IN THE HIGH COURT OF SWAZILAND

HELD At MBABANE CASE NO. 1505/1980

IN the matter between

SIMON DUBE APPLICANT

THE SENIOR MAGISTRATE, MBABANE FIRST RESPONDENT

AND

REGEM SECOND RESPONDENT

CORAM: THE C.J., Mr. Justice C. J. M. Nathan

And Mr. Justice David Cohen

APPEARANCES:

FOR APPLICANT: MR. P. DUNSEITH

FOR RESPONDENT: MR. AFFUL

JUDGMENT

Cohen, J.

The Applicant in this matter was charged before the Senior Magistrate at Mbabane with the theft of a motor car alleged to be the property of one Patricia Hart, a resident in the Republic of South Africa, from which country, so it was alleged, the car was stolen and thereafter brought into Swaziland by the Accused. The Accused was found guilty and sentenced to two years imprisonment. Against this conviction and sentence the Accused lodged an appeal and an application for review.

The matter first came before the court on the 14th Sept., 1980 when the court granted an application for the amendment of the grounds of appeal which included an objection against the admission of documentary evidence produced by the Crown in an endeavour to establish the identification of a motor vehicle found in possession of the accused and alleged by it to be the one stolen from the complainant. The application for review was handed into court but respondent's replying affidavits were not then available and the matter was accordingly postponed sine die. After the filing of respondent's affidavits and applicant's replying affidavit (including an application to strike out certain paragraphs in respondent's affidavits) the matter was set down for argument on the 3rd April, 1981.

On that date the court ordered that the review be argued first and thereafter reserved judgment on it without hearing any argument on the appeal.

The Crown evidence consisted of that of the complainant who was adamant that the vehicle before the Court was the one which had been stolen from her and in support she referred to certain features which by themselves however were not distinctive in character. The vehicle bore a Swaziland licence number and not the Transvaal one it had at the time when it was stolen. The witness handed in a bundle of documents dealing with the history of the car, and in particular a letter from the Manager of Licensing attached to the Randburg Municipality to an Insurance broker giving certain details relating to the identification of complainant's stolen vehicle. It is the introduction of these documents to which objection has now been taken by applicant in his appeal.

Inspector Bambo testified that this vehicle was found in the possession or control of the accused, being used by him as a taxi belonging to him. He also stated in evidence that as a result of certain chemical tests it appeared that the original engine number of that vehicle had been tampered with and that the original number corresponded with the number which according to the letter from the Randburg Municipality licensing officer was that of complainant's car.

One Steven Khumalo, a revenue officer in the Central Registrar in Mbabane, gave evidence concerning the present registration of the vehicle in favour of the accused. It appeared that it had been transferred fr. a licence issued in Piet Retief in the Transvaal - this evidence does not affect the issues on review.

The accused in his own testimony denied the theft, claiming that he had lawfully purchased it from some Indians in Piet Retief.

Thereafter the Court of its own volition called one Hugh Randall, an employee in Eriksens Motors, to testify but no reasons appear from the record why this was necessary nor of the circumstances which impelled the Magistrate to do so.

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The Magistrate permitted this witness to state the result of his discussions with the Manufacturers in Cape Town and referred to a booklet containing certain information. All this evidence is inadmissible as being hearsay and should not have been allowed and is clearly prejudicial to the accused. Be that as it may, however, thereafter the case was remanded for "test on the vehicle for court's information", and on the adjourned date the court proceeded with the accused to the police station where an acid test with police equipment was carried out and the numbers 45132 appeared from a filed part on the chassis.

The court was then re-convened and the accused was recalled by the Magistrate. Under oath he testified that although he saw the numbers before and after the test it was not clear whether he knew which numbers were revealed by the test. He disputed that the numbers revealed by the test were original numbers.

