

IN THE HIGH COURT OF SWAZILAND

CRIMINAL APPEAL NO,43/96

In the matter between:

LAWRENCE DA SILVA                    1ST APPELLANT

MARCUS STEWART                    2ND APPELLANT

ROXY RONALD GUMEDZE            3RD APPELLANT

VS

REX

CORAM

: SAPIRE A.C.J.

: MATSEBULA J.

FOR THE CROWN                    : MISS NDERI

FOR 1ST APPELLANT                : MR. T. NKAMBULE

FOR 2ND APPELLANT               : MR. MASUKU

FOR 3RD APPELLANT               : MR. MAZIYA

JUDGMENT

8/8/96

The three appellants were charged in the Magistrate's Court sitting in Manzini on one count of theft under the provisions of Section 3(1) of the THEFT OF MOTOR VEHICLE ACT 16/1991 it being alleged that on/or about the 2nd June 1995 and at or near Chester Centre in the district of manzini they did wrongfully and intentionally steal one white Isuzu van whose registration number was given as .SD786GS valued at E80 000.00. The property was in the lawful possession of Islam Barow.

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They all pleaded not guilty and were represented by Mr. Masuku at their trial At the end of their trial the Learned Magistrate convicted all three appellants as charged and based his reasons for his findings that all three appellants acted as he puts it as conglomerate of gansters with one motive of quickly enriching themselves".

The Learned Magistrate sentenced each appellant to a term of four years imprisonment and backdated each sentence to the 22nd July 1995. Each of the appellants has now noted an appeal against the conviction and sentence.

Appellant 1 and 2 state that the conviction was against the weight of the evidence. They state that, it was too harsh and that it induces a sense of shock and that they should have been given two years of

imprisonment. They also State that the sentence was so unreasonable that no court could have imposed it.

Appellant No. 3 states as his grounds of appeal against conviction -

1. that the Learned Magistrate erred in fact and in law;
2. the Crown had failed to prove beyond a reasonable doubt that he was involved in the commission of the crime;

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3. the evidence of the accomplices does not corroborate;
4. the person in whose premises the motor vehicle was found by the police failed to identify him;
5. 5 none of the exhibits were found in his possession

I do not propose to analyse the entire evidence but will only confine myself to what the witnesses at the trial said in their evidence and then consider that against the Learned Magistrate's judgment and the three appellants' grounds of appeal.

PW1 Islam Barow stated that the motor vehicle in question had been parked on the premises on 2nd June 1995 and saw it being driven away by a person wearing a balaclava hat so that he was unable to identify the driver. This evidence was not challenged and was accepted by the Learned Magistrate.

PW2 Henry Houghton was approached by appellant no. 2 for financial assistance. Appellant no.2 left four motor vehicle wheels whose description fits those of the motor vehicle SD785GS. Appellant no.2 later led the police to PW2 and the wheels were seized by the police. The witness PW2 was never challenged by the defence and the Learned Magistrate accepted PW2's evidence.

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PW3 Musa Zibuko's evidence corroborated PW1's evidence about where the motor vehicle had been parked and subsequently disappeared. The Learned Magistrate states in his reasons for judgment that PW2 was cross-examined at length but not on any material substance and I agree with the Learned Magistrate's view.

PW4 Mr. Mansoor kept the keys of the motor vehicle before the motor vehicle disappeared. He was called to the police station to identify parts of the motor vehicle. Some of these parts had the chassis number which corresponded with that on the blue book which the witness kept.

PW5 Errol Pyne was approached by appellant no. 2 with a differential and a gearbox for an Isuzu van. Appellant no.2 told PW5 that these parts were for a motor vehicle which had capsized. Appellant offered the parts for sale to the witness and was paid E2,700.00. Appellant no 2 subsequently fetched the gearbox and promised the witness to repay the witness a sum of E1 000.00. Subsequently the police came and took possession of the diff and the gearbox. The witness was not broken down in cross-examination.

