IN THE HIGH COURT OF SWAZILAND

APPEAL CASE NO.13/87

In the matter of

PRECIOUS MNGOMETULU	1st Appellant
BONGINKOSI MNGOMETULU	2nd Appellant
vs	
THE KING	Respondent
CORAM:	HANNAH, C.J.
FOR THE APPELLANT:	MR. D. LUKHELE
FOR THE CROHN:	MR C. MGADIA

JUDGMENT

(20/03/87)

Hannah, C.J.

On 5th February, 1987 the two appellants were found guilty of theft, the charge against them being:-

"The accused are guilty of the crime of THEFT OF A MOTOR VEHICLE. In that upon or about the 27th June, 1985 and at or near AUKLAND PARK, JOHANNESBURG in the Republic of South Africa the said accused, each or both of them, did unlawfully and intentionally steal motor vehicle KJF 804 T a Mercedes Benz Bus, the property or in the lawful possession of DOUGLAS COWLEY and that thereafter upon some date unknown to the prosecutor, the said accused did carry, bring or convey the said motor vehicle in BIG BEND in the Lubombo

District in the KINGDOM of SWAZILAND and within the jurisdiction of this court and theft being a continuous offence, the said accused did thereby commit a crime of THEFT of the said motor vehicle in the district of LUBOMBO."

They now appeal against their conviction.

Before turning to the grounds of appeal it is convenient to summarise both prosecution and defence cases as presented at the magistrate's court.

On about 28th June, 1985 a 1985 model white Mercedes-Benz bus the property of the South African Broadcasting Corporation (SABC), went missing from the corporation's parking lot at Aukland Park, Johannesburg. Its value was R45,000. On 3rd October, 1985 Detective Inspector Nkambule of the Royal Swaziland Police questioned the first appellant about a Mercedez Benz bus which he had seen in Big Bend. She said that it belonged to her and that she had purchased it from one Paul Sigudla following negotiations conducted by her husband, the second appellant. The Inspector examined the registration book produced by the first appellant and noted that the bus was described as a 1974 model. The bus he had seen looked much newer, however, and when asked about this the first appellant explained that it had been taken to Mozambique for panel beating. A Mr. Rodriques had made the necessary arrangements, she said.

D/Inspector Nkambule interviewed both Sigudla and Rodriques and then called in a member of the South African Police Force. Later in October Douglas Cowley, SABC's transport manager, went to Big Bend and positively identified the Mercedez Benz bus which the first appellant claimed belonged to her as the bus which had gone missing from Aukland Park earlier in the year. The chassis number had been filed off but

Cowley was able to identify the bus by the engine number, a dent on the body work and a crack on the windscreen. The bus bore the registration number SD 380 GH instead of its original South African registration and had blue stripes and a name painted on its side.

Sigudla was called by the Crown. He is a garage owner and also operated a bus service. He said that in 1980 he purchased a second-hand Mercedez-Benz bus. It was a 1974 or 1975 model and was white with blue stripes on the sides. In 1985 the bus was no longer in service as it was mechanically defective and he was approached by the second appellant's brother, Chief Mngomezulu who showed an interest in purchasing it. Within a week or two Mngomezulu returned accompanied by the second appellant and an agreement of sale was made. The second appellant paid him the agreed price of E1,500, he handed over the registration book and the second appellant drove the bus away. Later in the year Sigudla was shown the bus which the police had impounded from the first appellant and he said it was not the one sold by him. Compared with his it was a beautiful bus and the colour was also slightly different.

It was put to Sigudla that the bus impounded by the police was the very same bus which he had sold but he was steadfast in his denial. He also denied that the bus sold by him had no blue stripes.

Rodriques was also called by the Crown. He is another garage owner and said that during July, 1985 the second appellant and his brother, the Chief, came to his workshop and asked if he would paint a blue stripe on the second appellant's bus. He agreed and the following day the two returned with the bus and the work was carried out. The witness also said that when the bus was brought to the workshop it had no number plates but the second appellant fixed number plates on it before it was removed.

