IN THE HIGH COURT OF SWAZILAND

Cr. Case No. 207/94

In the matter between:

THE KING

vs

MHLUSHWA BOY MOTSA

CORAM: Hull, C.J.

FOR THE CROWN Mr. Kilukumi

FOR THE DEFENDANT Mr. Flynn and Mr.

Dunseith

Judgment

(24/3/95)

The accused is the owner of a towing business. His home is in Manzini. On the property he also has a caravan, which serves as his office. He also used another caravan as an office in the field, as it were. His method of operation was to have it parked with his fleet of tow trucks at a convenient point by the roadside, ready to respond to calls for assistance. Communications between the two offices and the tow trucks themselves were by way of radio telephone.

It is not suggested that, in itself, there was anything wrong at all in this. From time to time, until the incident that has led to these charges, the police themselves engaged the accused to tow vehicles, including those suspected of having been stolen. At first, they were

sometimes towed to the Manzini police station but later it become the practice to take them to Fortune's panel beating firm in Manzini.

On 12th July 1994, in a combined operation, members of the Royal Swaziland and South African Police Forces entered and searched the homestead of the accused. At the time he was away,

There were in the yard of the homestead, which was fenced, a large number of vehicles, and parts of vehicles such as engines. It has not been suggested the accused made any attempt generally to conceal the things that were in fact in his yard. It appears that the things that were there were lying about openly.

The police officers participating in the operation testified that they made written notes of the details of the vehicles and the parts that they found. They used the information for further inquiries. On 13th July, they removed a number of engines to Lobamba police station. On the following day they removed a number of vehicles to the same station. (These included some shells of vehicles and it is the Crown's case that they also included some chassis). These things were all kept there in the police vehicle compound. This is patrolled at night time. During the day, it is not patrolled; the police rely instead on their ability to keep watch on it from the adjacent police station.

Later in August and September, during the course of their subsequent operation, the police interviewed the accused on three occasions. The records of those interviews are in Siswati and the English translations have been produced here - the English translations as Exhibits 15, 14 and 13 respectively. In August, they also interviewed a man called Sikhumbuzo Ndzinisa whom the accused employed as a driver. The record of that interview in Siswati, and the English translation, have been produced as Exhibits 17 and 18.

On 4th October 1994, the police arrested the accused and Ndzinisa. They were charged thereafter with the nine counts set out in this indictment as it was originally presented.

The counts had to do to three motor vehicles.

The first three counts (count 1, what I will call count 1A, and count 2, the second of which was in the alternative to the first) relate to a 1982 Toyota Hilux that was stolen from a trucking company near Warburton in South Africa on 5th September 1991. It is not in dispute that the black chassis which has been produced at this trial as Exhibit 1 is the chassis of this stolen vehicle.

These three counts were preferred only against the accused, Mr. Motsa. The first is that he stole the 1982 Toyota Hilux from the trucking company in South Africa and then brought it into Swaziland at some time on or before 14th July 1994. The second, in the alternative, is that he received it at Manzini between 5th September 1991 and 14th July 1994, knowing it to have been stolen.

The third charge is that in Swaziland between 5th September 1991 and 14th July 1994, he altered and/or tampered with the Toyota in order to disguise or conceal its identification.

The next three charges (counts 3, what I will call 3A and 4) related to a 1984 Toyota Corolla 1.8 Sprinter motor car stolen from a Mr. J. Nyoni at Westonaria in South Africa on 12th June 1993. These charges were also preferred against the accused Motsa alone. They were of the same kind as the first group of charges relating to the 1982 Toyota Hilux. In other words, it was alleged first that the accused had stolen the Corolla at Westonaria and brought it into Swaziland; secondly (in the alternative) that in Swaziland he received it at some time between the date of its theft and 14th July 1994, knowing it to have been stolen; and in any event that in Swaziland during that period he altered and or/tampered with it to conceal or disguise its identification. It was the Crown's case that Exhibit 4, which is the body shell of a beige Toyota Corolla with some loose body panels inside it, was the remnant shell of Mr. Nyoni's stolen car. Exhibit 4 was admittedly recovered from the homestead of the accused during the police operation.

