidence is to the interest of the accused, is entitled to respectful and fair treatment by counsel for the defence. The fact that the evidence of the witness differs from the attorney's instructions from the accused does not

necessarily mean that the witness is a “liar”. That epithet was often used in this case with abandon in cross-examination of witnesses, even where there was room for a mistake, let alone the possibility that the cross-examining attorney’s client might not have been telling the truth. It is not a requirement of an effective cross-examination that attempts be made to humiliate the witness by insults.
One of the witnesses that was subjected to this was PW4. The learned Judge found that he stood to gain nothing by giving false evidence and although he was not “the brightest witness” that the learned Judge had experienced nevertheless impressed as being honest. The learned Judge concluded his analysis of PW4’s evidence by saying:

> “The overall impression he made on me was that of a witness who truthfully and to his best ability conveyed to the court all that he knows about the matter, without the addition of embellishments or distortions or omissions. He remains a single witness in some crucial aspects but due to the role he played, corroboration of his evidence is required before it can safely be relied on in as far as he connects the accused to the crime”.

The learned Judge then proceeded to consider the evidence in order to ascertain whether there was corroboration of PW4’s evidence which, in the circumstances, he considered necessary before accepting that evidence. Such corroboration was in my view justifiably found to exist in the following:-

(i) the fact that there was a stolen vehicle as described by PW4 is of course corroborated by the complainant.
(ii) PW3 confirmed the evidence of PW4 that the car was driven to his home and later fetched by Khumalo and the third appellant.
(iii) The parts of the vehicle discovered by the police was corroborative of PW4’s evidence that the vehicle was stripped.
(iv) Where the parts were recovered was also corroborative of PW4’s evidence that the parts were distributed amongst the various participants.
(v) There is further significance arising from where the parts of the vehicle were found. To illustrate the point, I refer to the parts found in the vicinity of the homesteads of the appellants.

Det. Sgt Nhlabatsi deposed to having found the rear chassis of a Nissan 4x4 vehicle “cut in the middle”. This was on the edge of the yard of the homestead of the third appellant. Much time was spent in the trial and a good deal of argument directed to ascertaining whether or not the alleged pointings out by the accused persons were done freely and voluntarily. There is enough evidence on record, including of course that of PW4, to indicate that there may be substance in the allegations that the appellants and the

other accused were all victims of physical assaults by members of the police force. If that is indeed so, it is, of course, and to put it mildly, quite unacceptable. This type of conduct by police towards persons detained by them is not only cowardly in the extreme, since there can be no retaliation, but is often counter-productive. In this case, the learned Judge, in my opinion quite correctly, held the pointings out to be inadmissible and drew no inference from them. That however is not the end of the matter.

Section 227(2) of the Criminal Law and Procedure Act 67 of 1938 reads:-

> "Evidence that any fact or thing was discovered in consequence of the pointing out of anything by the accused person or in consequence of information given by him may be admitted notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him."

This section was considered by this Court in the case of **JULY PETROS MHLONGO AND OTHERS VS REX (CRIM. CASE 185/92)**. It is clear from that judgment and the authorities dealt with therein that a pointing out is a communication by conduct which could constitute an extra-judicial admission. It follows when that is the case the Crown, if it wishes the pointing out to demonstrate that the accused knew where the item pointed out was, and that therefore an inference adverse to the accused could properly be drawn, must prove that the pointing out was freely and voluntarily made. This the learned judge found, on grounds with which I entirely agree, not to have been proved and therefore placed no reliance on the pointings out.

The evidence of the discovery of the parts of the vehicle in various localities was given mainly by Det. Sgt. Nhlabatsi and Det. Cst. Sabelo Dlamini. According to Nhlabatsi the green cab and loading bay were found in the immediate vicinity of the third appellant's home while other parts were deposed to by Det. Cst. Dlamini as having been recovered from within or very near the homestead where the first and second appellants lived. The recovery of the articles is admissible evidence and inferences can legitimately be drawn from the mere existence of the articles at or in the immediate vicinity of the homesteads of the appellants, that they were

aware of them. They were thus called upon to explain their existence there, which they failed to do satisfactorily. The discovery of the articles is, therefore, further corroboration of the evidence of PW4.

