Hon Mofokeng J.

CRI/A/28/82

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOLOPI KOAESA Appellant

v

R E X Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice F.X. Rooney
on the 30th day of September, 1982.

Miss Moruthane for the Crown
Mr. G.N. Mofolo for the Appellant

The appellant appeared before Mr. M.T. Motinyane at Leribe charged as follows :

> "That the said accused is charged with the crime of Theft Common.
>
> In that upon or about the 16th day of April 1981, and at Alberton in the Republic of South Africa, the said accused did unlawfully and intentionally steal one motor vehicle, the property of the South African Block Pty Ltd in the lawful possession of Tlhoriso Constable Tisane, and did unlawfully bring same motor vehicle in to Lesotho, to wit at Ha Makakamela, in the district of Leribe, where this court has jurisdiction of this case and did thereby commit the crime of Theft Common."

He was convicted as charged and sentenced to 12 months imprisonment.

A number of grounds of appeal were put forward. The appellant states that it was his defence at the trial that he obtained the vehicle from one John Ndhlofu alias Mokhomane of Naledi in the Transvaal. He claimed that the actual thieves had been convicted in the O.F.S. and that his connection with the vehicle arose entirely out of his activities as a police informer. Ground of appeal (5) reads as follows :

2/ " In the light .....

> "In the light of the evidence and appellant's qualified admissions, at least the court should have convicted appellant of receiving stolen property knowing it to be stolen."

Any person charged with theft may be found guilty of receiving stolen goods knowing them to have been stolen (Criminal Procedure and Evidence Act S.192).

It was not in dispute that sometime in 1981, on a date not disclosed the vehicle in question was stolen at the point of a knife by three men in Alberton in the Transvaal. According to the victim of the robbery Tlisang (PW.1) he was unable to identify the robbers as he was afraid to look at their faces, but, they were speaking to each other in Zulu.

It is not in dispute that on the 7th May, 1981 L/Sgt. Koza (PW.2) found the stolen vehicle at the residence of the appellant. The appellant explained to this witness that he had obtained the vehicle from certain people who were selling it and they produced an uncompleted document relating to the change of ownership.

In his evidence in the Subordinate Court the appellant denied that he was a thief. He claimed that he was asked by Sgt. Koza to go to the Republic of South Africa and give evidence at the trial of the persons charged with stealing the vehicle. The appellant was afraid to do so for fear that members of the gang might come to Lesotho and kill him.

The appellant also said in evidence that he was a police informer and that he knew that the vehicle in question had been stolen. Asked why he did not take immediate action to advise the police, he replied with the curious claim that he could not do anything since the Chassis number of the vehicle had not yet been tampered with. Who was to do the tampering was not very clear. The appellant admitted that he had vehicle in his possession since the 14th April 1981, which if the charge sheet is to be accepted at it's face value was two days before the theft.

3/ The appellant was ill- ...

The appellant was ill-advised to call as a defence witness one Teke Nkalai who said that he hired the stolen vehicle from the accused and used it to transport goods in the mountains.

Even if the appellant is a police informer, such an activity would not give him a licence to commit a crime. He could not in that capacity receive a stolen article and then proceed to make money out of it for his own benefit and afterwards claim that he was acting in aid of the law without a guilty intention. I find the defence put forward at the trial both farfetched and without substance.

In his judgment the magistrate said :

> "Our law knows no distinction between principles in the first and second degrees or between principals in the second degree and degree or between principles in the second degree and accessories. If calls a person who aids abets counsels or assists in a crime a socius criminis - an accomplice or partner in crime. And being so he is under the Roman Dutch Law as guilty and liable to as much punishment as if he had been the actual perpetrator of the deed."

At the hearing of the appeal it was submitted by learned Crown Counsel that this statement of the law was correct. I am unable to agree that it is so as a general principle. It was decided in R v. Mlooi 1925 AD 131 that it is a general rule of the Roman Dutch Law that an accessory after the fact is not a socius criminis and cannot therefore be convicted for the main offence.