I now turn to the defence case. The first witness to be called was the second appellant's brother, Chief Mngomezulu. In his judgment the learned Principal Magistrate commented on the fact that a defence

witness was called before either accused gave their evidence saying that although nothing prohibits such a practice it may affect the weight to be attached to the accused's evidence as they have had the opportunity of hearing what has been said. The learned Principal Magistrate is perfectly correct in saying that there is nothing which prohibits an accused from calling his witnesses first and then giving evidence himself. Section 174 (7) of the Criminal Procedure and Evidence Act states that after the opening, if any, of the defence case:

"The accused or his legal representative shall then examine the witnesses for the defence and put in and read any documentary evidence which may be admissible."

The subsection does not provide for any specific order in which the witnesses shall be called, that being left to the discretion of the accused or his legal representative. However, as the learned Principal Magistrate rightly points out the weight to be attached to the evidence of an accused who has heard his own witness being cross-examined may be lessened because of the opportunity and temptation to trim his evidence. It is for this reason that the usual practice is for the accused to give his evidence first and although this practice is not a rule of procedure, as is now the case in England (see R v Smith 1968 2 All E.R.115) it is a practice which defence attorneys would be wise to follow.

Chief Mngomezulu said that he had dealings with Sigudla from time to time and on one occasion when visiting him he admired a white bus which was in good condition. He said Sigudla agreed to sell the bus

for E30,000 and he then went to see the second appellant who had a permit to run a bus service. The second appellant said he could only raise E10,000 but the Chief agreed to lend him a further E5,000. The Chief said that Sigudla then allowed him to take the bus to paint-sprayers, which he did, and the second appellant's first sight of the bus was when it was at the sprayer's yard. The second appellant approved of the bus,

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Sigudla was paid and the painting work was then carried out. In other words, according to this witness the bus subsequently ascertained to have been taken from Johannesburg was innocently purchased from Sigudla.

The second appellant confirmed that he had been approached by his brother regarding the purchase of a bus from Sigudla and that he had agreed to buy it subject to an inspection. He and the Chief inspected the bus at Rodriques' garage and they both went to Sigudla and a deposit of E15,000 was paid. He had, he said, taken the precaution of making a note of the engine number of the bus and this corresponded with the number in the registration book which Sigudla gave him. Sigudla did not give him a receipt as he could not write but the witness recorded the transaction in his own notebook. This book was subsequently destroyed in a fire at his home. By 17th July the bus had been painted in the way he wanted it together with his name and he and Sigudla took it to the police station where the necessary transfer documents were signed. The first instalment of E1,500 was to be paid after two months. The two months, he said, were to run from August and no instalment was paid because of the intervention of the police. The second appellant also said that the bus had number plates when he first saw it at Rodrigues' but he replaced these with new ones as they were old. The first appellant knew about the transaction and the bus was registered in her name because the transport permit was also in her name. One other piece of evidence of some importance given by the second appellant was that the police checked the bus when the transfer was cleared and compared the engine number with that written in the registration book. As clearance was forthcoming presumably the two corresponded.

The first appellant gave brief evidence to the effect that her role in the purchase of the bus had been marginal. She denied telling the Detective Inspector that the bus had been taken to Mozambique for panel beating.

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The learned magistrate dealt in his judgment with the impressions made by various witnesses in the witness box. He was most favourably impressed by the three principal prosecution witnesses but not in the least by Chief Mngomezulu. He also dealt with the probabilities and improbabilities which arose from the evidence. Perhaps the most major factor was that on the defence version of what took place the bus which was cleared by the police must have been the SABC bus bearing engine number 394900005019637 and yet despite comparing this with the totally different number set out in a Swazi registration book the police cleared it. Further, if the bus in the appellant's possession in October 1985 was the bus purchased from Sigudla in July the comparison which the second appellant said he made between its engine number and that contained in the registration book would likewise have shown a major discrepancy. Other unlikelihoods were that the second appellant could never really have thought that he was buying a bus which according to the registration book was some nine years old, when in fact it was practically brand new, and that the parties would not have entered into a transaction involving E30,000 without receipt or any written record of the terms of repayemnt of the balance of E15,000.

