# IN THE SUPREME COURT OF ESWATINI

## JUDGMENT

**HELD AT MBABANE** **CASE NO. 18/2018**

In the matter between

**JOHANNES MFANKHONA DLAMINI** **1ST APPELLANT**

**SIZA SIBEKO** **2ND APPELLANT**

AND

**THE KING** **RESPONDENT**

**Neutral Citation:** *JOHANNES MFANKHONA DLAMINI AND ANOTHER v THE KING (18/2018) [2023] SZSC 5 (23 FEBRUARY, 2023)*

**Coram : J. P. ANNANDALE JA, MAMBA JA et M. J. MANZINI AJA.**

**Heard** : 28 FEBRUARY, 2022

**Delivered** : 23 FEBRUARY, 2023

**MAMBA JA:**

[1] *Criminal law – Theft of Motor Vehicle in contravention of Section 3 (1) as read with Section 3 (2) of the Theft of Motor Vehicles Act 15 of 1991 (as amended). Definition of motor vehicle, include any part of such vehicle.*

[2] *Criminal Law – Application of statutes – Motor vehicle initially stolen outwith jurisdiction of the Court. Later accused found in possession thereof in Eswatini – Statute applicable to prohibit and punish unlawful handling of motor vehicle in Eswatini – where requisite intent is established.*

[3] *Criminal law and Procedure – Sentence pre-eminently within the jurisdiction of trial Court. Appellant convicted and sentenced on multiple counts. Trial Court fails to take into consideration the cumulative effect of such multiple sentences. Where totality of sentences too harsh or disturbingly inappropriate, Appeal Court at large to interfere and consider sentence afresh.*

[4] *Criminal Law and procedure – Conviction on more than one offence of contravening Section 3 or 6 of the Act – Section 14 (1) decrees that sentences must run consecutively.*

[1] The appellants were indicted in the High Court on 72 Counts. These were mainly relating to a contravention of the provisions of the Theft of Motor Vehicle Act 14 of 1991 (as amended) (hereinafter referred to as the Act) and other kindred offenses related to such contraventions. In the course of the trial, 9 (nine) of these charges were abandoned by the Crown. Initially, there were three persons charged but at the commencement of the trial, the Crown withdrew all the charges against the third accused, one Vincent Souza Mwambo. This was before he pleaded. The Crown indicated that Mr. Mwambo would be used as an accomplice witness. For reasons that are not relevant for purposes of this appeal, his evidence and that of Mr.

George James Maluleka, another prospective accomplice witness for the Crown, was never led in Court.

[2] At all times material thereto, and this is common ground, the first Appellant had two homes; one at Ngwane Park and another one at Nhlambeni. Both sites and areas are situated just on the outskirts of Manzini and a few kilometres apart.

[3] In its overview of the evidence and relevant facts, the trial Court stated as follows:

> '[3] On or about 25th September, 2010 police officers from the Manzini police station raided the accused's Ngwane Park homestead. From the evidence they were in two groups. One group were there allegedly led by a tracker signal said to have been emitted from a certain motor vehicle or its remnants found at the said accused's homestead. It was to later transpire that the motor vehicle had been stolen from a certain Mr. Hugo Maree of Sulphur Springs, in the Republic of South Africa on the 23rd September 2010. A chassis frame which was later marked D2

by the police was amongst the ten or so chassis frames found at the said accused's homestead. It was upon examination by experts confirmed to belong to the said motor vehicle. Otherwise the other group of police officers who were there led by Superintendent Methula, were there on their own to conduct a planned raid on the said premises. I shall mention at this point that all these ten or so chassis frames had had their identity marks, in the form of chassis numbers, either ground off or obliterated or tampered with.

[4] The 10 or so chassis frames were not the only items seized from that raid by the Manzini police as others including some engine blocks with no identity numbers and cabs were also seized. The evidence indicates that these seized items were taken to the Lobamba security yard where they were kept pending investigations. The first accused was charged with offences relating to some of the items found and seized from his place. On the other hand, a close friend or relative of the first accused who stayed with him at his Ngwane Park homestead, one Botsotso Phumlani Jele, in the company of certain police

officers from the Lobamba police station is said to have broken into the Lobamba security yard and thereat stole some of the items that had been seized by the police and kept there. The current status of the criminal case that ensued from this is unclear.

[5] Although the first accused had been charged with some offences emanating from the raid, it is common cause those charges could not be pursued after the dockets went missing at the Manzini Magistrates Court which prompted some of the current charges against the accused given that the matter had not commenced when the glitches which prevented its trial there arose.

[6] It is common cause that further police raids at the first accused's two homesteads mentioned above were carried out on the 22nd and 23rd November, 2012, as well as on the 23rd and 24th January 2013. From these raids further items were seized. The first accused and his co-accused were subsequently charged with various offences emanating from these raids and items

seized therefrom. Given that the charges from the 2010 raid had not been pursued at the Manzini Magistrates Court, they were subsequently incorporated into the charges emanating from the raids of between 22nd November, 2012 and January, 2013. All these charges formed the basis of the 72 or so counts faced by the accused persons in this matter.

[7] Otherwise the items found and seized during the said raids including several cabs of motor vehicles with ground off or removed identity numbers, bakkies, several cattle immobilizer or rails, several chassis frames, motor vehicle engine blocks, Toyota bumper, chopped motor vehicle firewalls, a matric certificate belonging to Peter Robinson, motor vehicle engines with tampered engine numbers, canopies, motor vehicle registration plate DXC 203 MP, motor vehicle engine bar code number 7461030, a floor portion and roof top of a certain Toyota Quantum, various motor vehicle components such as doors, fenders, steppers, grills, motor vehicle wiring systems, fire walls with removed chassis tags and job numbers, Toyota bonnets, Toyota tailgates, propeller shafts, disc grinders,

chopped Toyota double cabs roof tops, motor vehicle roofs, two-seater quantum seats, 11 Toyota quantum seats, a blue tool box with various tools in it, black and green grinders, a grill machine and a welding machine.

[8] It shall be noted that I have decided to mention these items on their group types so as to avoid mentioning them individually in the overview because they were so many they would possible take several pages in enumeration.

[9] Motor vehicle experts, especially those from the Republic of South Africa were able to determine that some of the items seized were components of certain motor vehicles reported stolen in various parts of South Africa. There were on the overall ten such instances as are captured in counts 1, 2, 3, 4, 5, 6, 8, 9, 18 and 33. I will deal with the details of each count later on this judgment, which shall include how each case of the theft of a particular motor vehicle was uncovered including how and where it had been carried out.

