CIV/APN/58/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

MPHOLENG LETSAPO — APPLICANT

vs

THE COMMISSIONER OF POLICE — FIRST RESPONDENT
THE ATTORNEY - GENERAL — SECOND RESPONDENT

Before the Honourable Chief Justice B.P. Cullinan

For the Applicant : Mr S. Phafane
For the Respondent : Mr T. Mohapi, Crown Attorney

JUDGMENT

Case referred to:-

(1) R. vs Letsie & Another
CRI/T/40/90, Unreported;

(2) Makakole vs The Officer Commanding C.I.D Maseru & Another C of A (civ) No.18 of 1985, Unreported.

This is an application for the release to the applicant of a vehicle seized from him by the police.

The police suspected the vehicle as having been stolen when found in the possession of the applicant. They seized the vehicle, and thereafter jointly charged the applicant and his uncle Lesojane Leuta with offences under section 343 and alternatively section 344 of the Criminal Procedure and Evidence

Act, 1981 and again sections 15 (1) and 10 (2) of the Road Traffic Act, 1981, the latter charges being based on allegations of obliteration of or tampering with the engine and chassis numbers of the vehicle, and again based on an allegation of bearing a false registration number. Both accused pleaded not guilty to all charges. All charges were however, withdrawn by the prosecutor.

The applicant then sought the release to him of the vehicle by instituting these proceedings. He deposes that when the police seized the vehicle, they

> "informed me that my car was a stolen property. But I told them right- away that my motor vehicle was not stolen property and that I had lawfully acquired same. .....
>
> I wish to mention that I lawfully purchased this vehicle from SOLLY LEKHANYA and we had not yet effected a change of ownership when it was seized. This information I duly gave to the police who did not charge him or call him as a witness. A copy of the Deed of sale is hereto annexed and marked "C".

The deed of sale annexed is dated eleven months before the vehicle was seized by the police. It gives the applicant's (the buyer's) address as "Mafeteng, Lesotho", but that of Solly Lekhanya (the seller) as "Q4 D2 Umlazi Township", no more than

that. The purchase price of the vehicle is stated to be M15,000, of which M10,000 was payable forthwith and thereafter two instalments of M2,500 were payable within five and half months and seven and half months respectively. The deed then read in clause 3,

> "The seller shall pass ownership of the property to the Buyer immediately all the purchase price has been paid and not Fourteen (14) days thereafter"

I understand that clause to mean that the seller was obliged to pass ownership not later then fourteen days after the full purchase price of M15,000 has been paid, that is, not later than eight months after the signing of the deed. The deed provided for rescission by the seller, in the event that the buyer did not comply with any term of the deed within seven days of despatch of notice to comply therewith. In view of the applicant's statement that he "lawfully purchased this vehicle from Solly Lekhanya", and of his possession of the vehicle eleven months after the deed had been signed, he can only mean that he paid the full purchase price, and that, as I understand it, was Mr Phafane's position in reply, at the hearing. Yet we have the position that some months after the final instalment had been paid, the seller still had not transferred ownership. Further, in his founding affidavit, sworn three years after purchase, there is no indication of any subsequent transfer.

Then we have the bland avermant from the applicant that the police did not charge "Solly Lekhanya" or call him as a witness. But the point is that in these proceedings the applicant seeks to prove his ownership of the vehicle. He has not produced any document of transfer of ownership. I would expect, therefore, that he should have called Lekhanya as a witness, or at least as a deponent. This he has not done. Much less has he supplied his address, other than to produce a deed of sale which reveals that Lekhanya lives in "Umlazi Township." I am bound to say indeed that the lack of full address in the deed itself, is sufficient to put one on enquiry. If it is the case that the applicant purchased the vehicle from Lekhanya, then I would have expected him to supply full details of how he came to purchase the vehicle, where he viewed it first, where he met Lekhanya, and I would have expected him to call Lekhanya as a witness or deponent, and again to pursue the matter of the transfer of ownership, which in any event one would have expected the applicant to demand before handing over the final instalment of M2,500.

Of course, if it is the case that Lekhanya had stolen the vehicle, I imagine that securing his attendance as a witness, or even his cooperation in the matter of the transfer of ownership, might give rise to some difficulty. As to whether or not the vehicle was stolen, there is the averment of Detective Trooper Nkeane, C.I.D., Maseru, that the vehicle was suspected to be stolen property. That may well constitute hearsay. There is

however an averment from Detective Constable Krama of the South African Police, attached to the vehicle Theft Branch thereof, at Maseru Bridge, that he examined the vehicle after its seizure. He observed:

> "The surface on which the chassis number appear shows clear signs of being tampered with. The chassis number was removed completely, in that the whole chassis number was cut out and replaced ..... The surface around the chassis number shows clear welding as well as grinding marks."

