CRI/T/76/89

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

V

GOITSEMANG GAMOGA NTHETHE

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 14th day of May, 1990.

For the Crown : Mr. G.S. Mdhluli, Director of Public Prosecutions
Mr. S.P. Sakoane
Miss N. Nku

For the Accused : Mr. L. Pheko
Mr. S. Phafane

RULING

Cases referred to:

(1) R v 'Molotsi CRI/T/42/85 unreported;
(2) R v Kritzinger (1952)2 SA 401;
(3) Putsoa & Ors. v R (1975) LLR 201;
(4) R v Herholdt & Ors. (1956)2 SA 722;
(5) S v Heller & Anor. (1964)1 SA 524;
(6) R v Sikumba (1955)3 SA 125;
(7) R v Mkize (1960)1 SA 276;
(8) R v Mall & Ors. (1960)2 SA 340;
(9) R v Louw (1918) AD 344;
(10) Practice Note 19621 All E.R. 448;
(11) R v Hassen (1956)4 SA 41;
(12) R v Bergh (1927) OPD 177;
(13) The State v Wilson (1962)2 SA 619;
(14) Mpesi v R (1968) LLR 113;
(15) Napo v R (1969);
(16) Makepe v R CRI/A/35/87 (Unreported);
(17) S v Hussain (1987)3 SA 1;
(18) Coggs v Bernard (1703)2 Ld. Raym. 909;
(19) Savory v Baldochi (1907) TS 523;
(20) Dawood v Robb (1933) CPD 178;
(21) Rootes (Central Africa) (Pvt.) Ltd v Mundawarara & Anor. (1973)3 SA 447;

(22) Tappenden (trading as English & American Autos) v Artus & Anor. (1963)3 All E.R. 213;
(23) R v Ndou (1959)1 SA 504;
(24) S v Kaplin (1964)4 SA 355;
(25) S v Essack (1923)1 SA 922;
(26) Retief v Grievensteyn (1904) TS 64;
(27) R v Du Plessis (1924) TPD 103;
(28) S v Rama (1966)2 SA 395;
(29) S v Siswana (1968)4 SA 251;
(30) Mphuthi v R (1975) LLR 423;
(31) R v Morgan (1961)2 SA 377;
(32) R v Tshabalala (1942) TPD 27;
(33) R v Charlie (1908) EDC 449.

The accused stands charged on four counts, the first of those a count of stealing a motor vehicle, the second, in the alternative, of receiving the said vehicle well knowing it to have been stolen, the third count, again in the alternative, of acquiring or receiving the said vehicle without reasonable cause for believing that it was properly acquired, contrary to section 344 of the Criminal Procedure and Evidence Act, 1981. The fourth count is one of being found in possession of the vehicle, the identifications marks thereof having been tampered with, contrary to section 15 of the Road Traffic Act, 1981. I have ruled that the accused has a case to answer on the first two counts. Herewith are my reasons.

As the second and third counts are couched in the alternative, the accused in effect is charged with two counts. The charge sheet reads in part as follows:

"COUNT 1:

THAT:

GOITSEMANG GAMOGA NTHETHE

(HEREINAFTER CALLED THE ACCUSED)

IS GUILTY OF THE CRIME OF THEFT

In that upon or about the 30th day of April, 1987, and at or near Retief Street, Pietermaritzburg, Province of Natal, Republic of South Africa, the said accused acting in concert with one Mohammed Yusuf Kader did unlawfully and intentionally steal a motor vehicle, namely - a 1986 model 230 E Mercedes Benz sedan then registered as NP 104-455, the property of Shukarallah (Pty) Ltd trading as Freshmeats in the lawful possession of either Ismail Hoosen or Shabeer Hoosen, and did bring the said vehicle to Lesotho where it was found at Maseru on the 19th day of April, 1988, where this court has jurisdiction theft being a continuing crime.