. . .

[19] Although the crown witnesses had presented the evidence aimed at proving the crown's case against the accused persons the first accused tried to give his defence. In the same manner I have sought at this stage to highlight the case for the crown so shall I here highlight that by the defence in this overview. It should otherwise be mentioned that the details in each one of the cases shall be given in due course particularly as each count shall be dealt with.

[20] The case by the defence is that as regards the first accused, he had nothing to do with the items seized by the police in September 2010, from his Ngwane Park homestead, because he had need away from it for some three months owing to a quarrel he had with his wife Zodwa Ginindza. He was at the time allegedly staying at his Nhlambeni homestead. He attributed those items to Botsotso Phumlani Jele and also to his said wife.

[21] As concerns the items for the 2012 to 2013 raids in both homesteads, all those items he claimed belonged to George Maluleka. He therefore did not dispute that those items were stolen as he said he was still in the process of buying the said items from James Maluleka

who had brought them there in two trucks from his own spares shop which was closing down in Doornfontein, Johannesburg.

[22] Only two vehicles forming part of the cases against the accused remained outside the two broad defences set out above with the 2010 seized items and the 2012-2013 seized items. These were the Toyota quantum that formed the basis of count 2 and the Toyota Hilux that formed the basis of count 5. Otherwise the effect of such defences should be dealt with as I deal with each such count.

[23] It is, however, common cause between the parties that it is illegal for anyone to possess a motor vehicle that has no VIN number, job number or engine number as all these go to the identity of a motor vehicle. It is also an offence for any motor vehicle to have such identity number removed or tampered with. It should be understood that the tempering with or removal of the identity numbers of each one of the items seized by the police during their raids referred to above was the basis for such seizures by the police.

[24] It is important for a better understanding of each one of the police raids, to capture briefly what the evidence says happened during each such raid. I have to start with the 2010 raids. The

witnesses who testified on what happened during this rad are Justice Mziyako and Assistant Superintendent Methula. This raid occurred on the 25th September 2010 and was carried out at the accused's Ngwane Park homestead. It is important to appreciate that although Detective Constable Mziyako and Assistant Superintendent Methula attended the 2010 police raids at the first accused's Ngwane Park homestead, they went there for different reasons. Whereas Detective Constable Mziyako said he went there following an impromptu tracker signal that had activated in their car fitted with a tracker device, Methula and his team went there in answer to a search and seizure warrant granted by the Manzini Magistrates Court.

[25] According to Constable Mziyako, he and the team of officers he was with, were called to the Manzini Regional Police Headquarters where they were shown a tracker signal that was indicating that a certain car that had been stolen was in the vicinity of Manzini. They were then directed to use the car showing the tracker signal and follow its directions. The tracker led them directly to the gate at the first accused's home at Ngwane Park. As the gate was closed when they arrived, they asked for permission to enter same from the first accused

who was found there in the company of one Botsotso Phumlani Jele who testified as PW 45.

[26] The tracker signal led them to a place where they could not go beyond as they were blocked by the walls of a house. Having alighted from the car they went to the other side of the house where there was a garage. In that area they found about 10 chassis frames. They establish that the device that activated the car tracker was on one chassis frames marked D2 by the police.

[27] All the chassis frames in question had the part where there would have been the VIN numbers otherwise known as chassis numbers, ground off using possibly a grinder. This made it difficult to easily identify from which car those chassis frames had been extracted. The evidence was to later establish, with the involvement of South African motor vehicle experts that the particular chassis frame belonged to a D4D Toyota Hilux van stolen from one Hugo Maree, on the 23rd September, 2010. The South African police experts discovered this through the application of the etching process which is capable of bringing up the numbers supposedly ground off, if the

person who did so did not completely wipe off the VIN number during his removal of the original number.'

[4] Again, these facts are common cause. I shall presently deal with the specific details relevant on each charge when I analyse the evidence on each such count. But, before I do so, I think it is important to state that after the Appellants were convicted and sentenced on 17 and 31 October, 2018 respectively, they duly filed their respective Notices of Appeal. The first Appellant filed his Notice of Appeal on 01 November, 2018 whilst the second Appellant filed his on 15 November, 2018. Both Appellants challenged their respective convictions and sentences. Neither complained about the fact that the Learned trial judge had, prior to the trial, heard and made certain factual findings in the bail application that had been filed by the first Appellant. The Appellants were represented by Counsel throughout the trial.

[5] By Notice of Application dated 14 July 2021, the Appellants launched an application for an extension of time within which to file their heads of argument on the merits of the appeal. The matter had been set-down

for the 2nd day of August, 2021. Regrettably, the record before us does not reflect what became of this application, but I think, it is safe to assume that the application was successful. Support for this assumption is to be found in the fact that the Appellants did file their heads of argument on 02 August, 2021. In those heads of argument, the Appellants, for the very first time complained that the Learned 'trial judge was biased from inception' against the first Appellant. They complained about certain remarks or findings of fact that were allegedly made by the said judge in the course of the bail application. They also pointed out that the learned Judge had, before convicting the first Appellant, revoked or cancelled his bail without due process. For these reasons, they argued, the learned Judge ought to have *mero motu* recused himself from presiding over the trial. Because he did not do so, the whole trial was a nullity and it must be so declared by this Court. These submissions were also persisted in in the Appellants' amended heads of argument dated 06 August, 2021.

[6] In its Notice To Raise Points of Law dated 20 August 2021, the Crown objected to the above submission by the Appellants, stating that the disqualification of the learned Judge had not been raised as a ground

of appeal in the Notice of Appeal referred to in paragraph 3 herein above. The Crown pointed out that this was in contravention of Rule 7 of this Court. The heads of argument by the crown in this regard were filed and served on 07 September, 2021.

[7] Following the above objection by the crown, on 13 September, 2021, the Appellants filed what is referred to as a 'Supplementary Notice of Appeal' wherein they stated that, with leave of the Court,' they were supplementing their grounds of appeal to include the ground on recusal.