The last three charges (counts 5, what I will call 5A end 6), in the same way, related to a 1990 Toyota Hilux 4x4 LDV vehicle, registered

number NZY 629 T, which was stolen from a Mr. Leon Forssman at Nelspruit on 14th June 1994. These charges were preferred against both the accused and Mr. Ndzinisa. In other words it was alleged that they had stolen that vehicle from Mr. Forssman in South Africa and then brought it into Swaziland; in the alternative that they had received it in Swaziland between the date of its theft and 14th July, knowing it to have been stolen; and again, in any event, that they had between these dates altered or tampered with it within Swaziland in order to conceal or disguise its identity. It is the Crown's case that the red Toyota Hilux vehicle shown in the photograph that has been produced at the trial as Exhibit 5 is Mr. Forssman's stolen vehicle. This is not admitted. It is however common ground that the red Hilux shown in the photograph was in fact in Mr. Motsa's possession at his homestead on 14th July 1994, (and I do not understand it to

be in dispute at all that it was also there at the time of the police operation on 12th July 1994.)

The red Hilux shown in the photograph has not been produced as an exhibit in this trial. It is common ground that it was released by the police to an agent of the South African insurance company that had indemnified Mr. Forssman for the loss of his vehicle. It was so released pursuant to an order obtained from this court in November 1994. The order was made on the application of the agent. Notice of the application was given to the Crown, which consented to the order. In giving its consent, it was stated for the Crown that to the knowledge of the Commissioner of Police no other person claimed or had an interest in the vehicle. At the time when this was given, the Commissioner of Police was aware of two things. One was that the vehicle in the photograph Exhibit 5, the red Hilux, was a potential exhibit in this trial. The other was that on 8th August 1994, Motsa acting through his attorneys had formally demanded the return of the vehicles and vehicle parts removed from his homestead during the police operation. A copy of the letter of demand was produced at this trial as Defence Exhibit 7. Motsa was not given any notice of the application to the High Court for the release of the red Hilux shown in the photograph Exhibit 5.

In presenting the Crown's case, Mr. Kilukumi sought to lead evidence

to prove that other stolen vehicles were found at Motsa's homestead during the police operation.

He sought to do so on two bases, firstly on the provisions of section 262 of the Criminal Procedure and Evidence Act 1938 and secondly, at common law, on the similar fact principle. I refused to admit such evidence on either ground. As far as the common law principle was concerned, I was satisfied that this category of evidence does not fall within the similar fact principle. As far as the applicability, of section 262 of the Criminal Procedure and Evidence Act was concerned, I considered firstly that it was not open to the Crown to rely on that provision in a case where, as here, the indictment contains not merely charges of receiving but also charges of theft. I nave to add - I must add - that Mr. Kilukumi took the view (although as it happened Mr. Flynn had a different view) that I had a discretion in the matter. To the extent that I had a discretion, I would certainly have exercised it in favour of the accused.

When the Crown closed its case, Mr. Flynn applied under section 174(4) of the Criminal Procedure and Evidence Act 1938 to have all of the counts against each of the two accused dismissed on the grounds that there was no evidence on which a court, acting carefully, could reasonably convict either of them of any charge.

Each of the charges was brought under the Theft of Motor Vehicles Act 1991. The charges of theft and receiving were brought under section 3(1) of that Act. The charges of tampering were brought under section 9.

The evidentiary presumptions in section 4 of the Act, of which the Crown has the benefit, apply to the charges under section 3(1).

For the reasons that I gave at the time, I allowed the application in respect of the charges against Motsa relating to the 1984 Toyota Corolla 1.8 Sprinter (counts 3, 3A and 4), as well as the charge against him (count 6) of tampering with the Toyota Hilux 4 x 4 to conceal its identity; and the charges against Mr. Ndzinisa relating to the Toyota Hilux 4 x 4 (Counts 5, 5A and 6). The Crown did not in

fact oppose the application of either of the accused in respect of count 6.