PW6 Tommy Zeeman was approached by appellant no. 2 and offered him a gearbox and suspension. The gearbox was purchased for E2,500.00. The gearbox which appellant no 2 gave to PW6 was swooped for one which PW6 had. PW6 used the

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gearbox which appellant no.2 sold and PW6's gearbox was given to a Mozambican. This probably

explains the difficulty Mr. Maziya had for the 1st and 2nd appellant in regard to a 4x4 gearbox. The gearbox taken from Mr. Zeeman is one that he removed from the Mozambican scrap motor vehicle.

PW7 Vusi Mthethwa and PW11 Mfanukhona Dlamini were introduced as accomplice witnesses. PW7 told the court that he and PW11 Mfanukhona Dlamini were approached by appellant no. 2 and 3 and one Bhai Mansoor They all drove in appellant 2's motor vehicle to Chester Centre where appellant no.2 instructed PW7 and appellant no.3 to alight. PW7 was told by appellant no.3 that they had come to take an Isuzu motor vehicle. Appellant no. 3 produced a key to the motor vehicle and it was appellant no. 3 who drove the motor vehicle from the premises to Gumtree Bottle Store.

The approach by a trier of facts in matters where an accomplice evidence is involved is firstly -

- a) Is the witness credible?
- b) Is there any other credible evidence independent of that which the accomplice witness has given which implicated the accused and thus corroborates the witness' account?
- c) See in this regard R VS MANDLA DLAMINI SLR 1982-1986.

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At the Gumtree wheels were removed and put into appellant 2's motor vehicle and taken to WoodMasters At Woodmasters PW2 told the court what happened to the wheels. PW2 is Henry Houghton. At the Gumtree PW2 Emmanuel Godfrey told the court what took place to the motor vehicle taken there by appellant no.3 and others. PW12 told the court he knew all the appellants. The evidence of PW7 and PW12 corroborated each other. PW12 gave the description of the motor vehicle which was brought to his place and it fits that of the motor vehicle removed from PW1's premises.

The Learned Magistrate took particular notice of PW7's evidence and that his evidence was not challenged by the appellants. The case of R VS JEREMIAH DUBE AND OTHERS 1979-19(31 SLR 342 come to mind in this regard. It is very clear that the accomplices and in turn their evidence have been corroborated by other independent evidence implicating the appellants. The Learned Magistrate found PW7 and PW11 to be a credible witness.

There was also the evidence of PW8 Joaquin Figuredo whose testimony was that appellant no.2 used a PW8's Isuzu.

PW9 purchased two seat covers which were identified by the witnesses as some of the items removed from the stolen motor vehicle. This evidence was never challenged by the defence.

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PW10's evidence of the recovery of the different motor vehicle parts at PW12's homestead and PW12 told the court how the parts had landed at his homestead.

Appellant no.1 made a written statement exhibit 'E' in which he denies having stolen the motor vehicle but only-participated in the stripping of the said motor vehicle. This statement exculpates appellant no. 1 and can therefore not be regarded as a confession and it was correctly admitted by the Learned Magistrate. Also is appellant no.3's statement to the effect that he was given a key by a person Bhai and asked to go and fetch a motor vehicle. In this regard see R VS HANGER 1928 AD@ 459.

In so far as the conviction of all three appellants I can find no misdirection on the part of the Learned Magistrate and would confirm the conviction on all three appellants.

ON SENTENCE

This court sitting as a court of appeal will be very slow to interfere with a sentence passed by a trial court. It can only interfere where a sentence could be described as unreasonable excessive or it has been imposed under some serious misapprehension as to the law or even as to the facts bearing directly on the sentence. The discretion to pass sentence is vested in the trial court; it is a judicial discretion and before such discretion is interfered with

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good grounds must be shown. See in this regard R VS MAPUMULO AND OTHERS 1920 AD 56 @57.

I can find no justification for this court to interfere with the Learned Magistrate's sentence and confirm the sentence.

I agree

J.M. MATSEBULA

S. W. SAPIRE

JUDGE

ACTING CHIEF JUSTICE