[8] Rule 7 of this Court (Court of Appeal Rules, 1971) stipulates in very clear terms that an Appellant '. . .shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of appeal not stated in his Notice of Appeal . . .'. This Rule must, however, be read and understood together with Rule 12 which provides that this Court may allow an amendment of the Notice of Appeal. This, the Court may only do on application and upon good cause being shown or established. There was no application made in the present case and the Court did not grant leave to the Appellants to file the amended

Notice of Appeal. Even the very simple Notice to Supplement the Notice of Appeal was filed close to three (3) years after the initial Notice and no explanation whatsoever was given for this delay. The alleged offending remarks by the Court were made on 28 January, 2013 and the bail revocation was on 10 August, 2017, long before the Notice of Appeal.

[9] The general rule is that an Appellant is confined to the grounds of appeal. See *S v Baloyi 1991 (1) SACR 265 (B):* It is the Notice of Appeal that tells the Respondent what case it has to meet or answer in Court. Where an amendment is sought, this must be done timeously and all the circumstances explained by the Appellant in his affidavit in support of the application. It is trite law that it is only in such affidavit that the Appellant would be able to motivate or articulate his application and show good cause. (See *s v Potgieter 1977 (3) SA 291 (O)* and *R v L 1960 (3) SA 503 (A).*

[10] Consequently, because there was no application filed for leave to amend the Notice of Appeal, and no such leave was granted by this Court, the Appellants cannot be heard on the question of whether the

Learned trial judge ought to have *mero motu* recused himself from hearing the trial. I now examine the appeal on the grounds of appeal stated in the Notice of Appeal.

[11] In his Notice of Appeal, the first Appellant has stated seven (7) grounds of appeal against his conviction and three (3) grounds against the sentences meted out to him. These grounds of appeal are set out as follows: The Court *a quo*

> '1. Erred in fact and in law by not accepting the Appellant's version and/or explanation or defence regarding the discovery of the items at his then homestead in Ngwane Park in September, 2010 yet the same was reasonably and probably true.
>
> 2. Erred both in fact and in law by not accepting the Appellant's version and/or explanation and/or defence regarding the discovery of the items at his then homestead in Ngwane Park and his homestead in Nhlambeni in November 2012 and January, 2013 yet the same was reasonably and probably true.

3. Erred both in fact and in law by not accepting the Appellant's version, which coincidentally was accepted by Crown witnesses during evidence, that he only bought a bakkie of the allegedly stolen vehicle from another person and that beside that fact there was nothing which linked the motor vehicle he had bought at the Central Transport Organisation (the "Malkerns Motor Vehicle").

4. Erred both in fact and in law or and or misdirected itself in law by failing to appreciate that an accused person's version and/or explanation and or defence need not be true to be acceptable in respect of all that charges in for which he was convicted.

5. Erred both in fact and in law and/or misdirected itself in law by failing to appreciate that an accused person's version or explanation or defence has to be proven to be false beyond a reasonable doubt for it to be rejected.

6. Erred both in fact and in law by and misdirected itself in law by failing to appreciate that throughout a criminal trial the duty to prove an accused's guilt rests on the crown.

7. Erred both in fact and in law by failing to appreciate that no onus or duty rests on an accused person to prove his explanation in respect of any allegations against him.

## AD SENTENCE

8. Misdirected itself in law by taking [into] consideration factors not proven through evidence, and it not having made any findings thereon on the merits, when meting out sentence.

9. Misdirected itself in law by not making the Appellant's sentences to run concurrently as the charges for which he was convicted formed part of the same transaction in respect of the three incidents giving rise to same.

10. Misdirected itself in law by failing to backdate the Appellant's sentence to date of incarceration.

[12] The second Appellant's grounds of appeal are as follows:

> '1. The Court *a quo* erred both in fact and in law by failing to appreciate that, save for being found at 5.00 A.M. on the 23rd day of January 2013 there is no evidence indicating that [Appellant] actively participated and/or associated himself with his co-accused in the commission of any offence.
>
> 2. The Court *a quo* erred both in fact and in law by finding and holding that the [Appellant's] non-giving of evidence in defence was detrimental hence he was found guilty yet the only allegation was that he was found mechanically working on a motor vehicle at 5.00 A.M. on the 23rd day of January 2013, and the said motor vehicle had no link with the ones forming part of the allegedly stolen vehicles.
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> 3. The Court *a quo* misdirected itself by disregarding that in the absence of evidence linking Appellant to the commission of the offence, irrespective of the allegation of common purpose, he was not enjoined to answer anything as there is no obligation on an accused person to give evidence in defence unless the crown has established a *prima facie* [case against him].

4. The Court *a quo* erred both in fact and in law and misdirected itself in law by failing to appreciate that throughout a criminal trail the duty to prove an accused person's guilt rests on the crown.

5. The Court *a quo* erred both in fact and in law by failing to appreciate that no onus or duty rests on an accused person to prove his explanation in respect of any allegations against him.

6. The Court *a quo* erred both in fact and in law by convicting the Appellant on the evidence lead which did not establish the guilt of the accused beyond a reasonable doubt, consequently, the Crown had failed to discharge the onus which rested upon it.

AD SENTENCE

The Court *a quo* misdirected itself in law by:

7. Taking [into] consideration factors not proven through evidence, and it not having made any findings thereon on the merits, when meting out sentence.

8. Not making the Appellant's sentences to run concurrently as the charges for which he was convicted formed part of the same transaction in respect of the three incidents giving rise to same.

9. Failing to backdate the Appellant's sentence to date of incarceration.

[13] The Appellants were convicted by the Court *a quo* on 16 October 2018 and were sentenced fifteen days thereafter. In summarising its verdict, the Court stated thus:

[368] For the removal of doubt I order as follows:

"1. The two accused persons are found guilty of contravening Section 3 (1) as read with Section 4 of the Theft of Motor Vehicles Act, 1991 as particularised in Counts 1, 2, 3, 4, 5, 6, 8, 9, 18 and 33.

2. Both accused persons are found guilty of contravening Section 8 of the [Act] as particularised in Count 7. That is to say, whilst acting in furtherance of a common purpose, dealt in a stolen motor vehicle being a Toyota Hilux LDV which was

stolen from Erald Rabe of Paul Pietersburg, Republic of South Africa.

3. The two accused persons are found guilty of contravening Section 6 (1) as read with Section 6 (2) of the [Act] as particularised in Counts 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31.

4. Both accused persons are found guilty of contravening Section 7 (2) as read with Section 7 (2) of the [Act] as particularised in Counts 36,39, 40, 41, 42, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 65, 66, 67, 68 and 70.