It may be helpful if in summary I reiterate my reasons briefly. I was satisfied that there was no evidence on which a reasonable man, acting carefully, could have concluded that the beige Toyota Corolla shell and accompanying parts, which were Exhibit 4, had been identified as the Toyota Corolla Sprinter stolen from Mr. Nyoni in Westonaria. As far as Mr. Ndzinisa was concerned, the only evidence implicating him in the charges relating to the Toyota Hilux 4 x 4 belonging to Mr. Forssman is that of the questions by the police to him and his answers, set out in Exhibits 17 and 18. Having regard to his answers in the whole context in which they were given, I was satisfied that no reasonable man, acting carefully, could properly have convicted him of any of the charges on the strength of those answers, notwithstanding the presumptions in section 4 of the Act. On his own answers, taken as a whole, I saw no reason at all then suppose that he was not probably telling the truth. His answers were exculpatory. Moreover the Crown, as dominus litus, conceded rightly in my view that neither of the accused had a case to answer in respect of count 6. There is no evidence that the red Hilux shown in the photograph Exhibit 5 (which is allegedly Mr. Forssman's stolen vehicle) has been altered or tampered with in any way to conceal its identity.

I think too that in the interests of clarity I should also at this point repeat, in short summary, the remaining charges which Motsa faces, before dealing with them.

The first set of charges (Counts 1, 1A and 2) relate to the 1982 Toyota Hilux stolen from the Warburton area on 5th September 1991. It is not in dispute that the black chassis which has been produced as Exhibit 1 comes from that vehicle. It is disputed that Mr. Motsa was knowingly in possession of the black chassis, and it is also in dispute that he stole the vehicle (or the chassis); or received either, knowing it to be stolen; or tampered with the vehicle to hide its identity. The Crown alleges that he actually stole the vehicle and brought it into Swaziland: in the alternative that after it was stolen he received it in Swaziland, knowing it to have been

stolen; and that in any event that in Swaziland he tampered with or altered the vehicle to mask its identity.

The second set of charges relate to the Toyota Hilux 4x4 stolen from Mr. Forssman at Nelspruit on 14th June 1994. The Crown alleges that the red Hilux shown in the photograph Exhibit 5 is that stolen vehicle. It alleges that Mr. Motsa actually stole it, and brought it into Swaziland; or, in the alternative, that he received it in Swaziland knowing it to have been stolen. It is not in dispute that the red Hilux shown in the photograph was recovered from Motsa's possession during the police operation. It is in dispute that it has been proved to be Mr. Forssman's stolen Hilux. It is in any case in dispute that Motsa stole the red Hilux shown in Exhibit 5, or received it knowing it to have been stolen.

Count 2 - the allegation that Motsa tampered with the 1982 Hilux to conceal its identity - can be disposed of at once. The evidentiary presumptions in section 4 of the Theft of Motor Vehicles Act 1991 on which the Crown relies do not apply to charges of tampering under section 9 of the Act. There is no evidence at all that the black chassis itself (Exhibit 1) has been tampered with. Its critical identifying feature, i.e. its embossed chassis number, has not been interfered with at all. There is nothing else to indicate that any attempt has been made to disguise the chassis itself. This particular charge can only depend on an inference that Motsa once had the original vehicle or at least something more than the chassis, and that he then dismantled it to reduce it to the chassis to conceal the identification of the vehicle. In the absence of any statutory presumptions to assist the prosecution, there is clearly no basis in evidence at all on which such an inference could properly be drawn. Accordingly I find the accused not guilty on Count 2 and discharge him on that count.

The determination of the other charges does involve a consideration of the statutory presumptions.

The basic principle in a criminal trial is that the prosecution bears the onus of proving the charge and of doing so beyond reasonable doubt.

Section 4(1)(a) of the Theft of Motor Vehicles Act 1991 provides in its relevant parts as follows:

"Unless the contrary is proved by him, a person shall be presumed to have committed an offence under section, and on conviction punished accordingly, if -

"(a) he is found in possession of a motor vehicle which is reasonably suspected to be stolen ..."

