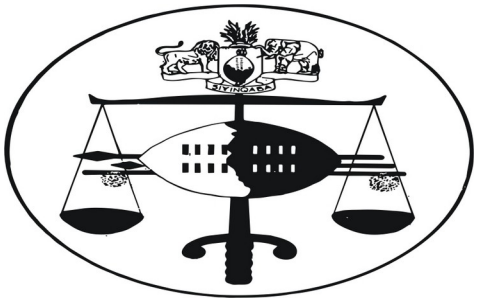

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

Criminal Appeal No. 04/2013

In the matter between

MFANUKHONA DLAMINI **Appellant**

and

REX **Respondent**

Neutral citation:	Mfanukhona Dlamini *v Rex (04*/2013) [2013] SZSC 1 (21 February 2013)
Coram:	RAMODIBEDI CJ, M.C.B. MAPHALALA JA, and OTA JA
Heard:	**7 FEBRUARY 2013**
Delivered:	**21 FEBRUARY 2013**

Summary: **Criminal law and procedure – Bail – Appeal on the ground that the High Court granted excessive bail – The provisions of sections 95, 96 and 103 of the Criminal Procedure and Evidence Act 1938 as amended as well as section 18 (1) of the Theft of Motor Vehicles Act of 1991 considered – Court's discretion – No misdirection shown to exist – Appeal dismissed.**

JUDGMENT

THE COURT

[1] The appellant, who together with two others is facing a formidable array of nine (9) counts comprising amongst others theft of motor vehicles under both the common law and the Theft of Motor Vehicles Act 1991 as amended, is aggrieved by a decision of the High Court (Hlophe J) granting him bail at "half the total value of the motor vehicles allegedly stolen", payable in cash only. He contends that the bail in question is "excessive." He maintains, too, that the amount of bail in question contravenes the provisions of s 16 (7) of the Constitution in that it is unreasonable.

[2] In order to appreciate the full import and serious nature of the charges against the appellant it is necessary to summarise them, even if briefly.

(1) On Count 1 the appellant is charged with the crime of theft. It is alleged that upon or about 9 November 2012 and at or near Nedbank parking lot, Kensington Drive, Durban North in the Republic of South Africa the appellant unlawfully and intentionally stole a Toyota Hilux Double Cab fully described in the charge sheet and valued at R300 000.00.

(2) Count 2 relates to a contravention of s 3 (1) read together with s 4 (1) (a) of the Theft of Motor Vehicles Act No. 16 of 1991 as amended. It is alleged that upon or about 23 November 2012 and at or near Ngwane Park in the Manzini Region the appellant did unlawfully possess a Silver Grey Toyota Hilux fully described in the charge sheet and whose engine number and identification mark had been disfigured, obliterated, tampered with and removed from the vehicle. It is further alleged that the appellant "imported" the motor vehicle into

Swaziland from the Republic of South Africa in contravention of the Customs and Excise Act No. 21 of 1971 as well as the Immigration Act No. 17 of 1982. It is alleged further that the Motor Vehicle is valued at R 300,000.00.

(3) Count 3 alleges a contravention of s 8 of the Theft of Motor Vehicles Act No. 16 of 1991 as amended. It is alleged that upon or about 22 November 2012 and at or near Nhlambeni and Ngwane Park, Manzini in the Manzini Region the appellant, acting in furtherance of a common purpose with others, unlawfully and fraudulently engaged in stealing and selling a motor vehicle Toyota Hilux Double Cab fully described in the charge sheet and which had been stolen from the Nedbank parking lot, Kensington Drive, Durban North in the Republic of South Africa, being the property of or in the lawful possession of one Gordon James Wiseman and valued at R300,000.00. It is further alleged that the motor vehicle was stripped into several parts, some of which were recovered whilst others were not.

(4) Count 4 relates to the crime of theft. It is alleged that upon or about 9 October 2012 and at or near Safari Spar Parking, Marikana Rustenburg in the Republic of South Africa, the appellant acting in furtherance of a common purpose with others, unlawfully stole a motor vehicle, Toyota Hilux fully described in the charge sheet and valued at R 280,000.00, being the property of or in the lawful possession of one Riki Raymond Hales.