The first Appellant was of course also found guilty of a contravention of Section 14 (2) (d) of the Immigration Act of 1982, 'by harbouring Vincente Souza Mwambo, which is the same thing as saying by employing him without a permit and keeping him at his homestead.'

[14] In total, bar payment of the fine, the first Appellant was sentenced to an effective custodial period of 54 years whilst it was 39 years for the second Appellant.

[15] As it would appear from the judgments of the Court *a quo* and indeed on how the several Counts were dealt with by the parties, I find it neater and convenient to deal with these Counts in blocks or categories in relation to the particular statute contraventions. Count 71 which is a contravention of the Immigration Act is a stand-alone count and shall be dealt with alone.

[16] On Counts 1, 2, 3, 4, 5, 6, 8, 9, 18 and 33 the Appellants were charged and convicted of a contravention of Section 3 (1) of the Act. This Section provides that:

> '3. (1) Any person who steals a motor vehicle or receives a motor vehicle knowing it to be stolen is guilty of an offence and liable on conviction to imprisonment for not less that –
>
> (a) Two years, in respect of first offender without the option of a fine; or
>
> (b) Five years, in respect of a subsequent offender, without the option of a fine:

The Act defines a motor vehicle as 'any vehicle propelled by mechanical or electrical power adapted or intended to be used on roads for the purpose of conveying persons or goods and shall include any part of such vehicle.' So, any part or component of a motor vehicle would constitute such vehicle. In the alternative to the said statutory contravention, a charge of theft at common law was preferred against the Appellants. On all these counts, the crown alleged that the motor vehicles were stolen in various parts in the Republic of South Africa and thereafter unlawfully conveyed by the accused into the Manzini Region in Eswatini – which is within the jurisdiction of this Court. As already stated above, the Appellants were found guilty as charged on the main charge on each count.

[17] At first glance, the above verdict would appear to be at odds with the High Court decision in *George Khoza v R Crim Appeal 45/1997*(unreported) delivered on 19 March 1998. The motor vehicle in this case had been stolen from South Africa and later found in the possession of the Appellant in Eswatini. The appellant was convicted of common law theft. It held that the Act had no extra territorial application. The Court held further that this was in line with its earlier

decision in *Mduduzi Sipho Dlamini v R Crim. Appeal 26/1995.* It is noted, however, that the Court did not deal with the issue of theft as a continuous crime. Section 3 (1) of the Act regulates the theft and receiving of stolen motor vehicles. This must logically be within the boundaries or territory of the country. In this case the Court held that the proper verdict was to return a guilty verdict on the alternative charge (common law theft).

[18] In *S v Kruger en Andere 1987 (4) SA 326* the Court dealt with the concept or notion of theft as a continuing offence (at common law). The accused were charged with the theft of cattle which were originally stolen in Bophuthatswana and later conveyed into the Republic of South Africa. There was no evidence led to establish that theft was also a continuing crime in Bophuthatswana. The Court held that:

> 'it had to be proven that theft in Bophuthatswana was a continuing offence in order to give the South African Court jurisdiction; if it were not a continuing offence the mere possession or receipt in South Africa of goods stolen in

Bophuthatswana would not be a crime. Although two witnesses had referred to the prevalence of stock theft in Bophuthatswana they had not indicated that they were qualified to testify as to the nature and existence of the crime and no reliance could therefore be placed on this evidence.'

The accused were acquitted and discharged due to lack of evidence on what the law was in Bophuthatswana.

[19] This judgment was confirmed on appeal but for different reasons. *S v Kruger en Andere 1989 (1) SA 785 (A).* The Appellate Division came to the conclusion that:

'The South African criminal law only had internal application in the sense that a person who committed a crime in terms thereof in a foreign country could not be guilty here: in 'bringing-in' cases, a person who had in terms of South African law committed theft in a foreign country could be tried here, not because of the theft in the foreign country but because of his continued act of appropriation, with the necessary intent, within South Africa. The reason for this was that, according to South African law, theft was

> a continuing offence and the Court *a quo* had erred in finding that the accused could not be tried in South Africa for theft of stock which had been trucked in Bophuthatswana and transported to South Africa unless it had been proved that, according to Bophuthatswana's Law, they had committed theft of a continuing nature.'

One must, however, emphasize that these judgments dealt with common law theft and not statutory theft or its kindred offences. The two local cases specifically dealt with a contravention of Section 3 (1) of the Act. In terms of the common law, whether theft is a continuing crime in the country where it originated or started is immaterial. The crucial issue is if the accused handled the stolen item '*invito domino*' within the jurisdiction of the trial Court, his conduct there would constitute theft, provided he then had the requisite intent.' (*S v Van Coller 1970 (1) SA 417 at 422-423).* Similarly, in this case, the Appellants were charged and convicted for their unlawful handling or receiving of the motor vehicles in Eswatini not in South Africa. Because of this reasoning and analysis, I am of the view that *George and Mduduzi (supra)* do not make good law or reasoning.

[20] I turn then to consider the evidence that was led on the relevant charges. The evidence on this count is analysed by the Court *a quo* in great detail from paragraph 43 to paragraph 175 of its judgment. The evidence is largely common cause. The only contentious issue is what are the legal conclusions to be drawn therefrom. The broad defences offered by the first Appellant were that: first, the items confiscated during the Police raid at the Ngwane Park home in 2010 were unknown to him as he was not living at that home at the time. In cross examination of the crown witnesses, it had been put to them that only PW43 Botsotso Jele and the wife to the first Appellant who would know of their origin. However, when PW43 testified and denied knowledge of these items, or that they belonged to Jerry Dlamini, the first Appellant in his testimony stated that he did not know them as he was not living at his Ngwane Park home at the relevant time. This was particularly his defence in respect of count 4; the theft of a Toyota Hilux owned by Riaan Maree of Sulphur Springs Farm in South Africa. The Court *a quo* dealt with these issues extensively in its judgment at paragraph 81 and 82. The second defence was that the items were brought to his premises by James George Maluleka who had closed down his business in Doornfontein in South Africa. The

first Appellant stated that he was yet to agree with Maluleka on the terms for the purchase of these items.

[21] The Court *a quo* held, correctly so in my view, that although admissible, there was very little weight to be attached to the evidence of Botsotso Jele inasmuch as he had been sitting in Court and listening to the other witnesses before he was called in as a witness. (See *R v Nhlabatsi 1979 – 1931 SLR 338).* He was, it should be remembered, a crown witness.