Section 4(2) provides:

"In any proceeding in which the accused is charged with receiving a motor vehicle knowing it to be stolen, the onus shall be on the accused to prove that at the time he received the vehicle he had no reasonable grounds to believe that the vehicle was stolen."

In order to avail itself of the presumptions in section 4(1)(a), the Crown must in my view prove beyond reasonable doubt -

(i) that Motsa was in possession of the vehicle (or part of the vehicle) to which the charge relates; and

(ii) that it is reasonably suspected of having been stolen.

Where the Crown fulfills those conditions, then in my view the legal onus of proof shifts to Motsa to show, on a balance of probabilities, that he did not steal it or receive it knowing it to be stolen.

In relation to the two receiving charges, I understand Mr. Kilukumi to concede that the presumption in section 4(2) is subsumed by the presumptions in section 4(1)(a) but in any event I construe section 4(2) to mean that if the Crown proves beyond reasonable doubt that Motsa was in possession of a vehicle that was in fact stolen, then the legal onus of proof rests on him to prove on a balance of probabilities that he had no reasonable grounds for believing that it was stolen.

In respect of every charge to which the presumptions may be applicable, before either of them can be invoked, the Crown must in my view prove beyond reasonable doubt not only that the vehicle or the vehicle part was in his possession, but also that he knew that it was in his possession - by which I mean that he was aware that he had the thing himself in his possession.

Before dealing with the evidence that relates specifically to the charges, I want to refer to three considerations that Mr. Flynn raised.

As I have mentioned, it is not in dispute that Motsa operated a towing business in the course of which he towed vehicles at the request of the police themselves. These sometimes included stolen vehicles. There is evidence that he continued to provide this service at least until a fairly short time before the police operation. Mr. Flynn mentioned, in particular, evidence that he had once at the request of the police towed a vehicle from Hlatikulu Police Station to the Oshoek border. I understood Mr. Flynn to be inviting me to infer that in all likelihood he was towing a stolen vehicle at the request of the Police - in other words that the Royal Swaziland Police had recovered and were returning to South Africa - and I certainly understood Mr. Flynn to be making the point that Motsa himself was not told of the status of that vehicle by the police. That inference may not be unreasonable, and indeed the Crown did not really seek to dispute it, but in

any event, it is a matter of public notoriety that motor theft is a very prevalent crime in the region. That is of course one reason for the stringent provisions of the legislation governing such offences which reflects a serious public concern.

The relevance as Mr. Flynn's submission in this respect, as I understand it, is that in carrying on legitimately the business of a tow service, and of doing so admittedly at times for the police themselves. Motsa may very well from time to time have handled vehicles or parts of vehicles that had been stolen, not only because he may have been instructed by the police to do so for legitimate purposes but, more particularly, in circumstances in which he may well have been unware that they had been stolen.

In some jurisdictions, legislation places strict duties on persons who trade in circumstances in which their business activities may serve as convenient "fronts" (if I can use that expression) for unlawful dealings. One example that comes readily to mind is the kind of legislation that requires second-hand dealers and pawn-brokers to keep full records of the persons with whom they have transactions. Section 6 of the Theft of Motor Vehicles Act 1991 itself imposes certain duties on car dealers, garage managers, and persons who repair or service motor vehicles. It seems to me that one might usefully include in that - I do not say this in any way in respect of Mr. Motsa, but as a general comment - persons who provide tow services.

However it was not suggested at all at this hearing that Motsa had been in breach of any statutory obligations, and on these specific allegations of crimes of theft, receiving and tampering, I am of the view that Mr. Flynn's submissions have force, as a general consideration to be kept in mind.

He also identified aspects of the Crown's evidence which were in his submission clearly unsatisfactory. These were as follows:

(a) It was clearly the evidence for the Crown that in the course of the police operation, the police photographed vehicles and parts of vehicles that were found on Motsa's premises, and that the negatives (including the black and white prints that were taken from them) were, definitively, those of the photographs taken.

(b) It was also to be inferred from Superintendent Lukhele's evidence that the photographs taken were then put on dockets for investigation.