Quite apart from the foregoing the learned magistrate relied on an absence of challenge by the defence of a number of matters alleged by prosecution witnesses. Perhaps the most noteworthy of these is the failure to challenge Sigudla's evidence that he sold the bus for E1,500 when the defence case was that the purchase was for E30,000 of which only E15,000 was actually paid.

Taking these and other matters into account, and having considered the account tendered by the appellants, the learned magistrate was satisfied that the appellants must have been party to the original

theft of the bus and convicted them of theft.

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Several grounds of appeal have been argued by Mr. Lukhele but I shall deal firstly with his argument on the facts. Relying on well-known dictum in R v Difford 1937 AD 370 he submits, in short, that however much suspicion may have been raised by the evidence there was no justification for finding that the explanation tendered by the appellants for their possession of the bus was beyond any reasonable doubt false. With great respect I am unable to agree. In my opinion, there was ample material to justify the learned magistrate's finding that the appellants had dealings with the bus well knowing it to be stolen. I have already high-lighted much of the material in question and I do not propose to repeat it. In addition the learned magistrate had the undoubted advantage of seeing the witnesses and assessing their demeanour. I therefore proceed to consider the other grounds of appeal on the basis that the evidence established that the bus was taken from Johannesburg without the consent of its owner, was brought into this country and was then substituted by the appellants for a legitimate vehicle in order to hide its true origin. Mr. Lukhele submits that even given these facts the charge brought against the appellants was not made out.

His first submission is based on the South African case of State v Makhutla and another 1968 (2) S.A. 768. Unfortunately, the judgment is in foreign language and therefore all we have to go on is the English headnote. According to this the accused were charged in South Africa with a robbery committed in Lesotho. The proceeds of the robbery were then brought by the accused into South Africa where they were convicted of theft. On appeal it was held, inter alia, that judicial notice could not be taken of the fact that robbery was an offence in Lesotho, a foreign country. Mr. Lukhele submits that by analogy the courts of Swaziland cannot take judicial notice of the fact that theft is an offence in the Republic of South Africa and if the basis on which the learned magistrate convicted the appellants was that they were guilty

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of a theft in South Africa at very least formal proof should have been tendered that theft is an offence in that country. I must confess to finding the proposition that the courts of this country cannot take judicial notice of the fact that we share the same Roman Dutch common law as the Republic of South Africa a starling one. Section 232 (1) of the Criminal Procedure and Evidence Act provides:

"If proof is required of the contents of any law, or of any other matter which has been published in the Gazette, ... of the Republic or Union of South Africa or a province of such Republic or Union ..... judicial notice shall be taken of such law ....

While I cannot agree with Crown Counsel that this section deals with more than laws or matters published in the Gazette it would indeed be surprising if the courts are enjoined to take judicial notice of such laws and yet cannot take judicial notice of the Roman Dutch common law which we share. I am of the view that the courts of Swaziland can take such judicial notice and this view is reinforced by the fact that in a lengthy analytical judgment Nathan C.J. in R v George Dlamini 1970/76 SLR 282, while specifically referring to Makhutla's case, made no reference to any need for proof of the common law of the Repubic of South Africa in circumstances where such a requirement, if it existed, would have been most relevant. In my judgment no such requirement exists.

Mr. Lukhele's next point covers ground extensively traversed by Nathan C.J. in his judgment in R v George Dlamini (supra). He submits that as there was evidence to suggest that neither appellant was the actual thief who took the bus in South Africa - the Detective Inspector accepted that neither of their passports showed them as being in that country at the relevant time - and as there was insufficient material from which to infer that either was a party to the original theft,

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a conviction for theft was bad. In other words, submits Mr. Lukhele, the notion of theft being a continuous

offence ceased to apply.