ALTERNATIVELY

COUNT 2

THAT:

GOITSEMANG GAMOGA NTHETHE

(HEREINAFTER CALLED THE ACCUSED)

IS GUILTY OF THE CRIME OF RECEIVING STOLEN PROPERTY WELL-KNOWING IT TO HAVE BEEN STOLEN

In that upon or about the 30th day of April, 1987, and at or near Retief Street, Pietermaritzburg, Province of Natal, Republic of South Africa, one Mohammed Yusuf Kader did unlawfully and intentionally steal a certain motor vehicle, namely - a 1986 model 230 E Mercedes Benz sedan then registered as NP 104-455 with engine number 102-980621-38699 and chassis number 123223 6A 274437, the property of Shukarallah (Pty) Ltd trading as Freshmeats, in the lawful possession of either Ismail Hoosen or Shabeer Hoosen, and thereafter between the 1st day of May, 1987 and the 19th day of April, 1988 (the exact date to the prosecutor unknown) at Maseru in the district of Maseru, the said accused did unlawfully and intentionally receive the said motor vehicle into his possession well knowing the same to have been stolen."

ALTERNATIVELY

COUNT 3

THAT:

GOITSEMANG GAMOGA NTHETHE

(HEREINAFTER CALLED THE ACCUSED)

IS GUILTY OF THE CRIME OF CONTRAVENING

SECTION 344(1) OF THE CRIMINAL PROCEDURE AND EVIDENCE

ACT NO.7 OF 1981

In that between the period 4th May, 1987 and 19th April, 1988 (the exact date to the prosecutor unknown) the said accused did otherwise than at a public sale, acquire or receive into his possession from a person to the prosecutor unknown, goods other (than) stock or produce as defined in the Stock Theft Proclamation 1921, namely - a 1986 model 280E mercedes benz sedan, without having reasonable cause for believing at the time of the acquisition or receipt of the said motor vehicle that it was the property of the person from whom he received it, or that such person had been duly authorised by the owner thereof to deal with or dispose of it.

Now therefore the accused is guilty of contravening section 344(1) of Act No.7 of 1981.

COUNT 4

THAT:

GOITSEMANG GAMOGA NTHETHE

(HEREINAFTER CALLED THE ACCUSED)
IS GUILTY OF CONTRAVENING SECTION 15
(1) OF THE ROAD TRAFFIC ACT NO.8 OF 1981 AS
AS AMENDED BY ORDER NO.15 OF 1987

In that upon or about the 19th day of April, 1988 and at or near Maseru Industrial Area in the district of Maseru, the said accused, was found in possession of a motor vehicle, namely - a 1986 model 230E Mercedes Benz sedan the engine and chassis numbers which had been tampered with otherwise than by a registering authority under section 9 of the Road Traffic Act.

PARTICULARS

(a) It is alleged that the engine number of the said vehicle was tampered with in the following respects -

(i) the original engine number was 102-98062138699;

(ii) The figure "6" preceding the last two digits of the original number was substituted with the figure "8" so that the engine number of the

said vehicle now reads as 102-980621-38899.

(b) It is alleged that the chassis number was tampered with in the following respects -

(i) The original chassis number was 123223.6A 274437;

(ii) The chassis number was tampered with in that a piece of metal on the chassis bearing the original chassis number was cut out of the chassis and replaced with another piece of metal bearing a certain number, ADB 123223621 24575."

The Crown called 20 witnesses. When the Crown had closed its case, the learned Attorney for the accused Mr. Pheko submitted that there was no case for the accused to answer on any of the four counts. In this respect, section 175(3) of the Criminal Procedure & Evidence Act, 1981 reads as follows:

"(3) If, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged in the charge, or

any other offence of which he might be convicted thereon, the court may return a verdict of not guilty."