(c) The photograph that is Exhibit 21 - a photograph of a black chassis - was produced at the trial as a photograph taken, as I understood it, at Mr. Motsa's premises, of the black chassis which is Exhibit 1. On comparison of the photograph with the black chassis, it is however clear that it is not. In particular, although there are also other differences, there is a small hole on the side of the chassis frame in the photograph

that is simply not present on the black chassis which is Exhibit 1.

(d) As I have mentioned already, the police released to the agent of Mr. Forssman's insurer the red Hilux shown in Exhibit 5, which is allegedly his stolen 1990 Hilux 4x4. They did so pursuant to a court order to which the Crown consented, on the basis expressly that the Commissioner of Police knew of no one else who claimed an interest in the vehicle; and notwithstanding that they were aware that Motsa had given formal notice of such a claim; and notwithstanding too that it was a potential exhibit in this trial. In consequence of the release of the vehicle, Mr. Flynn submits, the court and the defence were put in the position of being unable to test the evidence of the Crown witnesses who said that they identified the

vehicle at Lobamba, by comparing their testimony with the exhibit itself. Mr. Flynn's submissions in this regard were I think, all directed towards the charges relating to the 1990 Toyota Hilux 4x4 essentially. It was the evidence for the defence that a log book which related to the way in which the red Hilux in photograph Exhibit 5 had came into Motsa's possession - in other words legitimately - had been handed over to 893 Detective John Dlamini but had not been produced by the prosecution in evidence. It had been put to the officer that he had been given it. He did deny it. The point of Mr. Flynn's submission was that given the other unsatisfactory features of the case that he referred to, there was a reason for looking critically at the officer's denial. He was, of course, also saying that the defence witnesses' version should be believed.

A third consideration to which Mr. Flynn adverted, which can in my view be properly regarded as a comment of a general nature because it does affect both charges, is that the Crown have failed to show that two of the defence witnesses were not credible or not independent. It goes further than that. He was saying that it was never really put to them at all that they were not being candid, or that either of them had any kinds of motive to serve. He was referring to a Mr. Xulu, who had been in charge of panel beating at Fortunes in Manzini, and to a Mr. Themba Qwabe.

It is not in dispute that Motsa's towing service had been in the practice of leaving at Fortune's vehicles that had been towed there by the service at the request of the police. Mr. Xulu corroborated the accounts of Motsa and Ndzinisa that the vehicles had been left outside Fortune's yard, pending payment of the towing and receiving fees and collection by their owners. He also confirmed that vehicles or parts of vehicles, including chassis and pieces of chassis had accumulated there when owners had failed to claim them. He also gave evidence that in the panel-beating process, chassis sometimes had to be separated from vehicles, and sometimes cut into pieces for repairs. He confirms too, that a time had come when Motsa's drivers had removed unclaimed vehicles, parts and scrap to Motsa's own homestead. As Motsa and Mr. Ndzinisa had also said, he explained that this was because the Manzini Town Council had complained about the debris accumulating outside Fortune's yard.

In his closing submissions, Mr. Kilukumi for the Crown submitted that the only evidence that the Council had complained was hearsay. Nevertheless, Mr. Xulu himself was saying that he observed at times the debris being taken away by Motsa's drivers, and I agree with Mr. Flynn's submission (as I have already indicated) that Mr. Xulu was not shown to have been a witness who was not credible or not independent.

Mr. Qwabe, a television presenter, gave evidence that of his own initiative, he had gone to Motsa's homestead with his own supervisor and asked Motsa. to sell to his supervisor parts of the red Hilux which the supervisor wanted for his own Hilux as replacement parts. There is an issue as to the admissibility of Mr. Qwabe's evidence. I agree with Mr. Flynn, however, that Mr. Qwabe was not shown in any way to be an unreliable witness as to what he did have to say.

Turning now to counts 1 and 1A, relating to the 1982 Toyota Hilux, the first question is whether the Crown has proved beyond reasonable doubt that this was found by the police in the possession of Motsa.