As I have said this argument was considered in detail by Nathan C.J. In R v George Dlamini (supra) and rejected. The learned Chief Justice said at page 286:

"For the above reasons I answer the real question of law raised in the stated case in the affirmative by saying that where property has been stolen in a foreign country by some person unknown and brought into Swaziland by some person unknown an accused who has thereafter had dealings with that property well knowing it to have been stolen can be convicted in a Swaziland Court of theft or any lesser offence competent on the indictment or charge."

As I find the reasons referred to convincing I respectfully adopt this passage as representing the law to be applied to the facts of the present case.

Mr. Lukhele's next submission is that even if the passage cited correctly sets out the law to be applied there was insufficient evidence that the appellants had dealings with the SABC bus knowing it to have been stolen. Again I cannot agree. The evidence established that the second appellant had the SABC bus in his custody when it was with Rodriques and also that this event was contemporaneous with the purchase of what may conveniently be described as the dummy bus from Sigudla. The only conclusion open is that the whole purpose of the purchase was to obtain a genuine registration book which could then be used for the SABC bus and it is obvious that the second appellant must have known it was stolen. The evidence of purchasing a bus for E30,000, which was supported by the first appellant, was a fiction and guilty knowledge

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must also be ascribed to her. If further evidence of guilty knowledge on the part of the first appellant is required it is to be found in her false explanation to the Detective Inspector that the bus looked new because it had been to panel beaters in Mozambique, As for dealing with the bus I can see little better way of describing the activities of the appellants in having its paintwork altered, affixing to it false number plates, and operating it as a totally different bus.

Mr, Lukhele's final submission arises from the fact that in his final address in the court a quo Crown Counsel asked the court to convict only of receiving stolen property and not of theft, Mr. Lukhele contends that this was tantamount to a stopping of the prosecution case and thereafter the learned magistrate was precluded from convicting on the theft charge. Mr. Lukhele relies on Scott v Additional Magistrate, Pretoria and Another 1956 (2) S.A. 655 but in my view that case is plainly distinguishable. There the prosecution had agreed with defence attorney that there was no evidence upon which one of the accused could be convicted but despite this the magistrate went on to convict that accused. On appeal it was held that the words of the prosecutor were tantamount to saying "I have no case" and were an implied request to the magistrate to discharge the accused and the magistrate should have done so. Whether that case was correctly decided, it is unnecessary to consider because, as I have said, it is plainly distinguishable. In the present case Crown Counsel was not asking the court to discharge the appellants, he was not seeking to stop the prosecution, he was merely inviting the court to convict of an alternative offence. This does not amount to a withdrawal of the main charge. See State v Van Biljon 1964 (2) S.A. 426 and R v Komo 1947 (3) S,A, 508. In the latter case Hathorn J.P. said
at page 511:

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"..... I cannot conceive any reason whatever why it should be supposed that when the court is performing its duty of trying the issues raised by the plea of not guilty, the Attorney-General has the power to step in and direct the Court not only to refrain from trying the issues, but also to enter a verdict of guilty on a lesser charge."

Although the learned Principal Magistrate convicted the appellants on the basis that they must have been

party to the original theft, an approach which may not have been justified by the evidence, he could equally well have convicted them on the basis that they had dealings with the bus well knowing it to have been stolen. Although this is not the way in which the charge against them was drafted the charge does make the clear allegation that they committed theft in Swaziland and I do not think it can properly be said that they did not know what case they had to meet. Despite Mr. Lukhele's tenacious efforts to persuade me to the contrary I am of the view that both appellants were properly convicted and accordingly this appeal is dismissed.

N.R. HANNAH

CHIEF JUSTICE