(5) Count 5 alleges a contravention of s 3 (1) read together with s 4 (1) (b) of the Theft of Motor Vehicles Act No. 16 of 1991 as amended. It is alleged that upon or about 22 November 2012 and at or near Ngwane Park, Manzini in the Manzini Region the appellant acting in furtherance of a common purpose with others unlawfully possessed the engine of a motor vehicle, Toyota Hilux LDV fully described in the charge sheet. It is alleged that this Motor Vehicle was stolen from one Riki Raymond Hales in Rustenburg in the Republic of South Africa on 9 October 2012. It is further alleged that the appellant, acting in furtherance of a common purpose with others,

imported the motor vehicle into Swaziland in contravention of the Customs and Excise Act No. 21 of 1971 and Immigration Act No. 17 of 1982. Furthermore, it is alleged that the engine number of the motor vehicle has been obliterated, altered, disfigured and tampered with.

(6) Count 6 alleges a contravention of s 8 of the Theft of Motor Vehicles Act No. 16 of 1991 as amended. It is alleged that upon or about 22 November of an unspecified year the appellant acting in furtherance of a common purpose with others unlawfully engaged in stealing, selling and/or fraudulently dealing with a motor vehicle, Toyota Hilux LDV, fully described in the charge sheet and which had been stolen from Riki Raymond Hales at Safari Spar parking lot in Rustenburg in 9 October 2012. It is further alleged in this count that only the engine of the motor vehicle which had been tampered with for that matter was recovered from the appellant's home at Ngwane Park.

(7) On Count 7 the appellant is charged with the crime of theft. It is alleged that upon or about 11 May 2012 and at or near Pongolo area in the Republic of South Africa the appellant acting in furtherance of a common purpose with the others unlawfully and intentionally stole a Toyota Hilux LDV fully described in the charge sheet valued at R45,000.00, being the property or in the lawful possession of one Thembinkosi Andreas Ndwandwe. It is specifically alleged in this count that theft is a continuing offence.

(8) Count 8 alleges a contravention of s 4 (1) (b) and (d) read together with s 3 of the Theft of Motor Vehicles Act No. 16 of 1991 as amended. It is alleged that upon or about 23 November 2012 and at or near Ngwane Park, Manzini in the Manzini Region the appellant acting in furtherance of a common purpose unlawfully had in his control and possession a registration number plate DXC 203 MP of a Toyota Hilux LDV with a white canopy stolen at Pongolo area in the Republic of South Africa on 11 May 2012. It is further alleged that the appellant and others "imported" the motor vehicles concerned into

Swaziland in contravention of the Customs and Excise Act No. 21 of 1971.

(9) Finally, count 9 alleges a contravention of s 8 of the Theft of Motor Vehicles Act No. 16 of 1991 as amended. It is alleged that upon or about 23 November 2012 and at or near Ngwane Park in the Manzini Region, the appellant unlawfully engaged in stealing and selling of a motor vehicle, Toyota Hilux LDV fully described in the charge sheet and stolen from Pongolo in the Republic of South Africa on 11 May 2012. It is specifically alleged that only the registration number plate of the motor vehicle was found at the appellant's home.

[3] On 24 January 2013, the appellant filed a notice of motion in the High Court for an order admitting him to bail upon such terms and conditions as the Court might deem fit. In his founding affidavit he professed innocence of the charges levelled against him. He averred in paragraph 5 of the affidavit that he is a businessman involved in repairing damaged motor vehicles. He alleged that he mainly bought them from auction sales and agents of insurance claims.

[4] It should be noted that the respondent did not file any opposing affidavit. Importantly, it is common cause that this was by agreement with Mr Mabila, counsel who appeared for the appellant both in the court below and in this Court. The learned judge *a quo* recorded the position accurately on paragraph [4] of his judgment when he said the following:-

> *"[4] Reacting to Mr. Mabila's submission firstly on the need or otherwise to file opposing papers, Mr. Mathunjwa for the crown, confirmed that bail was not being opposed per se except for an insistence that same be fixed in line with provisions of section 18 (1) of the Theft of Motor Vehicles Act of 1991; which is to say it has to be fixed at half the value of the motor vehicle concerned payable in cash only, which is to say no portion of that "half the value" can be in the form of a surety or sureties. He therefore confirm there was no need to file opposing papers as the issues were crisp and were common cause."*

[5] We are satisfied, therefore, that the mutual understanding between counsel on either side was that the outcome of the bail application

depended not on facts but on law. Indeed, the record shows that the Crown did not oppose bail per se. The Crown's contention was simply that bail should be fixed at half the value of the motor vehicles concerned, payable in cash only. It has maintained that attitude in this Court.