In certain respects the evidence that the black chassis (Exhibit 1) was recovered from the homestead is in my view less than satisfactory. No photograph has been produced here, showing that it was there. The photograph which is Exhibit 21 is not a photograph of that chassis and

it has not been explained; and Mr. Motsa himself has not admitted at all that it was on his property.

In his evidence in chief, Sergeant Van Rooyen of the Oshoek Border Post of the South African Police said that in the operation on 12th July, there had been many chassis in Motsa's yard. He said that he had noted down the numbers at the time, but that he could not give them. Then, still in his evidence in chief, he testified that he had gone afterwards with Mr. J.J. Geldanhuys, (a senior official in the trucking company from whom the 1982 Hilux had been stolen) to Lobamba to inspect the black chassis and that there (i.e. at Lobamba), he had noted its number. He produced his file and what he identified as his contemporaneous note, and from that then gave the chassis number.

In cross-examination, he first said that he did not have with him a note of the chassis number made on 12th July. He went on to say that he did not have the notes that he made when he inspected the chassis at Lobamba. My own notes do indicate that immediately after this, in his cross-examination, he then said that he did not understand the question, and that he went on to explain that he did not make notes on the visit to Lobamba but had in fact made rough notes on 12th July which he had then transferred to the file from which, at the hearing, he had given the chassis number.

In answer to questions that I had subsequently put to him, Mr. Van Rooyen confirmed the sequence of events as he eventually described it in that respect - in other words, the events relating to the way in which he recorded the chassis number.

In his submissions. Mr. Flynn was very critical of these aspects of the case. As counsel defending in person on a criminal charge, that is understandable; and as a counsel defending a man on charges on which, pending his trial, he has not been eligible for bail, on which he has to respond to evidentiary presumptions which are exceptions to the ordinary criminal process, and on which he faces severe minimum consequences if convicted, I think that it is very understandable indeed. I think he was bound to take that view.

However, in the presentation of a criminal prosecution, I think it is

a matter of common experience that things sometimes go wrong. That does not necessarily mean that Crown witnesses have not been candid. What it often means, in fact, is that in the way in which the record of an investigation is put together, and sometimes in the way in which Crown witnesses themselves give evidence from the box, other tilings come into play which affect the credibility of the Crown case. I have to say that as far as Mr. Van Rooyen himself was concerned, it was my own impression that he shifted his ground in the course of cross-examination, and from a marginal note I made at the time, it was not my impression that he did so because he became confused. But the truth of the matter may have been that he did become confused, and there may well of course be innocuous reasons for the other unexplained features of the Crown's case relating to the 1982 Hilux.

On these charges that have been brought against Motsa relating to that vehicle, however - in particular, in practical terms if not in principle on these allegations under very stringent legislation - the Crown bears a heavy burden of proof even before it can fall back on the evidentiary presumptions that are available to it. The proof of the allegation that Motsa in fact had the black chassis on his homestead depends essentially on the evidence of 893 Detective Sergeant John Dlamini. He did say that he made a contemporaneous note of its presence by recording its number on 13th July. But I have to say that that is the strongest point in the Crown's case to establish that this chassis was indeed at Mr. Motsa's home. I accept that it is some evidence that it was.

But in any case, I do not consider that it has been shown at all that Mr. Motsa knew himself that the black chassis (Exhibit 1) was in fact in his possession. On the evidence, it may very well have been something that in the ordinary course of his business was part of a vehicle that had been taken to Fortune's - quite possibly, even at the request of the police - and later removed to his own yard, without his having been conscious that it was there.

Moreover, even if it is inferred that he knew that the chassis was one of the things that was lying in his homestead, the defence has in my view on the evidence succeeded in showing that, more probably than not, he did not steal the 1982 Hilux or acquire it as a criminal

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receiver. He went into the witness box to give evidence in his defence. The nature of his tow service and what it involved legitimately is common ground.