From the applicant's founding affidavit it appeared that he relied on an irregularity committed by the Magistrate in excluding his presence from the inspection in loco at which the acid test was conducted. He was apparently told by the magistrate to stand on one side - about 20 metres away during the test, although present at the experiment were the Magistrate, the Prosecutor, the court interpreter and of course the persons performing the test, as well as certain of the police. About 40 minutes afterwards he was told to come forward and was then advised of the result of the acid test. The Crown explanation is that the applicant and the public were excluded not from the test itself but when the chemicals were to be mixed and blended as the mixture v/as a secret the police did not want disclosed because it might fall into the hands of would-be car thieves. Detective Inspector Victor Mbambo, the "expert" in these matters stated the position to be as follows -

"That can only be done in the presence of the accused if the court of Law gives an order that it be done in his presence, otherwise it is never done in public." That may indeed be advisable if it is done before the witness gives his testimony, but where it is done during the course of the trial in the presence of the Magistrate and the prosecutor such ....

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performance becomes part of the real evidence created at the trial itself. It seems clear beyond doubt that, whether or not the magistrate required the test to be carried out for his own information, it was done as part of the actual hearing of the case during which the magistrate formed or fortified certain impressions relating to the guilt or innocence of the accused.

The Magistrate in an affidavit deposed that the accused was not "kept away from an experiment," but was

"not allowed" to see the name of the different chemicals. In his additional reasons the Magistrate also stated however that the accused was not allowed to see "in what proportion these were mixed in order to bring out the old numbers which had been filed off". All this according to him was done in order to prevent "would-be-thieves" watching the test. The implication is that the accused was placed by him in that category of persons. He stated accused never complained about the test, but I do not think that is correct according to the evidence he gave when the magistrate had him recalled. See also page 4 where he cross-examines Mbambo.

Section 172 of the Criminal Procedure fit Evidence Act, 1938, is explicit in its terms that every criminal trial shall take place in open court in the presence of the accused unless he conducts himself so as to render the continuance of the proceedings in his presence unpracticable and that witnesses must give their evidence viva voce in his presence. Subsection (4) provides as follows -

"The court may, at any time, during the trial, order any person who is being called as a witness (other than the accused himself) to leave the court after his evidence has been given."

(The underlining has been done by me for obvious reasons) Hoffman, "S.A. Law of Evidence" (2nd Edition) at a foot note on page 289 states:-

"It is irregular for an inspection to be held in the presence of only one party or his witnesses: Tumabole Bereng v R (1949) A.C. 253"

Unfortunately Ms report is not available but it is also relied upon by Swift, "Law of Criminal Procedure" (second Edition) at page 228 who gives certain other references.

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In the case of Rex v. Van der Merwe 1950(4) S.A. 17 (0), it was held that a court is not permitted to take cognisance of the words and deeds of a person present at an inspection in loco and to utilize them as evidence in the case. If they are to be relied on, evidence under oath must be given in court as to such words or deeds. At page 20 Brink J had the following relevant remarks to make which I feel justified in quoting in extenso in spite of their length:-

"In London General Omnibus Ltd. v Lavell (1909(1) Ch. 135 at p. 139) the court remarked that a view was not to be put in the place of evidence, but was to enable the tribunal to understand the questions raised and to follow and apply the evidence. In Goldstuck v Mappin and Webb Ltd (1927 TPD 723) Feetham J., said it was difficult to draw a line between a view for the purpose of understanding and applying evidence and a view for the purpose of the obtaining evidence (it may be noted that the attitude or magistrate in the present matter is that the experiment was performed for his own information). The learned Judge then remarked -

"I think there is good ground for the opinion expressed in Wigmore on Evidence, section 1168: "It is wholly incorrect in principle to suppose that an autoptic inspection by the tribunal does not supply it with evidence; for, although that which is received is neither testimonial nor circumstantial evidence, nevertheless it is an even more direct and satisfactory source of proof, whether it be termed evidence or not. The suggestion that, in a view or any other mode of inspection by the jury, they are "merely enabled better to comprehend the testimony; and do not constitute an additional source of knowledge, is simply not correct in fact."

Brink J in a subsequent paragraph further stated: "Section 220 of Act 31 of 1917 requires the witnesses, save as is otherwise expressly provided by the Act (an inspection in loco is not one of the exceptions) to give their evidence viva voce in open court. The learned authors Gardiner and Lansdowne South African Criminal Law (fifth edition), state at page 305:-

"Where at a local inspection information is received which is acted upon as evidence, a subsequent conviction towards which that information contributed will be set aside on the ground that evidence has

been received under improper conditions and at some other place than the proper place of trial."