As to the operation of those provisions, Mr. Pheko refers to a ruling of this Court R v 'Molotsi (11) wherein the Court quoted the case of R v Kritzinger (2) with approval. Mr. Pheko points to another decision of this Court by Mapetla C.J. in the case of Putsoa & Ors. v R (3) in which the learned Chief Justice observed at pp.202/3 that a particular passage by Roper J. (as he then was) in Kritzinger at p.406, did not meet approval by Bekker J. in R v Herholdt & Ors. (4) at p.723, nor Trollip J. in S v Heller & Anor. (No.2) (5) at p.542. The particular passage in Kritzinger (2) reads as follows:

> "It seems to me that the rule is clear, namely, that if at the close of the case for the Crown the evidence against the accused, is not such that a reasonable man might convict upon it, the Judge has a discretion whether or not to discharge. He is quite entitled to refuse to discharge if he considers that there is a possibility that the case for the Crown may be strengthened by evidence emerging during the course of the defence. The Judge has before him the record of the preparatory examination and knows the compass of the case, and he is

> usually in a position to form an opinion <u>whether a deficiency in the evidence for the Crown is likely, or not likely, to be supplemented by evidence emerging during the course of the defence</u>. Where he considers that to continue the trial would merely put the accused to further expense, or inconvenience, or anxiety, and is not likely to result in a conviction, he will naturally cut the useless proceedings short at once, and discharge the accused. This course is often taken, but <u>the Judge is not obliged to take it, even when in his opinion at the end of the Crown case there is no evidence upon which a reasonable man could convict the accused."</u> (emphasis supplied)

Mapetla C.J. also expressed disagreement with that part of the above passage which I have emphasised. In <u>Molotsi</u> (1) at p.3, <u>Kritzinger</u> (2) and <u>R v Sikumba</u> (6) (the reference thereto should be to p.127) were referred to as authority for the proposition that the test to be applied is "whether on the evidence a reasonable tribunal, acting carefully, might but not necessarily must convict". The reference to <u>Kritzinger</u> (2) is to p.402 of that report and certainly the first half of that page, wherein that test is contained, must be regarded as unobjectionable. As to the above passage quoted from page 406 of the report, I respectfully do not

subscribe to the proposition contained therein. Indeed in the cases subsequently quoted in Molotsi (1), namely R v Mkize (7) and R v Mall & Ors, (8) the passage does not find approval. In Mall (8) indeed, Caney J. at p.343 quotes the dissent of Bekker J. in Herholdt (4) at p.723.

It will be seen that Roper J. considered that the word "may" was discretionary and could not be regarded as mandatory. In Mkize (7) Burne A.J. interpreted the word as meaning "is empowered to". The word "may" however is frequently used in a mandatory sense. The legal dictionaries illustrate many examples of where the use of the word, places a duty, rather than a discretion upon the court. All the South African authorities indicate that, if there is a discretion, it arises from sources other than the word "may" such as e.g. in the use of the word "considers" in section 175(3). Indeed, in the Appellate Division case of R v Louw (9), Innes C.J. (Solomon & Maasdorp JJ.A concurring) in considering the similar provisions of section 221(3) of the Criminal Procedure & Evidence Act No.31 of 1917 of the Union of South Africa, in which the oprative word "may" is used, and on which provisions no doubt those of section 172(3) of the Criminal Procedure & Evidence Proclamation 59 of 1938, and again of section 175(3) of the 1981 Act are based, uncompromisingly observed at p.352:

> "Now if at the close of the prosecution there had been no eficence that the accused committed the offence

charged, it would have been the duty of the Judge (sitting with a Jury) to direct an acquittal." (emphasis supplied)

In Molotsi (1) the Court referred to the Practice Note (10) issued in the Queen's Bench on 9th February, 1962 per Lord Parker C.J.

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
>
> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating

> tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

Mr. Pheko refers to "South African Criminal Law & Procedure" Vol.V by Lansdown 1 Ed at p.518 where the learned authors suggest a test in which para.(b) above is in effect transformed into two paragraphs. I respectfully do not see, for practicable purposes, that the above-quoted test, which is a standard test, can be improved upon. In this respect the authorities indicate that for the purposes of section 175(3), the situations depicted in paragraphs (a) and (b) above constitute "no evidence" as such.