[6] When the appeal was argued in this Court, Mr Mabila sought to make miliage from the fact that the Crown had not filed any opposing affidavit on the facts. He submitted in effect that the appellant's innocence, therefore, was uncontested. In paragraph 8 of his supplementary heads of argument filed on 11 February 2013, long after the appeal was heard, he submits that weight ought to have been attached to the appellant's "uncontroverted evidence." In our view, counsel's submission in this regard is disingenuous. Having entered into an agreement with the Crown not to file any opposing affidavit, he cannot turn around midstream and use this factor to his own advantage when it suits him. In any event, it cannot be stressed strongly enough that the court seized with an application for bail in this jurisdiction has an overall obligation to ensure that the interests of justice are observed whether or not opposing affidavits are filed.

[7] In determining the appeal in this matter it is necessary, first, to consider the appellant's complaint that the amount of bail granted by the court *a quo* contravenes the provisions of s 16 (7) of the Constitution in that it is "unreasonable." This section provides as follows:-

> *"(7) If a person is arrested or detained as mentioned in subsection (3) (b) then, without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that that person appears at a later date for trial or for proceedings preliminary to trial."*

Subsection 3 (b) in turn provides that a person who is arrested or detained upon reasonable suspicion of having committed, or being about to commit a criminal offence shall be brought before a court without undue delay.

[8] Now, the ordinary meaning of the word "reasonable", as defined in Black's Law Dictionary: Eighth Edition at 1293, is "fair, proper, or

moderate under the circumstances." We are prepared to conclude, therefore, that the test on whether bail conditions within the meaning of subsection 16 (7) of the Constitution are reasonable or not is an objective one, to be determined on the basis of exceptional circumstances of each case. In *casu*, the exceptional circumstances are contained in s 18 (1) of the Theft of Motor Vehicles Act of 1991 as well as s 95 (6) of the Criminal Procedure and Evidence Act 1938 as amended. We turn, then, to a consideration of those sections.

[9] Section 18 (1) of the Theft of Motor Vehicles Act 1991 provides as follows:-

> *"18 (1) Where a person is charged with an offence under section 3 or 5 the amount of bail to be fixed by a Court shall not be less than half the value of the Motor Vehicle stolen, and a deposit of the amount of bail so fixed by the Court shall be made in cash only notwithstanding any law to the contrary."*

Section 3 (1) in turn provides that a person who steals a motor vehicle or receives it knowing it to be stolen is guilty of an offence. Importantly, s 4 provides that a person shall be pressumed to have committed an offence under section 3 if:-

> *"(a) he is found in possession of a motor vehicle which is reasonably suspected to be stolen;*
>
> *(b) the engine or chassis number or registration marks or numbers of the motor vehicle or other identification marks of the motor vehicle have been altered, disfigured, obliterated or tampered with in any manner;*
>
> *(c) he possesses forged registration book, papers or other document of registration or ownership in relation to that motor vehicle;*
>
> *(d) he has imported the motor vehicle into Swaziland in contravention of any law for the time being in force relating to the importation of motor vehicles."*

Section 95 (6) on the other hand provides as follows:-

"(6) Where an accused person is charged with any offence, other than the offences covered by the provisions of this section but not excluding an offence under the Theft of Motor Vehicles Act, 1991, the amount of bail to be fixed by the Court shall not be less than half the value of the property or thing upon which the charge relates or is based upon and where the value cannot be ascertained without any form of speculation the Court may, for purposes of this subsection, without or with the assistance of any person the Court deems could be of assistance to it, also fix an amount to be the value of the property or such thing."

[10] Now, a correct reading of s 18 (1) of the Theft of Motor Vehicles Act 1991 and s 95 (6) of the Criminal Procedure and Evidence Act will show that in both sections bail in respect of offences covered by the relevant sections of the Theft of Motor Vehicles Act 1991 must be fixed at no less than the value of the property stolen. Both provisions are

mandatory in this regard. The court fixing bail simply has no discretion in that regard.

[11] Before going further, it is necessary to record that in this Court Mr Mabila watered down the appellant's complaint that the amount of bail granted by the court *a quo* was excessive and unreasonable per se. That had been the appellant's high water mark in the court below. Counsel has now submitted in this Court that the amount of bail in question is excessive and unreasonable, not per se, but only to the extent that it does not provide for surety in lieu of cash, either in whole or in part.

