IN THE COURT OF APPEAL OF SWAZILAND

HEED AT MBABANE	CR. APPEAL NO. 5/80
In the appeal of:	
JUSTICE SIBANDZE	(Appellant)
vs.	
REGEM	(Respondent)
CORAM:	THE ACTING CHIEF JUSTICE - DAVID COHEN
	AND MR. JUSTICE D. LUKELE
APPEARANCES:-	
FOR THE ACCUSED:	IN PERSON
FOR CROWN:	MR. DONKOH

JUDGMENT

(Delivered on the 6th June, 1980)

Lukele, J.

In this case the accused was charged with theft of 40 litres of petrol the property of the Swaziland Government and theft of the Motor vehicle SG. 13127, the property of the Swaziland Government alternatively, contravention of section 118(2) of the Road Traffic Act 6/65.

The accused pleaded not guilty to all the charges but was found guilty on the first count and the alternative to the second count and sentenced to 6 months imprisonment in respect of the first count and E50 or 50 days imprisonment in respect of the alternative to the second count.

The accused appealed against the aforesaid convictions and sentences.

Section 118(2) of the Act 6/65 of the contravention of which the accused was found guilty reads "No person shall without the knowledge or consent of the owner or

person in lawful charge of a vehicle, ride in or drive the vehicle, or by fraud or misrepresentation, procure the use or hire of a vehicle."

In my opinion this section creates 2 separate and distinct offences. The first is that of riding in or driving a motor vehicle without the knowledge or consent of the owner or person in lawful charge thereof. The second is that of procuring the use or hire of a motor vehicle in fraud or misrepresentation. The former offence pre-supposes a total absence of the knowledge or consent of the owner or person in lawful charge of the vehicle, but which has been obtained as a result of perversion of the truth.

The charge sheet which sets out the alternative charge to count 2 reads: "The said accused is charged with an offence of contravening section 118(2) as read with section (3) of Act No.6/65 (Procuring the use or drive of a motor vehicle by fraud or misrepresentation) in that upon or about the 21st December, 1979 and or near Hlatikulu Police Station in the said District the said accused did wrongfully and unlawfully

procure the use or hire of the motor vehicle SG. 13127 by fraud or misrepresentation and without the knowledge or consent of Christopher Tsabedze a person in charge of the vehicle, in that the accused instructed David Mhdzebele to drive the said vehicle to Lavumisa as if he had obtained permission from the person in charge of vehicle to use it yet he was not authorised to do so and as a result the vehicle was involved in an accident and was extensively damaged."

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The aforesaid charge was badly drafted. The words "as a result the vehicle was involved in an accident and was extensively damaged" in the charge have nothing to do whatsoever with either of the offences created by section 118(2) of Act 6/65. It might be necessary to include these words where an accused is charged with the closely related but separate and distinct offence of interfering with a vehicle without reasonable cause or without knowledge or consent of the owner or person in lawful charge of the vehicle. The words "and without the knowledge or consent of Christopher Tsabedze a person in charge of the vehicle seem to suggest that the accused was charged with riding in or driving the vehicle without the knowledge or consent of the owner or person in lawful charge thereof whereas the essence of the charge appears tobe that the accused was charged with offence of procuring the use or hire of the vehicle by fraud or misrepresentation. On the face of it the accused was charged with more than one offence in the Court. For that reason, in my view, the manner in which this charge was drafted did not sufficiently apprise the accused of the precise nature of the offence with which he was charged.

Section 122 of the Criminal Procedure and Evidence Act 67/38, which sets out the essentials of an indictment or summons, requires that an offence with which an accused has been charged must bo set out in an indictment or summons in such manner and with such particulars thereof as are sufficient to apprise the accused sufficiently of the charge against him.

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There are many judicial authorities for the proposition that where this section or any other identical section has not been complied with and the accused is prejudiced as a result of such non-compliance then conviction and sentence should be set aside.

It is not necessary in this case to decide whether the accused was prejudiced as a result of the charge against him having been slovenly drafted, because when the words "and as a result the vehicle was involved in an accident and was extensively damaged" and the further words "without the knowledge or consent of Christopher Tsabedze a person in charge of the vehicle" are deleted from the charge sheet and the words "as read with section (3) in the charge sheet are replaced by the words "as read with section 118(3), it is abundantly clear from the balance of the charge sheet that the accused was charged with the offence of procuring the use or hire of the vehicle by fraud or misrepresentation.

In my view in this latter case the Crown must allege and prove that the use or hire of the vehicle was procured by fraud or misrepresentation. In other words the Crown must allege and prove that it was as a result of, or by means of, fraud or misrepresentation that the accused procured the use or hire of the vehicle.