The ruling in Molotsi (1) at p.3 and p.5 refers to the particular "stage" reached, that is, on the evidence before the Court, the Crown having closed its case, and to the situation where the accused might not "give or adduce any evidence to the contrary". That particular aspect I wish to emphasise. The Court is obliged to assess the case on the evidence before it. It cannot, in my respectful view, speculate as to what evidence the accused, or co- accused, might or might not give. The decision must be made on the evidence as it stands. If the Court considers that there is "no evidence", in the sense conveyed by paragraph (a)

or (b) above, then I cannot imagine on what basis the Court could put an accused on his defence. To do so, I consider, would not be a judicial exercise of the Court's discretion.

I now turn to the evidence before the Court. Prosecution witnesses gave evidence that a Mercedes Benz 230 E Saloon, motor vehicle, Registered No. NP 104 455, thistle green in colour, was stolen from the possession of Ismail and Shabeer Hoosen, in Pietermaritzburg on 30th April, 1987. On 1st April, 1988 the accused was found in possession of a set of vehicle number plates, bearing Registered No. OW 3439, and again a South African motor vehicle registration certificate in respect of a Mercedes Benz 230 E Saloon of the latter registration number. On 19th April, 1988, a Mercedes Benz 203 E Saloon vehicle, green in colour without number plates, but bearing a licence disc with the registration number OW 3439 thereon, was found by the police in a garage at Maseru, named "Maloti Panel & Paint". The vehicle had been overturned and was badly damaged. The accused had left the vehicle at the garage for repair approximately three to four days before 19th April. The proprietor of the establishment was not present when the vehicle was towed to the garage: it had been brought there previously, "towards the end of 1987", he said, when he had repaired it. On the second occasion, it is not clear whether he had spoken to the accused before or after the vehicle was left at the garage. In any event he verbally agreed with the accused to repair it. He did not supply a written invoice. He merely

informed the accused that it would cost about M16,000 to repair the vehicle, and he was "given the go ahead to repair".

In any event, upon examination by the police at the garage, the vehicle was towed away to Police Headquarters for further examination. There the officer who examined it, a Capt. (now Major) Van Vuren of the South African Police, observed that the chassis number and engine number, had been tampered with: further he observed that a metal tag mounted on a cross member of the chassis above and in front of the radiator, bore the same chassis number but also a "CDA" number (Manufacturer's Production number) which did not coincide with another CDA number which, due to his training, he was able to locate in a concealed position elsewhere in the vehicle. He accordingly suspected that the vehicle was stolen.

The accused came to Police Headquarters on 21st April, in the company of an Advocate. When shown the vehicle he stated that it was his property.

A number of witnesses (including Messrs Hoosen) from Pietermaritzburg were unable to positively identify the vehicle found in the garage at Maseru as the one stolen in Pietermaritzburg (other than to point out certain similarities), as it bore different chassis and engine numbers to those on the stolen vehicle. It however bore the same CDA number, that is, the

'hidden' CDA number, as that which the stolen vehicle had borne. Suffice it to say that I consider that there is prima facie evidence that the vehicle found at the garage in Maseru was that stolen in Pietermaritzburg.

Central to most of Mr. Pheko's submissions is the aspect of whether or not the accused was "found in possession" of the motor vehicle. It proves convenient to here deal with that aspect. It will be seen that the provisions of section 15 of the Road Traffic Act 1981 only apply to "a person driving, or found in possession" of a motor vehicle with identification marks which have been tampered with. The latter aspect then directly affects the fourth count. The expression "found in possession" appears e.g. in section 16 of the Stock Theft Proclamation and also section 343 of the Criminal Procedure & Evidence Act 1981. The provisions of that section are based on those of section 36 of Act No.62 of 1955 of the Republic of South Africa. In the case of R v Hassen (11) Broome J.P. referred to the "very drastic" provisions of that section, observing at pp.42/43 that an accused must be "as it were, caught re-handed with the stolen goods". I must confess, with respect, that I find nothing drastic with those provisions: possession of goods reasonably suspected to have been stolen, surely calls for an explanation, the burden of proof never shifting.

In any event, in Hassen (11) the stolen goods were found in

suitcases in the house of another. Broome J.P. observed at p.42:

> "Even if the owner of the house were appellant's agent and held the goods in that capacity, it would be the agent and not the appellant who was "found in possession"."