[12] In approaching the matter, the learned Judge *a quo* expressed himself as follows in paragraph [19] of his judgment:-

> *"[19] I have noted that in the matter at hand, the facts reveal that all the motor vehicles were stolen in the Republic of South Africa. For this reason there could not realistically be a charge based on the statute as the alleged theft was in terms of the common law in view of the fact that theft is in law a continuing offence.*

Indeed the theft charges preferred against the accused in terms of counts 1,4 and 7 of the Act (sic) are expressed in terms of the common law ex facie the charge sheet and is (sic) not in terms of section 3 (1) of the Theft of Motor Vehicles Act.

[20] This being the case it does not seem appropriate to me that in a matter where the facts undoubtedly point to a possible charge of theft against the accused being only in terms of the common law, it would avail the crown to simply include in the charges the statutory offence which attracts restricted bail conditions as a means of ensuring that an accused is given bail as restricted in terms of the Act as in the case of one charged with contravening the Statutory offences provided for in law which limit feasible bail conditions. I see no reason why this court should not take such a factor into account if anything as regards the strength of the case against the accused so as to determine whether bail would be appropriate."

With the greatest of respect to the learned Judge *a quo*, we consider that he was in error in coming to the conclusion that the statutory charges against the appellant were inappropriate. Similarly, the Judge was incorrect in paragraph [22] of his judgment to the effect that he was "not obliged by any statute on how to fix the bail." The very same principle that theft is a continuing offence means that when property is stolen from outside the country and brought into Swaziland the theft is continuing. The theft now takes place in this country. Once that proposition is accepted, as it must, the Crown is, in our view, perfectly entitled to bring any appropriate statutory charges against the accused, as happened here. Indeed, it will be seen from paragraph [2] above that some of the counts were based squarely on the Theft of Motor Vehicles Act 1991. Furthermore, we consider that it is within the Crown's domain, if so advised, to amend counts 1, 4 and 7 in order to bring them under the Act.

[13] It is important to record that although the learned Judge *a quo* incorrectly held that he was not obliged by any statute on how to fix bail, he nevertheless made the following apposite remarks in paragraph [22] of his judgment:-

" I cannot lose sight of how the Legislature, by analogy, wants such offences to be dealt with particularly when considering that its intent is to eradicate the crime concerned, perhaps because of its effect on the well-being of law-abiding citizens or even the economy of the country."

Thus, in coming to the decision that it did, the court *a quo* duly took into account the spirit of the legislation in question, the serious nature of the offences and the alleged repetitive commission of such offences by the appellant. In our view these are relevant considerations.

[14] The law is well-established in this jurisdiction that under the common law bail lies within the discretion of the court. Statutorily, such a discretion is contained in subsection 95 (2) of the Criminal Procedure and Evidence Act 1991. Similarly, subsection 96 (16) confers a discretion on the court to order that the accused shall furnish a guarantee, "with or without sureties." It is again well-established that an appellate court will not interfere with the lower court's exercise of a discretion in the absence of a material misdirection resulting in a failure of justice. No such misdirection has been shown to exist in this matter. Indeed, as Mr Nxumalo for the respondent correctly submitted, in our view, s 103 of the Criminal Procedure and Evidence Act 1991 as amended provides a killer blow to the appellant's contention that the

amount of bail fixed by the court *a quo* is excessive or unreasonable. This section provides as follows:-

> *"103. Subject to section 102A, the amount of bail to be taken in any case shall be in the discretion of the Court or judicial officer to whom the application to be admitted to bail is made:*
>
> *Provided that no person shall be required to give excessive bail* ***and the amounts specified under section 95 shall not be construed as excessive.*** *(Added), A.4/2004)*
>
> *Amended A/14/1991.)"*

Mr Mabila simply had no answer to the provisions of this section.

[15] In light of all of the foregoing considerations we have come to the conclusion that the appeal cannot succeed. It is accordingly dismissed.

M.M. RAMODIBEDI
CHIEF JUSTICE

M.C.B. MAPHALALA
JUSTICE OF APPEAL

E.A. OTA

JUSTICE OF APPEAL

For Appellant	**:**	**Mr. M. Mabila**
For Respondent	**:**	**Mr D. M. Nxumalo**