There was no evidence to support the view that the appellant acted in concert with the thieves or asssisted them before the initial contrectatio or that he agreed before the theft to receive the stolen vehicle from any of the theives. The question for consideration is whether by receiving the property (and whether this was done in the R.S.A. or in Lesotho is open to question) the appellant effected a contrectatio of it so as to render him liable to be convicted in Lesotho on the basis that theft is a continuing offence.

In R. v. Mlooi (supra) Innes C.J. at 138 having stated the general rule that our law recognises the distinction between the guilt of a socius who assists the perpetrator of a crime beforehand or at the time, and the guilt of an accessory who only assists him afterwards considered exceptions to the rule

> "which however, are more apparent than real. One of them has been noticed above - the accessory becomes a socius if the assistance rendered after the event was promised beforehnd. Another may probably be found in cases where a thief has been assisted in the disposal of the stolen property by one who only intervened after the event. For theft where the article remains in possession of the thief is a continuing crime; and the assistance subsequently rendered by one who had no part in the original taking may well constitute part of the fraudulosa contrectatio which is the essence of the offence. Rex v. Brett & Levy 1915 TPD 53 was such a case. The accused knowing the waggons which were in the possession of two other persons had been stolen by the later assisted in the disposal of the property. It was held that they had rightly been convicted of theft."

See also the remarks of Solomon J.A. at 142 and Kotze J.A. at 152 to 154.

In ex parte Minister of Justice in re Rex v. Maserow 1942 AD 164 Watermeyer J.A. pointed out at 169. that the offence of receiving stolen goods knowing the same to have been stolen has been taken over from English law as the name of a substantive crime. On page 170 he said

> " Clearly a person who receives stolen property from a thief knowing it to have been stolen may fall into one of several classes.
>
> 1. He may commit no crime at all, for example when he receives the goods honestly, either with the consent of the owner or for the purpose of returning them to the owner.
>
> 2. He may be a socius in the crime of theft, e.g. when he has acted in concert with the thief and agreed before the taking that he would receive and assist to dispose of the stolen property.

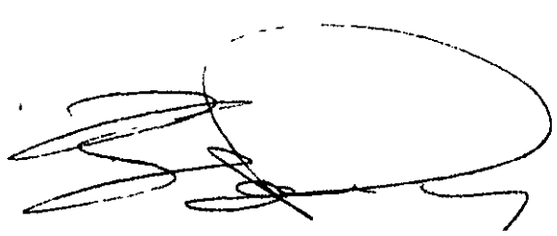
3. He may be an accessory after the fact, e.g. when he receives and hides the stolen property for the thief without have made any previous arrangement with the thief.

4. He may be a receiver in what I may call the proper sense, viz. one who acquires the stolen pro property from the thief not for the purpose of assisting the thief but for his own profit or gain.

In the second and fourth cases the receiver is clearly guilty of theft (see Rex v. Brett and Levy, 1915, T.P.D. 53; Rex v. Mlooi, 1925, A.D. 131 at pp. 138,142,153; Rex v. Attia, 1937, T.P.D. at p. 106),while in the third case he may not be guity of theft. (See the remarks of KOTZE, J.A. in Rex v. Mlooi, supra at p.153)."

The accused's purpose in this case was his own gain and profit. He knew that the vehicle was stolen in the Republic and he continued in its possession in Lesotho. In retaining the vehicle, he assumed control of it thus depriving the owner of the exercise of his rights in respect of it. This amounted to contrectatio and the accused was therefore rightly convicted of the theft of the vehicle. Although the magistrate misdirected himself in passing sentence by making a reference to robbery being a serious crime, in all the circumstances a sentence of 12 months imprisonment is appropriate.

In the result therefore this appeal is dismissed.



F.X. ROONEY
JUDGE

30th September, 1982.

Attorney for the Appellant : G.N. Mofolo
Attorney for the Respondent: The Law Office.