[22] In respect of count two (2) – the theft of the Toyota Quantum at Badplaas on 01 February 2012 – the first Appellant's defence was that the motor vehicle had been brought to his premises by a certain kombi driver who had privately made certain arrangements with the Appellant's panel beater. This version or defence, the Court *a quo* noted, had not been put to the crown witnesses in cross examination. The Court also noted this in respect of count 5; the first Appellant testified that he had purchased the loading bin (bakkie) from Msandi Nkosi of South Africa and had used the 2.7ℓ engine he had from Central Transport Organisation (CTO) to put together "the Malkerns"

motor vehicle.' This is the motor vehicle that was stolen from Lochkraal Farm in Paul Pietersburg. The complainant was Mr. Erald Rabi (PW1). The expert evidence showed that the engine in the Malkerns vehicle was a 3.0ℓ Hilux KZTE one and not a 2.7ℓ as testified to by the first Appellant. Again, in respect of count 18, the motor vehicle expert Hammel Naidoo (PW 39), positively identified the vehicle identification number on the Toyota chassis frame as that belonging to the motor vehicle stolen on 05 November, 2012 in Durban. It was taken from the lawful custody of William Campbell. In his defence, the first Appellant first suggested that this chassis frame was from an accident damaged motor vehicle he had bought from PW21, George Velibanti Gamedze. However, later he stated that the said frame was part of the consignment delivered to his premises by Maluleka. The same defence was raised in respect of count 33 in respect of the Toyota Hilux stolen from Mr. Van Vuuren on 30 August, 2011.

[23] From the above evidence and defences advanced by the first Appellant, it is plain to me that the first Appellant did not challenge the evidence tendered by the experts. He only sought to explain how

and when the relevant items had found their way onto his premises. The Court was, in my judgment, alive to this fact and it was based on this analysis that the Court embarked on an assessment or evaluation of whether the version proffered by the Appellant could reasonably probably be true. In doing so, the Court has to take into account all the relevant facts in the case.

[24] In the case at hand, after analysing and assessing the evidence tendered by the first Appellant and stating its merits and demerits, the Learned trial judge concluded that:

'[351] This brings about the question whether both accused persons can be found guilty of all the offences of allegedly violating section 3 (1) as read with section 4 of the theft of motor vehicles Act 1991. The reality is that all the motor vehicles were shown to have been stolen by September 2010 as concerns those seized from the first accused's Ngwane Park homestead in September 2010 and up to November 2012 for those recovered from November 2012 up to January 2013 from the first accused's Nhlambeni and Ngwane park homesteads.

[352] As long as I have found there to be no explanation that can be said to be reasonably probably true from that given by the first accused, it should follow in my view that he cannot possibly escape liability for the counts relating to the theft of the motor vehicles forming the basis of counts 1, 2, 3, 4, 5, 6, 8, 9, 18 and 33. These vehicles were found at his homesteads and he is the only one who can realistically give us an explanation that is reasonably probably true. The standard of proof required from an accused person is for him to give an explanation that is reasonably probably true. This was captured in the following terms in *R v Difford 1937 AD 370 at 373:-*

> "No onus rests on the accused to convince the Court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false."

I find no fault in these remarks by the learned Judge; particularly the reasons why the Court rejected the version or defence raised by the first Appellant.

For these reasons, I hold that there is no merit in the appeal on these counts. The position of the second Appellant is, however, different. He denied any involvement in the matter. I shall deal with his conviction later when I consider the issue of common or shared purpose.

[25] It was submitted on behalf of the Appellants that '. . . in order to convict the Appellants of contravention of Section 3 of the Act, the Court had to find that the Appellants were the actual thieves, failing which a conviction in terms of common law theft (as a continuing offence), being the alternative charge, had to follow in respect of these accounts.' This submission is clearly incorrect. It completely ignores the plain words of the statute. The prohibition is for both stealing, which is the actual or initial theft, plus receiving a motor vehicle knowing it to be stolen. A finding that the Appellants were not the actual thieves but mere receivers of the stolen motor vehicle would not inevitably or *ipso facto* result in a conviction for theft at common law. (See also my conclusions in paragraph 19 above).

[26] The first Appellant has not appealed against his conviction for a violation or contravention of the Immigration Act; count 71 and for that reason, his conviction thereon is not in issue.

[27] The rest of the Counts are in relation to a contravention of Section 6 (1) as read together with Section 6 (2), Section 7 (2) and 7 (3) or alternatively Sections 7 (2) and (4) of the Act. These offences are in regard to a failure by a motor vehicle dealer or manager of a garage or a person who is in the business of repairing or servicing motor vehicles to report certain anomalies on a motor vehicle delivered to him for purposes of sale, repair or servicing to forthwith report such issues to his nearest police station. Failure to report as aforesaid is a criminal offence. These sections are in the following terms:

> '6 (1) Any motor vehicle dealer, or manager of a garage or a person who carries on the business of repairing or servicing motor vehicles, who discovers or has reasonable grounds to suspect that the registration number, engine or chassis number of, or other identification marks on, the motor vehicle delivered to him for sale, repair or service have been altered, disfigured,

defaced, obliterated or tampered with in any manner, shall forthwith report the matter to the nearest police station, and the police shall unless a satisfactory explanation is obtained, without warrant, seize that motor vehicle.

6 (2) Any motor vehicle dealer or manager of a garage or person who carries on business of repairing or servicing motor vehicles who contravenes sub-section (1) is guilty of an offence and liable on conviction to a fine not exceeding five thousand Emalangeni or imprisonment not exceeding two years or both.'

Section 7 (2) and 7 (3) provides as follows:

(2) Any person who purchases or receives a motor vehicle commits an offence if at the time of purchasing or receiving the motor vehicle he does not demand from the seller or transferor a document effecting the purchasing or receiving of the motor vehicle.

(3) Any person who contravenes sub-section (1) or (2) shall be liable on conviction to a fine not exceeding five thousand Emalangeni or imprisonment not exceeding two years.'