In his work "South African Criminal Law And Procedure", Vol. II, at p.624 Hunt observes that "it cannot be regarded as finally settled that possession through an agent does not suffice". As early as 1927 De Villiers J.P. observed obiter in R v Bergh (12) at p.179 that

> "possession ..... may include physical possession in the extended sense in which one may be said to possess a thing which is on one's farm or in one's house or in the custody of one's servant or agent."

Those dicta were adopted with approval by Ogilvie Thompson J.A. in the Appellate Division case of The State v Wilson (13) at p.622, when considering the expression "found in possession" in legislation dealing with possession of drugs. The learned Judge of Appeal observed at p.624 that "it is not an essential element of being "found in possession" .... that "the person charged"

should have been physically present at the time the dagga is found."

The dicta in Bergh (12) and Wilson (13) were adopted by Jacobs C.J. in Mpesi v R (14) at p.15. The learned Chief Justice was there dealing with the provisions of section 16 of the Stock Theft Proclamation. He observed at p.115:

> "The word "possession in the section in my opinion does not mean that the accused must necessarily have had actual physical detention. It will be sufficient if it is shown that he had physical possession in the extended sense in which one may be said to possess a thing which is at one's cattle post or in one's house or in the custody of one's servant or agent (cf. R. v. Bergh (12) 1927 at p.179 and The State v. Wilson (13).)

The same statutory provisions were considered by the Court of Appeal in Napo v R (15), to which case the learned Director of Public Prosecutions Mr. Mdhluli particularly refers. In that case stolen sheep were found by the police in the appellant's cattle post, during his absence, the appellant's herdboy being in charge of the stock. The judgment of the Court (Roper P., Schreiner J.A. and Maisels J.A.) was delivered by Roper P. The judgment reads at

p.10:

> "Now when the policeman found the livestock at the cattle post they were in the accused's kraal and in the charge of his herdboy, so that the accused had possession of them even though he himself was absent (see, e.g. the judgment of Jacobs, C.J., Makeng Mpesi v R. (14))."

Mr. Pheko refers to the appeal case of Makepe v R (16) decided by Kheola J. In that case the appellant left a particular motor vehicle, with ignition keys therein, at the house, that is, in the yard of another, with whom he was staying as a guest at the time. When the vehicle was found by the police the appellant was not present. The learned Judge referred to above-quoted dicta in Hassen (11) and Mpesi (14). Mr. Mdhluli submits that the dicta in Hassen (11) have, as far as Lesotho is concerned, been superseded by those of the Court of Appeal in Napo (15): and see now S v Hussain (17). For my part I respectfully agree with the dicta in Mpesi (14) and Napo (15), which latter dicta are of course binding upon me, namely that possession by a servant or an agent suffices for the purpose of the statutory requirement of being "found in possession". In Makepe (16) the learned Judge observed that the appellant was not in direct control of the vehicle when found. The court below had held that the appellant's host acted as agent for

the appellant in the matter. The learned Judge thereafter (at p.8) seemingly relied upon the above-quoted latter dicta of Broome J.P. in Hassen (11), but in any event he observed that the appellant's host "cannot be regarded as agent of the appellant."

As I see it, the aspect of agency is basically an issue of fact in any particular case. In the present case the accused left the motor vehicle with the garage proprietor for repair. Mr. Mdhluli has referred me to Chapter VIII of The Law of Property by Silbererg & Schoeman entitled "Possession" at pp.114/161, but I can find nothing in that Chapter that assists the Crown's case. Indeed, the example chosen by the learned author (Professor Schoeman) to distinguish between the jus possessionis and jus possidendi (at pp.117/118) concerning the hire of a motor vehicle, while not entirely in point, serves to indicate that the accused in this case retained no more than the jus possidendi.

In my view, the contract between the accused and the particular garage proprietor was one of bailment. According to the learned Editor of Chitty on Contracts (24 Ed.) at para.2212, Roman law has had considerable influence on the English law of bailment. As far back as 1703 Holt C.J. in the leading case of Coggs v Bernard (18) classified bailments into six classes, by analogy with Roman law. For our purposes a simpler classification is that of (a) gratuitous bailments and (b) bailments for valuable consideration. An example of the latter class is a bailment for

hire of work and labour, that is, where the chattel is bailed to the bailee in order that he may perform work upon it for reward (see Chitty at para.2248). The evidence indicates that that was the nature of the bailment in the present case. Even where the bailment is merely for safe custody for reward, possession of the chattel must be transferred to the bailee. A fortiori that is the case where the bailment is one for repair for reward. Indeed in the case of Savory v Baldochi (19) decided in 1907, Innes C.J. held at pp.524/525 held that,

> "...... a person executing such repairs had a jus retentionis which did not depend upon privity of contract and prevailed against the whole world. Therefore (the respondent) had a jus retentionis for the value of the repairs ......"

See also the case of Dawood v Robb (20) per Sutton J. at pp.178/179 and Rootes (Central Africa) (Pvt.) Ltd v Mundawarara & Anor (21) per Beck J. (as he then was) at pp.448/451, and Silberberg & Schoeman ibid at p.480 and p.485. In the English case of Tappenden (trading as English & American Autos) v Artus & Anor. (22) Diplock L.J. (as he then was) observed at p.215:

> "The common law lien of an articifer is of very ancient origin ..."

and again at p.216

"The common law remedy of a possessory lien, like other primitive remedies such as abatement of nuisance, self-defence or ejection of trespassers to land, is one of self-help. It is a remedy in rem exerciseable on the goods and its exercise requires no intervention by the courts, for it is exerciseable only by the articifer who has actual possession of the goods subject to the lien. Since, however, the remedy is the exrcise of a right to continue an existing actual possession of the goods, it necessarily involves a right of possession adverse to the right of the person who but for the lien, would be entitled to immediate possession of the goods."

In the present case the evidence indicates that the garage proprietor had effected no repairs as such, other than to supply an estimate of the cost thereof. No doubt the accused was at that stage liable to the garage for the storage of the vehicle, if nothing else. I need not consider whether a possessory lien had arisen in respect of such storage. The point is that the garage proprietor was in any event clearly in possession of the vehicle. The question however arises as to whether he held possession as agent as well as bailee. The learned author of Bowstead on Agency (14 Ed.) at p.9 observe that,

"A bailee of goods is not normally _ipso facto_ an agent of the bailor, though an agent may

well also be a bailee of his principals goods."

The footnote to the latter observation gives the example of an auctioneer, who of course acts as agent for both parties. There are many examples of agency given in Bowstead & Chitty. I can find no authority however for regarding a bailee for repair for reward as an agent of the bailor. Certainly a garage proprietor may become an agent of necessity of a vehicle bailed to him for repair in the case e.g. of an outbreak of fire at his premises. His possessory lien in respect of any work done on the chattel, does not necessarily distinguish him from an agent, who may nonetheless in certain cases possess such a lien. Had the evidence established that the garage proprietor agreed to take the vehicle in order to conceal it from the police, that would have been a different matter: but that was never the Crown's case. The evidence before the court is that the whole purpose of the bailment was not that the bailee should in any way represent or act on behalf of the bailor, but that he should, as an independent contractor, effect repairs to the bailor's motor vehicle for valuable consideration.

The question of agency to some extent arose in the fairly recent Appellate Division case of S v Hoosain (17) which concerned possession of drugs and turned, inter alia, on the expression "found in possession". In that case the appellant retained possession of drugs, received from another, upon payment for such

service. The other left the country completely. Subsequently the appellant, at the other's request, transferred the drugs in a locked trailer from his home to a garage on one of his business premises. Suffice it to say that his nephew, the manager of the particular business, was aware of the presence of the trailer, having been entrusted with the care therefore, but not of its contents. A co-accused was instructed by the nephew to guard the trailer at night. An employee who retained the key to the garage was apparently not even aware of the trailer, which was eventually discovered by the police, in the absence of the appellant. Kumleben AJA (Rabie ACJ as he then was and Hefer JA concurring), relying on the dicta of Ogilvie Thompson JA in S v Wilson (13), held at pp.11/12 that the nephew and the co-accused "were no more than caretakers of the trailer. Neither of them possessed the trailer or its contents in any realistic sense of the word". Kumleben A.J.A. continued at p.12:

> "It was appellant who decided to remove the trailer from his home to his business premises. It was he, not they, who could decide for how long it should remain there and what was to be done with it. He, and no one else, exercised effective control of it."