There is a portion which is missing from the above statement, which portion I ruled to be inadmissible, as it seemed to be hearsay. There was objection to the averment on the grounds that it had not been shown that the deponent was sufficiently expert to warrant the reception of his evidence. I ruled a statement, concerning the engine number of the vehicle, to be inadmissible for that reason. But when it comes to the chassis number. I cannot see why a layman could not give the same evidence, the "clear welding as well as grinding marks" being visible to the Police Constable. The very existence of such marks, indicating the removal of a piece of metal bearing the chassis number, gives rise to reasonable suspicion that the vehicle was stolen.

As I have said, the applicant was jointly charged with his uncle Lesojane Leuta in respect of the vehicle. As to the withdrawal of the charges Det/Tpr Nkeane deposed,

> "I finally decided to withdraw charges against the accused in the light of the fact that it was clear that both the accused did not steal the vehicle nor could they have known that it was stolen".

That averment was made as to the officer's state of mind at the time, which of course was based on the available facts at the time. In this respect both the applicant and his uncle made statements to the police. Those statements were annexed to the Det. Trooper's affidavit, I ruled the uncle's statement, and a number of other annexures, to be inadmissible, mainly on the gounds of hearsay: in some cases, there was no foundation laid for the admission of documents, as an exception to the hearsay rule, as public documents. The uncle's statement constituted hearsay. But let it be understood that it is hearsay and inadmissible only as proof of its <u>contents.</u> The statement obtained by Det Tpr Nkeane is still evidence of the <u>making</u> thereof.

It was the uncle's statement that he owned the vehicle, but that at the relevant time he "had lent it to Mr Letsapo when I borrowed his van." He stated that he had purchased it "from one S. Lekhanya" some three to four months before its seizure by the

police the statement continues:

"This Lekhanya I did not (know) nor do I know what the "S" stands for. This Lekhanya was introduced to me by a person whom I knew who was called Sipho Mahamba. He was also in the company of one "Themba". The police asked me whether I could give them particulars or information that could help them trace these people. I couldn't give such information because I only had Sipho's telephone number. He had told me that he had moved from Umlazi to another place. Unfortunately my room was in a mess and I couldn't find the telephone number."

I emphasize that the above unsworn and hearsay statement in no way constitutes evidence as to the contents thereof. I reproduce it solely to illustrate the facts (true or untrue) communicated to the police at the time. Then there is the applicant's statement, obtained by Det. Tpr. Nkeane, Mr Phafane resisted its introductions, firstly on the ground that it was unsworn and could not therefore constitute evidence. But, in any event the statement is admissible as proof of its making and further, as will be seen constitutes a prior inconsistent statement.

Mr Phafane then submits, on the basis of a replying affidavit, that the statement was induced by the Det. Trooper and was hence involuntary and inadmissible. Assuming for the moment that it was involuntary, I know of no exclussionary rule in

respect of such a statement in civil proceedings. The exclusionary rule, as I observed in a ruling in the case of R. v. Letsie & Another (1), is based not so much on the unreliability of involuntary statements, as on the Courts determination to ensure that the law enforcement agencies act in a fair and human manner towards suspects. The Courts lean against self incrimination by an accused. But there is no accused before me. There is no question of self incrimination. The liberty of the subject is not at state. Instead the applicant seeks possession of motor vehicle.

In the statement made to Det. Tpr. Nkeane, the applicant states, with regard to the vehicle,

> "Its owner is Mr Lesojane Leuta who is working at Central Bank of Lesotho. He is my uncle. He had been using my van Reg. No. E1333 as I was still using his. The reason being that as he was on leave he had many things to do with my van."

The applicant then in his statement describes how the police at C.I.D headquarters in Maseru asked him to produce

> "the relevant documents for the same car. I did not have them with me. I went to Mr Leuta's house to collect them. I did give them to the same policeman ....."

Subsequently, in the statement the applicant states that he requested the police "to go with me to the owner", and finally, after he had surrendered the vehicle to the police, states that he "gave the report to Mr Leuta."

In a replying affidavit the applicant avers that Det. Tpr. Nkeane induced both his uncle and him to make false statements as he assured them that "the case against us would be easier that way." The Det. Trooper allegedly said that

> "It would be better for another person who was not found in possession of the car to appear as the owner ..... an owner who was not found in possession of a "tempered car" could not be convicted, and a driver who was not the owner equally could not be convicted ..... if we took same (suggested position), we would escape conviction on a charge he said he was under pressure to prefer against us."

There is no suggestion from the applicant as to why Det. Tpr. Nkeane behaved in such manner and what indeed was his motive for allegedly manufacturing evidence and preventing the course of justice. It is significant that the applicant makes the briefest of references in his founding affidavit to the fact that he was jointly charged with another; he merely says "my co-accused and I were acquitted and discharged." Nowhere does he specifically state the name of his co - accused or the fact that he was his uncle. Neither does he attempt to explain <u>why</u>, if,

as he says, he is the owner of and was at the time in possession of the vehicle, his uncle should be jointly charged with him, indeed as the first accused. How could Det. Tpr. Nkeane make any suggestion concerning false statements to the uncle and the applicants, unless the uncle and the applicant were together in the company of the Det. Trooper ? Why should the uncle be in the company of the police, unless he was involved in some way? If the applicant were found by the police in possession of the vehicle and he declared to them that he was the owner, why then should the uncle be involved in any way, unless that is, as the applicant's own statement to the police indicates, he directed them to the uncle as the owner of the vehicle.