[28] It is common ground that the first Appellant was in the business of buying, repairing, servicing and reselling motor vehicles. It is also common ground that at the relevant period he did receive or buy motor vehicles from different persons or entities. Some of these motor vehicles in the form of chassis frames, engine or chassis numbers (VIN) or other identification marks were altered, disfigured, defaced or generally tampered with. Again, it has been established that the first Appellant did not report these things to the police. The said anomalies or tampering of the said motor vehicles were discovered by the first Appellant or he ought, as a prudent and reasonable businessman in that trade, to have noticed or discovered these and consequently reported them to the Police. He failed to do so. The first Appellant also failed to request and obtain a document effecting the transaction. He thus contravened Section 7 (2) of the Act. He was therefore properly convicted. Again, the situation or circumstances of the second

Appellant are different and I turn to his appeal in the next segment of this judgment.

[29] From the outset it has to be noted or observed that the second Appellant was convicted on the bases of common purpose. Additionally, the second Appellant did not give any evidence in his defence. The trial Court took into account this failure to give evidence in determining or assessing his guilt or otherwise. The Court came to the conclusion that because the Court had ruled that a *prima facie* case had been established against him, his failure to testify was prejudicial to him or his interests. This general rule, in my judgment, is not cast in stone. It all depends on the nature of the *prima facie* case or evidence implicating the accused or Appellant. The fact that an accused person fails to testify in his defence, notwithstanding a *prima facie* case against him, is not a factor or incident that must lead inevitably to his conviction. Establishing a *prima facie* case is distinctly different from proving a case beyond any reasonable doubt. The latter is of a higher standard than the former.

[30] In *S v Changisa (K/S 15/2011) [2011] ZACHC 16 (20 September 2011)* a case cited with approval by the trial Court, the Court made the following remarks; namely:

'At the close of the state's case the accused exercised her right to remain silent and has therefore not rebutted the state's case. The principle applicable in this kind of situation has been set out in *S v Boesak [2002] ZACC 25; 2001 (1) SACR 1 (CC).* At page 9 paragraph 24 Langa DP lays down the principle with regard to right to remain silent as follows:

'The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain

silent in the face of such evidence, a Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J. in *Osman and Another v Attorney-General, Transvaal.'*

[31] The *prima facie* case against the 2nd Appellant was, to put it mildly, weak. The second Appellant was a mere motor vehicle mechanic at the first Appellant's business. He was employed by the first Appellant. It is common cause that there were other persons doing various tasks at the said business. Amongst such persons was Mr. Mwambo and a panel beater. There was not even one iota of evidence that the second Appellant was deliberately and knowingly involved in the unlawful operations conducted by his co-Appellant. That he had been working there since 2001 or so was of no moment. Again, there is absolutely no evidence to show that he tampered with or in any way unlawfully handled any of the motor vehicles that are under consideration in this appeal. The crown had to prove, beyond a reasonable doubt, that the

second Appellant knowingly participated in the illegal enterprise conducted by his employer. The crown failed to lead such evidence.

[32] The principles and requirements of the doctrine of common purpose or shared purpose were restated in *R v Sicelo Chicco Dludlu & 2 Others, HC Case 10.2008,* a case cited with approval by the Court *a quo,* where it said:

'[357] In *R v Sicelo Chicco Dludlu & 2 Others, Case No 10/2008,* the High Court expressed itself in the following manner with regards to the doctrine of common purpose:

"The principles involved in the notion or concept of acting in furtherance of a common purpose were in my judgment sufficiently and authoritatively stated in *S v Mgedezi & Others 1989 (1) SA 687 at 705I to 706B* as follows

"In the absence of proof of a prior agreement, accused No.6 who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa & Others 1988 (1) SA 868 (A),* only if certain pre-requisites are satisfied.

In the first place he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea,* so in respect of the act of killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed, and performed his own act of association with recklessness as to whether or not death was to ensue."

[33] The notion of common purpose is not, as some jurists suggest, based on transferred intention from the main protagonist or perpetrator to the so-called secondary actor. Each participant's guilt is assessed and ascertained on his own intention or conduct. Where there is no overt agreement between or amongst the perpetrators of the illegal act, the liability of each of them would be determined on their individual

conduct. For an accused to be liable on the basis of a common cause, he must have deliberately made common cause or in common parlance, thrown his lot with the main perpetrators. Again, this may be overtly or tacitly, with the requisite intent. I cannot find any of these requirements in this appeal. The crown has simply relied on the rather tenuious or weak assertion that the 2nd Appellant was an employee of the first Appellant.

[34] For the above reasons, I am of the firm view that the crown failed to establish beyond a reasonable doubt that the second Appellant acted in furtherance of a shared purpose with his co-Appellant in the commission of the relevant crimes. Consequently, I would make the following order:

(a) The appeal by the first Appellant against his conviction is hereby dismissed.

(b) The appeal by the second Appellant against his conviction and sentence is hereby upheld on all Counts.

[35] I now deal with the appeal against the sentence imposed on the first Appellant. As already stated above, in the event he fails to pay the fine imposed, he has to serve a total of 54 years imprisonment. However, should he pay the fine, his custodial sentence is 39 years.

[36] It has been repeatedly stated that the issue of sentences is a matter pre-eminently within the discretion of the sentencing Court. The legislature may also want to have a say on such issues, and thus the stipulation in the statute of the sentences that ought to be imposed by the Court on certain offences. In deciding what would be an appropriate sentence in each case, the Court must always bear in mind the competing interests of society, the accused and the offence for which the accused has been convicted. Needless to say that, the Court ought to take into account the whole circumstances pertaining to the offence. At the end of the day, the Court has to do a balancing act. None of the three pillars of the triad must be over-emphasized or down played in the exercise.

emphasized the point that these offences had the potential of portraying Eswatini as a lawless country and investor unfriendly. Though many offences were undoubtedly committed by the first Appellant, these were rather localised and specialised crimes in the sense that it only involved the theft of motor vehicles.

[39] I must also observe that another important element or factor to take into consideration in the sentencing equation, is the sentencing patterns within this jurisdiction in respect of similar crimes.

[40] As already stated, the legislature in its wisdom decided to give guidelines on the nature of the appropriate sentences to be meted out for a contravention of the various sections of the Act. I say guidelines simply because the sections involved are not prescriptive. They stipulate the upper and lower limits of the sentences and at times how these sentences ought to be served; that is to say, either concurrently or consecutively. For instance, section 14 of the Act stipulates that where an accused has been convicted for more than one offence for a contravention of either section 3 or section 6, the sentences must be ordered to run concurrently. It also provides that no sentence or part

of a sentence for a contravention of any provision of the Act may be suspended.