That cannot be said of the accused in the present case. The vehicle was found at the premises and in the clear possession of

the garage proprietor. I am unable to say that the latter acted as an agent of the accused in the matter. Further, the judgment in the case of R v Ndou (23), per Roper A.J. (as he then was) at p.505, and to a lesser extent that in Hassen (11), indicates that the particular 'finding' in possession may be either when the goods are first 'found', or subsequently when the accused is asked for an explanation, subject of course to substantial contemporaneity of reasonable suspicion in the case of an offence under section 343 of the Criminal Procedure & Evidence Act 1981: see Hunt ibid at p.625. In the present case, however, when the accused was asked for an explanation in the matter the vehicle was then in the possession of the police, That being the case it cannot be said that the accused was "found in possession" of the vehicle. A prima facie case has not therefore been established in respect of the fourth count.

It proves convenient to turn to the third count. I observe, rather late in the day, that the charge is defective, in that it dos not allege that the specific goods were "stolen goods". It proves unnecessary to deal with the point however. It will be seen from the provisions of section 344 of the Criminal Procedure & Evidence Act that, inter alia, a necessary ingredient of the offence is that the accused acquires or receives into his possession the stolen goods "otherwise than at a public sale". The authorities of S v Kaplin (24) and S v Essack (25) establish that the onus of proof lies upon the prosecution in the matter.

"Public sale" is defined in section 333(2), under which provisions four situations, such as a sale effected "at any public market", are stipulated. As I see it, the prosecution must then negative each of those four situations. There is no direct evidence however as to how the accused acquired or received the vehicle in this case, nor do I see that any inference can be drawn as to the exclusion of the four situations. The Crown has not therefore established a prima facie case. I therefore find the accused not guilty of the third and fourth counts and accordingly acquit him thereof.

As to the first and second counts, there is again no direct evidence of theft, nor complicity with Yousaf Kader, nor of any receiving of the vehicle with guilty knowledge. There is however circumstantial evidence. There is the so-called 'doctrine' of recent possession. Mr. Pheko submits, once again however, that the accused was not "found in possession" of the vehicle. As I understand his submission, it is that the doctrine does not arise unless the accused is "found in possession", that is, by the police, in the sense already discussed. That expression however is to be found in the statutory provisions to which I have referred. It is not my understanding of the common law doctrine that such statutory provision is necessarily applicable: see for example the cases of Retief v Grievensteyn (26) per Mason J. at p.64, R v Du Plessis (27) at pp. 104/105, S v Rama (28) per Rumpff JA at pp.398/400 and, and S v Siswana (29) per Eksteen J. at

p.253. Those cases illustrate that the doctrine may apply even where the accused is not found in possession, in the sense discussed, by the police themselves.

Mr. Pheko then submits that the doctrine of recent possession cannot apply in this case, as the possession was not recent. He refers to the case of Mphuthi v R (30) per Cotran J. (as he then was). But as was held in R v Morgan (31) at p.378, no hard and fast rule can be laid down in the matter; and see the authorities quoted in Hunt ibid at p.612. Furthermore, the weight to be attached to the so-called doctrine of recent possession very often depends on other evidence in the case - see the cases of R v Tshabalala (32) at pp.30/36, R v Charlie (33), and R v Siswana (29) at p.253. In the present case there is evidence aliunde. I do not consider it desireable at this stage to detail such evidence. Suffice it to say that I find that the evidence before me is such that were the accused at this stage not to give or to adduce any evidence to the contrary, a reasonable tribunal might, but not necessarily must convict him thereon. I find therefore that the accused has a case to answer on the first two counts.

Delivered at Maseru This 14th Day of May, 1990.

B.P. CULLINAN
CHIEF JUSTICE