There is then the applicant's averment that he purchased the vehicle from Lekhanya, who had not transferred ownership when the vehicle was seized. He then went on to depose, "This information I duly gave to the police who did not charge him (Lekhanya) or call him as a witness. There is in answer, the averment of Det. Tpr. Nkeane.

> "I found no evidence during my investigations to the effect that the applicant had bought the vehicle. The contract (deed of sale) referred to by the applicant was never presented or shown or mentioned by me. The applicant ..... (was) adamant during the investigations that the car was bought by Leuta".

There are of course direct issues of credibily, as Mr Mohapi submits. But Mr Phafane was of the view that the matter could be safely resolved on the affidavits before the Court. I believe that such is the case bearing in mind the nature of this application.

Had the applicant produced the deed of sale to the police, as he says he did, I cannot see how his alleged bona fides ownership of the vehicle would necessarily incriminate him, making his allegation of Det. Trooper Nkeane's corruption all the more improbable, if not wholly unreal. As I have said, the applicant's founding affidavit offers scant information, such as to be found in the uncle's statement, as to how he (the applicant) came to acquire the vehicle. Again, the founding affidavit makes no mention of his uncle's name, much less his involvement: even the replying affidavit does not acknowledge or deny any relationship, but refers only to "Leuta". In particular, having deposed in the founding affidavit that he had informed the police of his ownership of the vehicles, one would have expected the applicant to refer to and explain the completely inconsistant statement to the police. There is no such reference however in the founding affidavit. Instead such reference and the quite extraordinary explanation therefor only surfaces in the replying affidavit.

Mr Phafane submits, on the basis of the Court of Appeal authority Makakole v Officer Commanding C.I.D. Maseru & Another

(2), that the applicant does not have to prove ownership: all he has to do is establish that he was a bona fide possessor of the vehicle. In this respect he submits that there could be "a million reasons" why the applicant told lies to the police and again that even if the applicant" lies in his teeth to the police" that does not affect bona fide possession. The authority there referred to are the dicta of Miller J.A. in his judgment in that case (Schutz P. & Aaron J.A. concurring) at p3 where the learned judge of Appeal said,

> "On the papers before ... it cannot say that the appellant was at all relevant times owner of the car's history or that at the time of taking possession of the car that his brother had not at any time been the lawful owner thereof. Nor is there justification for doubting his statement to the effect that the car was given to him by the family and accepted by him, in order to compensate him for his expenditure of money in connection with the funeral of his brother. That being so he was, at the time of the taking of the car from him by the police, a bona fide possessor thereof. He would, as such, have an interest in and rights in respect of the car; he did not need to establish ownership in order to have the necessary locus standi for claiming the relief sought by him."

Miller J.A. was there indirectly referring to the provisions of section 53 of the Criminal Procedure and Evidence Act, 1981

("the Code") which provide that where criminal proceedings are not instituted, as was the case in Makakole (2),

> "the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it."

In the present case, criminal proceedings were instituted and under the provisions of section 56 of the Code the Magistrate was obliged at the conclusion thereof to make an order disposing of the vehicle in similar manner as under section 53. Ultimately, under section 56, if no person is entitled tothe vehicle or may lawfully possess it or if the person entitled thereto cannot be traced or is unknown, the vehicle shall be forfeited to the Crown. For the purpose of making any such order, the Magistrate was empowered to hear evidence viva voce or an affidavit. Such hearing might subsequently be heard by the Magistrate or another Magistrate of the Court in question. In any event, the applicant chose to make application to this Court by way of motion proceedings, on affidavit.

I agree with Mr Phafane that the Court may restore to a bona fide possessor, rather than the owner. But here, unlike the appellant in Makakole (2), the applicant bases his right to possession on ownership.

He does not say for example, that his uncle is the owner, but he is entitled to possess the vehicle by continuing agreement with his uncle.

Mr Phafane submits, as I have said, that lies told to the police do not affect the situation. That might or might not be the case. The point is, who, other than the applicant, is to say the applicant lied to the police? Can it be said he was lying then, but is telling the truth now?

For my part I find the applicant's whole evidence to be inherently improbable. The onus as to establishing ownership is upon the applicant. I am in no way satisfied that he has discharged that onus. I am not satisfied therefore that the applicant may lawfully possess the vehicle. For that matter, I cannot say who is entitled to or who may lawfully possess the vehicle. That, I consider, is a matter for viva voce evidence in the Magistrate's Court. Meanwhile, on the papers before me, this present application must be dismissed. I grant costs to the respondents.

Dated this 1st Day of December, 1994.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE