CRI/A/57-58/85

IN THE HIGH COURT OF LESOTHO

In the Appeal of

SABATA NYAKANE — 1st Appellant
MHLONGO MAQHEANE — 2nd Appellant

v

R E X

JUDGMENT

Delivered by the Hon Mr Justice J L Kheola
on the 16th day of April, 1986

The appellant and one Sabata Petrose Nyakane were charged at Quthing Magistrate's Court with the offence of contravening section 343 of the Criminal Procedure and Evidence Act, 1981, in that upon or about the 7th day of May, 1985 and at or near Tele in the district of Quthing the said accused did each or both of them unlawfully have in their possession a motor vehicle (E20 Nissan Combi) and were unable to give a satisfactory account of their possession whereas there was a reasonable suspicion that it was stolen To this charge the appellants pleaded not guilty. Having heard the evidence the learned magistrate found them guilty as charged and sentenced each to two (2) years' imprisonment. Both of them have appealed to this court but the appeal by Sabata Nyakane has been abandoned because he escaped from prison while awaiting the hearing of this appeal

Mr. Seholoholo, for the Crown, intimated to the Court that the Crown did not support the conviction I think this was a right decision.

/The facts.. ..

The facts of the case were not in dispute On the 7th May, 1985 the appellant was a passenger in a vehicle driven by Sabata Nyakane On its windscreen was displayed a temporary registration permit No O B A 180522 It was a white Nissan Econobus. When it came to Tele border post it was stopped by two police officers who conducted a routine check of the vehicle and eventually asked Sabata Nyakane to give them the registration certificate of the vehicle. Nyakane explained that the vehicle was the property of an insurance company for which he worked and the company did not give him the registration certificate because they feared that he might sell their vehicle When he was asked where he was going to, he said he was taking the appellant to Tsita's Nek to see his wife who was ill The appellant confirmed that he had asked for a lift from Nyakane who was going to Tsita's Nek to deliver the vehicle to one Tseko Lindi Nyakane admitted that he was delivering the vehicle to one Tseko Lindi who had bought it from one gentleman in Bloemfontein He gave full particulars of the gentleman

On the 29th May, 1985 Sgt. Mara went to Bloemfontein in search of one Nkosi Linda whose address was said to be Motor Cha in Bloemfontein. He found the garage of that name but the manager said he never had an employee by the name of Nkosi Linda This evidence is hearsay and inadmissible The manager had to be called as a witness in this case

At the trial Sabata Nyakane gave an entirely different story. He said he was going to Mamasepatsana's place at Alwanskop where he intended to get some traditional medicines. I think the court was justified to come to the conclusion that Sabata Nyakane was unable to give a satisfactory account of his possession of a vehicle reasonably suspected of having been stolen.

/The appellant.. .

The appellant elected to remain silent at the close of the Crown case However, his story that he had asked for a lift from Sabata Nyakane who was delivering the vehicle to one Tseko Lindi was put to the Crown witness. The learned magistrate found that the stories given by the appellant and his co-accused conflicted. He, therefore, came to the conclusion that they were telling lies and that they had failed to give a satisfactory account. The proper procedure was to consider each explanation independently and to find out if it is a satisfactory account of possession of the vehicle reasonably suspected of having been stolen

The appellant told the police and the court (through cross-examination) that he had asked for a lift. The learned magistrate was of the opinion that because the appellant knew where the vehicle was going and that it was going to be delivered to one Tseko Lindi, that was proof that the appellant was not a mere passenger With respect this was a wrong inference because the appellant and his co-accused were not strangers to each other. They were friends and lived in Bloemfontein The appellant asked for a lift because he knew where his friend was going. It was conceded by the Crown that the appellant had relatives and his wife at Tsita's Nek where the vehicle was allegedly going to be delivered. I find his explanation to have been quite satisfactory.

The learned magistrate came to the conclusion that the appellant was found in the possession of the vehicle because "though he did not physically drive which in law would mean that he was in control of the vehicle, he was constructively in control of the vehicle as the driver A1 drove for him as well". I do not agree with this line of reasoning The mere presence of a passenger in a motor vehicle does not mean that he has the physical control of the vehicle. The

/Crown.....

Crown had to prove that the appellant had the physical control of the venicle and either the intention to keep the vehicle for his own benefit (which constitutes possession) or alternatively, an intention to keep or guard the vehicle for the benefit of another person (which constitutes custody) (see South African Criminal Law and Procedure, Vol III by Milton and Fuller page 167). The crown failed to prove that the appellant was in possession of the vehicle.

The appeal is allowed. The conviction and sentence imposed by the trial court are set aside. The appeal fee must be refunded to the appellant.

J.L. KHEOLA
J U D G E .

26th May, 1986.

For Appellant - Mr. Sooknanan

For Crown - Mr. Seholoholo