

IN THE HIGH COURT OF LESOTHO

In the Appeal of

GERARD NKAKI

Appellant

v.

R E X

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 3rd day of March, 1986.

The appellant was charged in the magistrate's court in the district of Butha Buthe with two offences of contravening section 343 of the Criminal Procedure and Evidence Act 1981 and section 14 (1) of the Road Traffic Act No.8 of 1981. The appellant pleaded not guilty to both charges but at the end of the trial he was found guilty as charged and sentenced to six (6) months' imprisonment on each count. He is appealing against both conviction and sentence.

It is common cause that the vehicle in question was registered at Butha Buthe on the 23rd July, 1984 and given Reg. No B1254. It was registered in the name or names of Osman Motors P. Nkaki. It is also common cause that a certain Alice 'Mapali Lichaba who was working at the Butha Buthe sub-accountant's office handled the registration of the vehicle in question. When the investigation of this case started the police ordered her to report herself periodically at the charge office but she failed to do so disappeared from her place of work. Her whereabouts are unknown, hence she did not give evidence at the trial. Her evidence was crucial because she knows the person who used the false documents to obtain the

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registration of the vehicle. Her sudden disappearance is conclusive proof that she knew very well the person who registered the vehicle and that the documents were false.

Khotso Osman (P W.1) is the owner of Osman Motors. He once sold a vehicle to the appellant for R4 000. That vehicle was later seized by the police from the appellant and it was found that it had been stolen. He refunded appellant's money and denies that he promised to get another vehicle for him. He denies that the vehicle in the present case was bought from him by the appellant. He further denies that he registered this vehicle on behalf of the appellant before he sold it to him. He says that when he sells a vehicle to a customer all he does is to get a clearance certificates from both the South African police and Lesotho police. The customer registers the vehicle himself.

D/Sgt Khobatha was on duty on the 19th November, 1984 when the appellant came to him and showed him a registration certificate in the name of Osman Motors, P. Nkaki and an unsigned notice of change of ownership. The appellant explained that when he bought the vehicle he used the name of his father and he had later been advised that as the Motor Transportation Certificate was issued in his name the registration of the vehicle he intended to use must also be registered in his name. The suspicion of the witness was aroused by the fact that the change of ownership had not been signed by the seller and the buyer. His records revealed that although the vehicle purported to have been registered in Butha Buthe on the 23rd July, 1984 there was no copy of a clearance certificate in his files. He went to the sub-accountant's office and perused the file for vehicle Reg No. B1254. The documents in the file were false. He arrested the appellant and charged him accordingly.

Moeketsi Piter (P.W.3) is the father of the appellant. In 1984 he gave the sum of R4 000 to the appellant and asked him to buy a tractor, a

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plough and trailer for him. The appellant did not buy the farming machinery but instead he bought an E20 Datsun 15 seater vehicle and showed it to him. He showed him a document which bore his (Moeketsi's) name at the top. The appellant told him that he bought it from Osman Motors.

The appellant's explanation was that he bought the vehicle from Osman Motors. He said that when the first vehicle he had bought from P.W 1 was taken from him by the police P.W.1 promised that he would get another vehicle for him. He subsequently received a message from P.W.1 that he had found another vehicle. P.W 1 asked him to give him the name of a person in which he wanted to register the vehicle. He gave him the name of his father P. Nkaki. The vehicle was registered by P.W 1 and he subsequently gave him the registration certificate issued in the name of Osman Motors P. Nkaki. On the 19th November, 1984 he went to Butha Buthe and wanted to change the Registration Certificate from his father's name into his.

The judgment of the learned magistrate leaves much to be desired. I was not at all surprised when Mr Thetsane, counsel for the Crown, indicated that he was not supporting the conviction. The learned magistrate gave a detailed summary of the evidence and abruptly "came to the conclusion that the two charges have been proved beyond any reasonable doubt. Accused had only a duty to produce a receipt to show that he bought a disputed vehicle from P.W 1." I do not think that it was fair to say that the appellant was unable to produce a receipt. During the entire trial no one asked the appellant to produce a receipt from P.W.1 for the sum of R4 000 paid by the appellant. I am quite sure that if he had been asked to produce it he would have done so or given an explanation about its absence. I say this because P.W 1 told the court a quo that he issued such a receipt. His version was that the receipt was in respect of the first vehicle which was seized by the police from the appellant. The appellant's version is that after the

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seizure of the first vehicle P.W.1 promised to get him another vehicle and gave him back his money. Neither the police nor the public prosecutor and the court demanded a receipt from the appellant in respect of the vehicle before court. The issue was never canvassed during the trial. The appellant was completely taken by surprise

As far as count 1 was concerned the question was whether or not the appellant failed to give a satisfactory explanation of his possession of a vehicle reasonably suspected of having been stolen. The appellant had the money and bought a vehicle from P W 1. It was later seized by the police and found to have been stolen. The documents in that first sale appeared to be genuine. Was it not natural for a seller who knew that the buyer had cash to promise to get another vehicle? R4 000 is a lot of money and no reasonable businessman can easily let it go to another businessman. In a charge under section 343 of the Criminal Procedure and Evidence Act 1981 the Crown must prove beyond reasonable doubt that the account is not reasonably true. If the accused gives an explanation which may reasonably be true and which, if true, would be a satisfactory account of his possession, he must be acquitted (S v. Kajee, 1965 (4) S A 274). In the instant case I am of the opinion that the explanation given by the appellant was not shown to be beyond a reasonable doubt untrue and unsatisfactory and that he ought to have been acquitted.

With regard to count 2 there was no evidence that on the 23rd July, 1984 the appellant was the person who produced the false documents before official who issued the registration certificate. The Crown could not prove this point because Alice 'Mapali Lichaba has vanished into thin air and cannot be traced. Unfortunately the learned magistrate has not given any reasons why he came to the conclusion that it was the appellant who gave the false documents to Alice on the 23rd July, 1984. If the appellant had been charged with producing a false change of ownership form to D/Sgt

Khobatha on the 19th November, 1984 the charge would have been approached in a different light.

I have come to the conclusion that the Crown failed to prove the two charges brought against the appellant beyond reasonable doubt. The appeal is allowed and the convictions and sentences are set aside. The appeal fee must be refunded to the appellant

J. L. KHEOLA
J U D G E

14th April, 1984

For Appellant - Mr. Monaphathi
For Crown - Mr. Thetsane