[41] In *S v Malgas 2001 (1) SACR 469 (SCA), paragraph 12,* the Court stated:

> 'A Court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at by it simply because if prefers it. To do so would be to usurp the sentencing discretion of the trial Court. Where material misdirection by the trial Court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a Court of first instance and the sentence imposed by the trial Court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial Court. It may do so when the disparity between the

sentence of the trial Court and the sentence which the appellate Court would have imposed had it been the trial Court is so marked that it can properly be described as "shocking", or "startling" or "disturbingly inappropriate". It must be emphasized that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial Court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.'

That is the standard or practice employed or used in this jurisdiction as well.

[42] The trial Court meticulously went through all the relevant sentencing provisions in the Act in considering the sentences imposed. Whilst the respective sentences imposed cannot be said to be in anyway contrary to the relevant provisions of the Act, I am of the considered view that the cumulative effect of the sentences meted out to the first Appellant is too oppressive. It is disturbingly harsh and disproportionate. It

induces a sense of shock. I do not think I need to restate the facts in this case, but there was no evidence tendered before Court that the first Appellant used any violence in the commission of any of these offences. For this reason, and bearing in mind the cumulative or global sentence in the whole case, I think the trial Court failed to exercise its discretion properly. It regretfully did not consider the total cumulative effect of the sentence. I consider that a sentence of over 35 years of imprisonment for a 45 year old first offender, even for multiple counts, seems to be oppressive in my judgment. I am advised that a sentence of life imprisonment in this jurisdiction is about 25 years and that is generally for heinous violent crimes or for repeat offenders. No such elements were shown to be present in this appeal.

[43] In *Bongani Gecevu Mhlanga & Another v R 06/2012 SZSC 38 [2012] (30 November 2012),* where sentences of 54 and 49 years for rape committed against young girls had been imposed on the two appellants respectively, these sentences were deemed excessive or too harsh and were both reduced to a period of 24 years imprisonment. This Court had this to say on sentencing on multiple counts:

'[11] I share these sentiments as espoused by the Learned judge *a quo*. The difficulty I have however, is the aggregate sentence imposed on each of the appellants, that is, fifty four years in respect of the first appellant and a sentence of forty nine years on the second appellant. In my view the totality of these sentences cannot be justified.

[12] In the case of *S v Sherman S-117-84* McNally JA said:

"How does one begin to measure the outer limits of sentencing in a case of this magnitude? One may say that even murder with actual intent attracts a sentence of 16-18 years. One may ask – which sentence would be appropriate where a quarter of a million dollars is stolen and nothing is recovered? What sentence would be appropriate when five or six million dollars is involved? These considerations and comparisons suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of which any court in this jurisdiction would impose for such a crime."

[13] This case was cited with approval in *S v Sifuya 2002 (1) ZLR 437 (H)* where the accused pleaded guilty to four counts of armed robbery before a regional magistrate and was sentenced to a total of 34 years imprisonment of which 4 years was suspended. The sentence was reduced on appeal to 20 years, by making some of the sentences to run concurrently.

[14] In *S v Nyathi 2003 (1) ZLR 587* the accused was convicted of 10 counts of rape (of his daughter), the offence having been committed over a period of 18 months. The magistrate imposed a complex sentence which worked out at 30 years imprisonment. On review, Ndou J reduced the sentence to an effective 18 years, by treating some of the counts as one for sentence and then ordering that some of the sentences run concurrently.

[15] In *S v Chitiyo 1987 (1) ZLR 235 (5)* the accused was convicted of ten counts of armed robbery, theft, attempted armed robbery and kidnapping. He was sentenced on each count individually and portions of the total of 82 years were ordered to run concurrently, giving a total of 50 years. This was reduced on

appeal (by Dumbutshena CJ, McNally and Korsah JJA) to an effective overall sentence of 18 years. Dumbutshena CJ said at page 240:

> "A sentence of 50 years' imprisonment with labour is, in my judgment, objectionable, not because it is unjust or underserved but because it seems to me inhumane to keep a young man of 25 years of age in prison for so long"

[16] I have also had regard to what my brother Moore JA stated in the case of *ThapeloMotoutou Mosiiwa v The State [ZW6] 1 B. L.R. 214:*

> "The matter of the appropriateness of sentences has plagued sentencers from the earliest times. Early sentences were characterized by their severity. Over the years however, humanitarian considerations have persuaded both legislators and judges to adopt a less drastic approach."

[17] The learned Judge Moore JA also drew attention to what Tebbutt JP had to say in the case of *Tlhabiwa & Another v The State (2003) 2 BLR at 43-44* where in delivering the judgment

of the Court of Appeal expressed his approval of the sentiments of the judge in the Court *a quo* in the following terms:

> "Dibotelo J said he found the total term of imprisonment of 15 years 'very severe and induces a sense of shock.' I agree. It is so excessively disparate to the offences – serious though they may be – as to amount to inhuman or degrading punishment. I feel that the appellant's total punishment should for the three offences, not total more than nine years. In coming to this view, I take into account the period spent by the appellant in custody prior to his sentence."

[18] My Learned brother Moore JA also in the Mosiiwa case *(supra)* drew attention in paragraphs 28 to 32 to the case of *Mogatla v State (2001) 1 BLR 192* where he stated:

> "28. ...The appellant had been sentenced to a *total* of 29 years imprisonment to commence on 23rd March 2000 which was the date of his *conviction*. The gross figure of 29 years consisted of three components:
>
> (i) Count 1 (rape) 15 years imprisonment

(ii) Count 2 (grievous harm) 7 years imprisonment

(iii) Count 3 (grievous harm) 7 years imprisonment

By ordering these sentences to run consecutively, the sentencing judge had *effectively* imposed a *nett* term of imprisonment.

29. Delivering the judgment of the Court of *Appeal*, Korsah JA wrote at page 203 F:

Section 142 of the Penal Code as *amended* by Section 3 of the Act No.5 of 1998 provides that:

'Where an act of rape is attended by violence resulting in injury to the victim, the person convicted of the act of rape shall be sentenced to a minimum term of 15 years' imprisonment or to a maximum of life imprisonment with or without corporal punishment.'

30. It will be noticed that in two of the three counts, upon which the appellant in **Mogatla** was convicted, the legislature, expressing abhorrence of the relevant offences,

had provided for mandatory minimum terms below which sentences are not allowed to go.