The evidence and credibility of Mr. Xulu was not impeached. Those things, if I may put in that way, are consistent with his own explanation. Mr. Kilukumi pointed out what he contended were inconsistencies in Mr. Motsa's evidence, but I say that I did not find him to be a witness who was obviously implausible at all. I do not agree that he was patently evasive. On the contrary, and in particular, with regard to the alleged discrepancies between his admitted statements to the police, I find it much easier in my own mind to reconcile them than I do to understand the features of the Crown's case that have been described as unsatisfactory. There is nothing at all in his answers to Superintendent Lukhele (translated in English in Exhibit 13) in which he admits knowledge of the black chassis. Mr. Motsa has in my judgment shown on the balance of probabilities that he had no reasonable grounds for believing that the chassis was stolen. I am obliged to make that finding.

Once it comes into operation, the scope of the evidentiary presumption in section 4(1)(a) of the Act is extremely wide. If the Crown had succeeded in establishing that Motsa was knowingly in possession of the black chassis, it would then lie upon him to prove not only that he had not received it criminally, but also that he has not actually stolen it in South Africa. On the facts of this particular case, that presumption in my view would not be difficult to discharge. Nearly four years have passed since the 1982 Hilux was stolen. There is no evidence at all before me that anything more than a black chassis was found at Motsa's premises, or that begins to suggest that he was ever near the warburton area on 5th September 1991. To my mind those two aspects of this case underline the inherent dangers in relying on evidentiary presumptions. If there were any merit in the counts which relate to the stolen 1982 Hilux, then in my view the gravamen of the Crown's case plainly has to do not with any allegation of actual theft or of tampering but in an allegation that Motsa was a criminal receiver. But for the reasons that I have given, I find him not guilty on counts 1, LA and 2 and he is discharged on each of those counts.

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On those counts (5 and 5A) that arise from the theft of Mr. Forssman's 1990 Hilux 4 x 4, it is acknowledged that the red Hilux shown in Exhibit 5 was in Mr. Motsa's possession. That is not in issue. To invoke the presumption in section 4(1)(a), the Crown must prove beyond reasonable doubt that it is reasonably suspected to have been a stolen vehicle.

Suspicion, by definition, is something less than actual proof. Mr. Flynn contended that if the Crown cannot prove that a particular vehicle has been stolen, then it cannot prove either that there is a reasonable suspicion that it has been stolen. The view I come to is that I am not persuaded by that. As the evidentiary presumptions are expressed, it does seem to me that it is possible, to put it shortly, for a person to be convicted of stealing a motor vehicle or of dishonestly receiving it, even if that is not the truth of the matter. That possibility itself, in my view, goes a long way towards explaining the dislike of the courts of law for legal presumptions, because they may produce results that do not reflect the truth of a thing. If for reasons of social concern, there is a need to declare conduct to be criminal, then I think that there is much to be said for doing that directly, instead of relying on what may be, in some cases at least, in reality legal fiction. Nevertheless as section 4(1)(a) stands, I do not think that it is essential for the Crown, in establishing that a motor vehicle is reasonably suspected of having been stolen, to prove beyond

reasonable doubt that the vehicle concerned is in fact a stolen vehicle. To give rise to the presumption, what it has to prove beyond doubt in my view - reasonable doubt - is simply reasonable suspicion that it is stolen. I can see no other meaning to section 4(1)(a) in that regard.

In the present case, if it lay on the Crown to prove beyond reasonable doubt that the red Hilux in Exhibit 5 is Mr. Forssman's stolen vehicle, then I think Mr. Flynn's submissions about the quality of the Crown's evidence on that point would have a great deal of force -determinative force, in fact, I think. In his evidence in chief, Mr. Forssman did not say that when he came to Lobamba he recognised his vehicle by its number plate. I am bound to say that I find that surprising. I would have thought that that would be the very first thing that a person would have recognised his vehicle by. There is

other evidence about the number plate that is at first sight not easy to understand. The other prosecution witnesses who referred to it apparently did not notice it on first inspection. The only photograph of the red Hilux, namely the one in Exhibit 5, does not demonstrate this number plate. I do not find any of that easy to understand. Surely it would be a matter of obvious interest. And on the other hand, on the Crown's own case, it was not in dispute that it was there. There is no evidence that, for whatever reason, it was put on the vehicle at some time after it had been seized. But if it was here all the time, the obvious question is why the accused, if he obtained the vehicle dishonestly, did not take the seemingly elementary precaution of getting rid of it.