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It seems to me that what has been stated in Wigmore and Gardiner and Lansdowne apply to the present matter. The experiment before the magistrate which clearly served to "bolster up" the Crown evidence on this aspect of the case and to exclude the accused wholly or merely in part from it, was in my view grossly irregular. What Brebner A.J. had to say as follows in the case of Rex v Steenkamp, 1947(1) s. A. 714 (S W A) seems to me to be apposite:-

"....and strictly the magistrate, instead of presiding at the trial, should have been a witness. It is quite clear that a judicial officer (or juror) should decide a case according to the evidence laid before him and not act on information he has obtained independently of the proceedings of the Court ...."

Mr. Afful for the Crown did not strenously urge upon this court that in fact no irregularity had been committed, but he stressed that there had been no prejudice to the accused and that the other evidence was overwhelmingly against him. That may indeed be so but the matter does not end there. It seems to me, however important the question of prejudice may be, as is the duty of a court to see that a guilty person does not escape the consequences of such guilt, it is even more important and in the greater public interest that such guilt must be established in accordance with the basic principles of our administration of justice lest disregard of them may be construed as attaching little or no importance to them.

This problem was considered by the Appellate Division in the locus classicus, the case of S v Moodie 1961(4) S.A. 752 in which Holmes J.A. divided irregularities into two classes in the following terms:

1. "The general rule in regard to irregularities is that the court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity.

2. In an exceptional case, where the irregularity consists of such a grave departure from established rules of procedure that the accused has not been properly tried, this is per se a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitably have convicted if there had been no irregularity.

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3. Whether a case falls within (1) or (2) depends upon the nature and degree of irregularity.

Hoffman has at page 342 felicitously summed up the position in this sentence "....Those which are, so to speak, mortal, and those which are merely venial"

The case of R v Maharaj 1960(4) S.A. 256 (N) seems to me to approach the situation in this matter. There, as I unhesitatingly do in the present case, Broome J.P. exonerated the magistrate from any other motive other than an honest desire to arrive at the truth, commenting that the irregularity was certainly committed in perfect good faith. The Magistrate had during an adjournment for the purpose of recalling a doctor in a case where the accused had been charged with driving under the influence of liquor, addressed a letter to the doctor enclosing a transcript of the evidence given by the accused, and a list of questions arising and of the evidence to which he required answers. At a later stage the magistrate had in the absence of the accused held a discussion in his chambers on the points raised and a general discussion of the evidence in the case. The learned judge had this to say in setting aside the conviction:-

"It is quite irrelevant that the evidence in the case as a whole might be strong enough to establish the guilt of the accused beyond a reasonable doubt. I give no opinion on that question for, even if that is the position, the irregularity itself is in no way cured is a principle of justice as administered in this country that trials must take place in open court in the presence of the accused. If that principle is violated, then, quite

apart from the question as to whether the accused is manifestly guilty, the proceedings are bad because it might be supposed that justice was administered in a secret manner instead of in open court ....."

I respectfully associate myself with these remarks and in particular the words underlined by me.

In the result I am of opinion that the irregularity committed by the magistrate falls under the second class enumerated by HOlmes J.A. in Moodie's case (supra), and that the conviction can accordingly not stand. It will be for the Director of Public Prosecution having regard to the principles relating to a plea of autrefois acquit as enumerated in the case of S v Moodie 1962(1) 587(A) (a sequel to the court's earlier decision) and the case of S. v. Nzuza

1963(4) S.A. 857 (A) to decide whether or not the accused should be re-charged.

In these circumstances I consider that the other grounds of review fall away, as does the appeal against the conviction and sentence. I may add however that the clearly inadmissible evidence admitted at the trial may, in spite of the complainant's personal identification of the vehicle as the stolen one, have influenced the magistrate in his acceptance of that evidence to the prejudice of the accused.

D. COHEN

JUDGE

Nathan C.J. I agree; and the conviction is accordingly quashed and the sentence is set aside.

C. J. M. NATHAN

CHIEF JUSTICE