In my opinion there was ample corroboration of PW4's evidence to justify the acceptance thereof by the learned judge.

The first and second appellants occupied a house adjacent to which was a rondavel. In the rondavel the police found the engine of the Nissan vehicle. This was not as a result of any pointing out but was seen inside the rondavel by the police apparently fortuitously. The first and second appellants were present and apart from alleging that they did not have the keys of the rondavel they did not suggest that they were not the occupiers or at least had no access to the rondavel. Only in their evidence in court, and that after the alleged ill-treatment of them had not elicited it, did they say that the rondavel was occupied by one Mvoti. I agree with Annandale J who, in this regard made the following finding:-

> "If indeed Mvoti was the tenant of that abode, with the ability to either take the blame or provide an explanation for its (engine's) presence inside his locked rondavel, where the accused persons were singled out for just that, one would reasonably expect them to have given such information to the police."

The learned judge also referred to the fact that it was never suggested to PW4 that a person by the name of Mvoti had been one who shared in the spoils – and this despite the extremely lengthy and detailed cross-examination of the witness by counsel for first and second appellants. The evidence of the appellants in this regard was correctly rejected as false.

The third appellant denied that the stripping took place at his home and relied on the evidence that Ngozo's home was the end of the road and that his (third appellant's) home was inaccessible because of a stream which cut it off from traffic. It transpired, however, that that was not the home occupied by him and that the stripping took place at a homestead which was accessible and to which the police went and discovered the chassis of the stolen vehicle which was cut into two. The third appellant's evidence was, therefore, patently false.

It is quite clear from the evidence that all the appellants were aware that the vehicle had been acquired unlawfully and their participation in stripping it and in the distribution of the parts amongst themselves was sufficient for the court to have found them guilty of the crime of theft.

Their appeals against their convictions of theft are without substance and are dismissed.

I turn now to consider the second appellants appeal against his conviction for contravening Section 3(1) of the Theft of Motor Vehicles Act

No.16 of 1991. The section provides that "any person who steals a motor vehicle or receives a motor vehicle knowing it to be stolen is guilty of an office." This, of course, introduces nothing novel but Section 4(1) of the Act reads as follows:-

> "4 (1) unless the contrary is proved by him, a person shall be presumed to have committed an offence under Section 3 and, on conviction punished accordingly if –
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> (a) he is found in possession of a motor vehicle which is reasonably suspected to be stolen," and Section 2 of the Act defines "motor vehicle" as including "any part of such vehicle."

It was common cause that the second appellant was found in possession of a winch. This winch was identified by one Lourens as the one which he had attached by welding to the back of his breakdown truck. This identification was accepted by Annandale J because of Lourens' detailed evidence of the characteristics of his winch which co-incided with that in second appellant's possession. There can be no valid attack on that finding. This gave rise in argument to the interesting questions as to whether a winch can be said to be part of a vehicle and whether a person found in possession of a stolen part of a vehicle can be found guilty of stealing that vehicle which is known not to have been stolen. Because of the conclusion to which I have come, however, it is not necessary to decide the precise meaning of the Act. The theft of the winch was reported to the police some months prior to it being found in second appellant's possession. In that time it could reasonably have changed hands once if not more. The appellant's defence was that he had bought the winch for E2 600,00 for which he produced a receipt issued by a dealer in spares in Manzini in respect of a winch purchased on 25th November 1999. There was no clear evidence as to when the winch was stolen from Lourens and, therefore, the appellant's explanation should have been accepted as satisfactory proof that he did not commit the offence under Section 3 of the Act.

On this count the appeal against the conviction and sentence of the second appellant is upheld.

The sentences on count 1 were described in Mrs. Mumcy Dlamini's helpful heads of argument for the Crown as "fair if not lenient". I fully agree with that submission.

In the result the appeals of the three appellant's on count 1 are dismissed and the convictions and sentence are confirmed.

On count 7 the appeal of the second appellant is upheld and his conviction and sentence are set aside.

J. BROWDE JA

I AGREE J.H. STEYN JA

I AGREE N.W ZIETSMAN JA

Delivered in open Court on the …… June 2002