Mr. Flynn's submission as to the way in which the police allowed the red Hilux to be removed from Swaziland before the trial, and despite Motsa's claim upon it against the Government, also carries force in my mind.

However, despite these features of the Crown's case, I think that on a correct view of the evidence the Crown has succeeded in proving beyond reasonable doubt that there are reasonable grounds, objectively, for suspecting that the red Hilux is a vehicle that was stolen from Mr. Forssman.

The test is objective. Notwithstanding the points made by Mr. Flynn, I consider that a reasonable man would in fact suspect that it had been stolen. He might not be sure of it. In fact I do not think that he would be sure of it. But notwithstanding the features that I have referred to, I do think that there may be innocuous reasons for those features as well, and that a reasonable man would in fact suspect that the red Hilux in Exhibit 5 might be Mr. Forssman's stolen vehicle.

Then the question is whether Motsa has proved on a balance of probabilities that it was not stolen or dishonestly received by him.

Mr. Motsa's explanation is that at his direction, this vehicle was recovered at the request of the police, following an accident, and taken to Fortune's yard, and later removed from Fortune's yard to Motsa's own homestead. Mr. Ndzinisa supported this version. So too did Mr. Xulu, who as I say has not been shown to be anything other

than a creditworthy, independent witness. Mr. Xulu is saying, as does Mr. Ndzinisa, that the vehicle sat outside Fortune's yard for a time; and on the Crown's own case, the view I think I have to take is that there is no evidence that it did not have a number plate on it then - and of course it follows that that there is no evidence that anyone tried to conceal the number plate. I say that because what that necessarily implies is a vehicle that has been brought to Fortune's yard by Motsa with its number plate - with a South African number plate - and allowed to sit outside the yard for a period of time on public view.

Mr. Qwabe, who falls into the same category as Mr. Xulu in my view, as far as his credibility is concerned, said that when he approached at his own initiative Mr. Motsa at his house to ask with his supervisor if they could obtain spare parts from this Toyota - the red Hilux -Mr. Motsa said to them that he could not sell to them. He explained to them that the vehicle belonged to someone else. Rightly or wrongly I have come to the view that Mr. Kilukumi's submission on this is correct, that strictly speaking that is not admissible evidence.

Mr. Kilukumi contended that the records of the questioning of Motsa and Mr. Ndzinisa in respect of the red Hilux - Exhibit 15 in Motsa's case and the translation Exhibit 18 in Ndzinisa's case - show that their answers contradicted the defence case. I am not able to agree with that. Although I do not go as far as to say that it is the only way of approaching an interrogation, I think that there is much to be said, in cautioning and then interrogating a suspect, to allow him at first to make a statement in his own words and then to use a question and answer method to clarify his answers as necessary. That is in fact what the Judges' Rules envisage - certainly what the English Judges' Rules envisage. They do so, subject to additional precautions. A person who is questioned by a police officer is not obliged to volunteer anything. In fact, the law of this jurisdiction imposes strict limitations on the admissibility of his answers. What the exhibits recording the interviews with Motsa show (and indeed. Ndzinisa show) is that the Superintendent in charge of the inquiry chose to interrogate him by means of specific questions. The answers must be considered both in relation to those questions and also in relation to the context. I do not consider that it has been shown, in

any material sense, that there are contradictions which undermine

Motsa's account in this respect. Mr. Ndzinisa's answers to police questions are not in any event evidence against Motsa but I do not consider that he has been shown to be untruthful either, in the overall context of his answers. (I wish to comment in passing that in fact in one of his answers, Mr. motsa himself referred to the fact that vehicles were sometimes taken to Fortune's.

On the whole of the evidence, I do consider that Motsa has succeeded in giving an explanation that is probably true. I can see no good reason for concluding, in any way in which it has been put in question, that there is anything more a reasonable doubt that has been raised against him in that respect.

On counts 5 and 5A, I therefore find him not guilty and he is discharged.

DAVID HULL

CHIEF JUSTICE