In the above connection the charge sheet alleges that the accused David Mndzebele was instructed to drive the said vehicle to Lavumisa as if he had obtained permission from the person in charge of vehicle to use it yet he was not authorised to do so.

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If this may be construed as an allegation that the accused procured the use of the vehicle by fraud or misrepresentation there is no evidence that it was as a result of this fraud or misrepresentation that the accused procured the use or hire of the vehicle. It is true that on his return from Lavumisa the accused tried to cover up his conduct by causing a false entry to be made in the Occurrence Book to the effect that he had driven towards Lavumisa to investigate the road accident he had found on the way to Lavumisa.

This false entry did not however take the Grown case any further because it was not as a result of this entry that the accused procured the use of the vehicle for the purpose of driving to Lavumisa. If the accused had made this misrepresentation or false entry before he had left for Lavumisa and it had been proved that he had procured the use of the vehicle the position might have been different.

In any event in my view where an accused has been charged with procuring the use or hire of a vehicle by fraud or misrepresentation the Crown must allege and prove that the person to whom the fraud or misrepresentation was made was in law and/or fact in a position to grant or not to grant the accused the use or hire of the vehicle.

There is no allegation in the charge sheet that David Mndzebele or the Police Officer in the Charge Office at the time the vehicle was taken from the Police Station for Lavumisa trip was a person who in law and in fact could grant or not grant the accused the use of the vehicle, and no evidence whatsoever was led to prove this fact.

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The evidence led shows that David Mndzebele to whom misrepresentation was made was an accomplice.

The evidence led further shows that of the persons at the Police Station at the time the vehicle was taken the accused, as the Station Officer, was the only one who could grant or refuse any other person the use of the vehicle. For the reasons set out in this and the proceeding paragraphs I am satisfied that the Crown failed to prove the guilt of the accused in respect of this count and that, therefore, the conviction and sentence should be set aside.

Even if the Crown had proved its case against the accused, in my opinion this count and the first count should have been treated as one for the purpose of sentence as a perusal of the whole record shows that this offence and the offence of theft of the petrol which was used when the vehicle was driven to Lavumisa were committed in one single transaction or with one intent. In my view there was undue duplication of charges.

With reference to the first count although there was no satisfactory documentary evidence that 40 litres were filled into the vehicle SG. 13127 there was proof beyond reasonable doubt that the accused had caused 40 litres of petrol to be filled into the vehicle SG. 13127. As there is evidence that the portion of this petrol was used for the benefit of its owner, Government, when the vehicle was driven to Mfishane for the purpose of delivering a spare wheel of another Government vehicle, the accused should not be found guilty of theft of the petrol used when the vehicle was driven for the aforesaid purpose.

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There can be no doubt, however that the accused used or caused to be used part of the 40 litres of petrol for his own purpose in circumstances when he knew, or ought to have known, Government as, the owner thereof would not have consented to the petrol being put to such use. In my view the accused was therefore rightly convicted of the theft of such petrol.

The accused was a public officer as defined in section 2 of the Theft & Kindred Offences by Public Officers Order, 1975, and the petrol the theft of which he was found guilty was a government or public property as defined in the aforesaid section. Consequently section 4 of the Order applies to him. In terms of this section unless these are extenuating circumstances the accused had to be sentenced to a minimum of 6 months imprisonment.

A distinction between extenuating circumstances and mitigating factors was made in R. vs. Enos Khumbula Shongwe 1977/78 S. L. B. 60. I am in agreement with the view that extenuating circumstances are sure circumstances which are connected with the commission of the offences which reduce the blameworthiness of an accused on moral grounds, whereas as mitigating circumstances may have nothing to do with the commission of the offence.

when the aforesaid definition of extenuating circumstances is applied to the facts of this case, I am satisfied of the following facts, namely, that the accused used the vehicle for the purpose of going to see his sick wife at Lavumisa after getting a telephone message to the effect that she was seriously ill, that what the accused had in mind was to do all he could in order to make necessary and proper arrangements for the immediate admission of his wife to a Hospital,

and that there was no other vehicle available at the time. Those fasts in my view constitute extenuating circumstances whereby the moral blameworthiness of the accused is reduced.

Regard being had to all the circumstances of the case, I think that justice would have been done by sentencing the accused to a fine of E50 or two months imprisonment, suspended for a period of three years.

D. LUKELE JUDGE.

I agree. The appeal is accordingly upheld in part with the following result:

Count I: The conviction is confirmed but the sentence is replaced as follows:-

"A fine of E50 or 2 months imprisonment suspended for a period of three years on condition that the accused is not convicted of any offence in which theft is an element committed during the period of suspension."

Count II: The conviction is quashed and the sentence is set aside.

It is further ordered that the sum of E4 deposited by the appellant in respect of the appeal be refunded to him.

DAVID COHEN

ACTING CHIEF JUSTICE