31. In the **Mogatla** case, the scales were already loaded against the appellant. He had against him, two mandatory penalty strikes of fifteen and seven respectively-already twenty-two years so far. The legislature had already deprived him of concurrent penalty relief by the operation of section 142 (5) of the Penal Code as amended by Act No.5 of 1998, which provided:

*"Any person convicted and sentenced for the offence of rape shall not have the sentence imposed run concurrently with any other sentence whether the other sentence be for the offence of rape or any other offence."*

The question which the sentencing court then had before it was whether the sentences in respect of the second and third counts of causing grievous harm contrary to section 230 (1) of the Penal Code (as amended by Act No.13 of 1993) should run consecutively or concurrently.

32. Faced with the statutory *minima* amounting to a totality of twenty-two years, the appellant's punishment was further aggravated by the order that the sentences under those two counts run consecutively. This is how Korsah JA at page 204 D reacted to the unenviable situation of the appellant:

*'The sentencing Acting high Court Judge ordered the sentences to run consecutively, resulting in a globular term of 29 years' imprisonment. We were all dismayed by the severity of the cumulative term of imprisonment imposed by the sentencing court. It was clear to us that even in murder cases, where life is tragically lost, if there are circumstances of extenuation, the sentences imposed range between 10 and 25 years, depending on the surrounding circumstances."*

. . .

[25] I am of the firm view that the totality of the aggregate sentences imposed on the appellants in this case are manifestly excessive. I associate myself with the views of Tebbutt JP as

expressed in the *Tlhabiwa* case (*supra*). "It is so excessively disparate to the offences – serious though they may be – as to amount to inhuman or degrading punishment." I also respectfully share the views of Korsah JA in the *Mogatla* case (*supra*).'

These remarks are relevant and starkly applicable in this appeal.

[44] In *Kruger v S (506/11) [2011] ZASCA 219 (29 November 2011)* the Court made the following pertinent observation:

'However, the practice of taking more than one count together for purposes of sentence is neither sanctioned nor prohibited by law. In *S v Young 1977 (1) SA 602 (A) at 610E* – H Trollip JA said:

"Where multiple Counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused."

The Court concluded by noting that:

'Punishing a convicted person should not be likened to taking revenge. It must have all the elements and purposes of punishment, prevention, retribution, individual and general deterrence and rehabilitation.'

See also *S v Muller & Another 2012 (2) SACR 545 (SCA))*.

[45] In order to ameliorate the harshness of the sentences, I would adjust these sentences in the following manner:

1. On counts 1, 2, 3, 4, 5, 6, 8, 9, 18, and 33 (contravention of Section 3 (1)). The first Appellant be sentenced to two (2) years of imprisonment on each count. (As per Section 14 (1) these sentences are to run consecutively).

   1.1 On count 7 (contravention of Section 8). He be sentenced to pay a fine of E5,000.00 failing which to undergo imprisonment for a period of two (2) years.

2. On counts 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 (contravention of Section 6 (1)). He be sentenced to pay a fine of E500.00, failing which to serve a custodial term of 6 (six) months on each count. These sentences

are to run consecutively as per Section 14 (1). (Cumulatively E10,000.00 or 10 years of imprisonment)'.

3. On counts 36, 39, 40, 41, 42, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 65, 66, 67, 68 and 70 (contravention of Section 7 (2)). He be sentenced to pay a fine of E500.00 failing which to serve a custodial term of one (1) month imprisonment on each count. (Cumulatively, E13,500.00 or 27 months imprisonment)'.

4. The sentences in 1 and 2 above are to run consecutively. Effectively this means that if the Appellant pays the fine of E10,000.00, he shall serve the period of imprisonment in 1 above.

5. The sentences imposed in 1.1 and 3 shall run concurrently. Effectively, this translates to a fine of E13,500.00 or a custodial term of 27 months (2 years and 3 months).

[46] The first Appellant was arrested and detained on 23 January, 2013 and was released on bail on 24 February, 2013. This period of one month spent in custody by the Appellant shall be deducted from the final

custodial term of imprisonment meted out against him. This shall be achieved by backdating his sentence by one month, calculated from the 10th day of August 2017, that being the date his bail was cancelled or terminated after pleading.

[47] In summary, I would make the following order:

(a) The appeal by the second Appellant is upheld and his conviction and sentences are set aside.

(b) The appeal by the first Appellant on his conviction is dismissed.

(c) The appeal on sentence by the first Appellant hereby partially succeeds. The sentences imposed by the trial Court are set aside and substituted with the following:

1. On Counts 1, 2, 3, 4, 5, 6, 8, 9, 18, and 33 (contravention of Section 3 (1)). The first Appellant is sentenced to two (2) years of imprisonment on each count. (As per Section 14 (1) these sentences are to run consecutively).

1.1 On Count 7 (contravention of Section 8). He is sentenced to pay a fine of E5,000.00 failing which to undergo imprisonment for a period of two (2) years.

2. On Counts 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 (contravention of Section 6 (1)). He is sentenced to pay a fine of E500.00, failing which to serve a custodial term of 6 (six) months on each Count. These sentences are to run consecutively as per Section 14 (1)). (Cumulatively E10,000.00 or 10 years of imprisonment).

3. On Counts 36, 39, 40, 41, 42, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 65, 66, 67, 68 and 70 (contravention of Section 7 (2)). He is sentenced to pay a fine of E500.00 failing which to serve a custodial term of one (1) month imprisonment on each Count. (Cumulatively, E13,500.00 or 27 months imprisonment).

4. The sentences in 1 and 2 above are to run consecutively. Effectively this means that if the Appellant pays the fine of E10,000.00, he shall serve the period of imprisonment in 1 above.

5. The sentences imposed in 1.1 and 3 shall run concurrently. Effectively, this translates to a fine of E13,500.00 or a custodial term of 27 months (2 years and 3 months).

6. The term of imprisonment shall be deemed to have commenced on 10 July, 2017.

**M. D. MAMBA**
**JUSTICE OF APPEAL**

**I AGREE**

**J. P. ANNANDALE**
**JUSTICE OF APPEAL**

**I ALSO AGREE**

**M. J. MANZINI**
**ACTING JUSTICE OF APPEAL**

**FOR THE APPELLANT:** **MR. D. J. COMBRINK** (Instructed by Linda Dlamini & Associates).

**FOR THE RESPONDENT:** **MR. S. I. MAGAGULA (DDPP)**