CIV/APN/47/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MAMOKHETHI NTHAISANE — APPLICANT

and

THE COMMISSIONER OF POLICE — 1ST RESPONDENT
THE ATTORNEY-GENERAL — 2ND RESPONDENT

JUDGMENT

Delivered by Mr. Justice G.N. Mofolo, Acting Judge on the 6th June, 1995.

This is an application which came to court by way of a Rule Nisi which was granted by my brother Mr. Justice Monaphathi on the 22 February, 1994.

Although it was claimed that the application was urgent and a certificate of urgency filed, it has taken more than a year for the application to be disposed of. It is not casting unnecessary aspersions, but one seriously questions the urgency of these applications, sometimes.

Substantially the application was for:

(a) An order that the 1st respondent release to the applicant a motor vehicle to writ: a Toyota Hi-Lux Light Delivery Van, Registration No. G.1138.
(b) Further and/alternative relief and
(c) Costs of suit.

It appears that the vehicle subject matter of this application was being used by applicant's son, one Khethisa in running applicant's business in Maseru. It is not denied that the vehicle belongs to the applicant.

When, on or about the 11th October, 1993 Khethisa was arrested by the police the vehicle was seized by the police and taken to the Magistrate's court to be registered as an exhibit in terms of the law. Applicant's efforts to have the vehicle released to her was unsuccessful and hence this application.

The application was, of course, resisted by the Attorney-General and an accompanying or supporting affidavit was filed by Sello Mosili who has deposed to the fact that:

(a) He is a Detective Sergeant attached to Robbery and Car Theft Squad.

(b) As the motor-vehicle had bloodstains on it, the motor vehicle was seized and kept in police custody and subsequently sanctioned by the court to be kept as an exhibit pending the result of a case for armed robbery and murder against Khethisa Nthaisane (applicant's son) and others. He says the suspected crime occurred on 11th October, 1993.

(c) The police fear if the vehicle were released

there was the likelihood that the motor vehicle would be tampered with, or disposed of to destroy crown evidence if it were made available to the accused. I pause here to observe that the application is not made by the accused but by his mother the owner of the vehicle.

Sgt. Mosili is supported by Seth Moahloli, Peter Chalale and Monyane Mothibeli all members of the Royal Lesotho Mounted Police. Sgt. Mosili in his affidavit says that the case against the suspects is C.R. 1330/93. He does not say whether there will be a Preparatory Examination and if so when it can be expected to be held nor does he shed light on the stage of the investigation in view of the fact that the vehicle has been lying with the police for well-neigh six months, that is from the time it was seized to the time of deposing to his affidavit.

When this application came before me, it was almost 1 year and 7 months since the vehicle had been seized and Mr. Mapetla was not very helpful as when the suspects would be indicted.

Mr. Sooknanan had earlier submitted that as the driver of the vehicle and from whose possession the vehicle was seized was suspected of murder, murder being not a property related crime as at the end of the case there would be no order as to the forfeiture of the vehicle the vehicle's seizure and detention was unjustified. I agree with this submission to this extend. But it seems to me Mr. Sooknanan hadn't properly read Detective Sgt.

Mosili's affidavit for Sgt. Mosili's affidavit was to the effect that Khethisa Nthaisane and others were suspected of robbery and murder. Therefore, even if murder is not a property related offence robbery is, in my view, so related. Mr. Sooknanan referred me to a Court of Appeal case and I requested him to furnish me with same but as so often happens I wasn't furnished with the case up to the time I wrote this judgment.

It was further submitted by counsel for the applicant that even if bloodstains were found it was not clear on which part of the vehicle they were found or whether even if they were subjected to forensic tests they would prove anything justifying the seizure and detention of the vehicle. I was referred to Ngubani v. Divisional Commissioner, S.A.P., Witwatersrand Division 1963(1) S.A. 316(W) being authority for the proposition that vehicles may not be seized in non-property cases.

Mr. Mapetla for respondents held the view that Section 52 of the Criminal Procedure & Evidence Act, 1981 authorised a policeman to seize an article involved in a crime and that once the policemen had delivered the article to the Clerk of Court or Registrar of the High Court as the case may be in terms of Section 55 the discretion of the policeman could not be interfered with and that any application made had to come by way of review. He further submitted that even if rights of third parties were affected administration of justice could not be hampered by release of articles seized to be used in pending criminal trials for such an affected third party could afford

(a) may, if the article is perishable with due regard to the interests of the persons concerned, dispose of the article in such manner as circumstances may require or

(b) may, if the article is stolen property or property suspected stolen, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of such policeman, such article was stolen and shall warn such person to hold such article available for production at any resultant criminal proceedings, if so required to do so; or

(c) shall, if the article is not disposable of or delivered under paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require.'

It will be seen that section 52(a) gives a policeman who seizes the article very wide powers as to the disposal of the article; (b) of the section gives a policeman a wide discretion too for he may allow the person from whom the article was stolen to retain same for production at the trial. It is not as if the policeman is bound to hang on to the article like a leech

until the trial date. It is also to be remembered that though the article may be forfeited to the crown on the close of proceedings, the law has not dictated that the article should under no circumstances be released to any one pending the result of charges pressed against a suspect.

> (c) of S.52 is simply to the effect that if the article is not disposable and has not been dealt with under (a) or (b) of S.52, it shall be given a distinctive identification mark and retained in police custody or make such other arrangements with regard to its custody as circumstances may require.

Mr. Mapetla's submissions dwelt on and were directed at the injustice this might result in if a policeman who seized the motor vehicle subject-matter of this application was not allowed to use a discretion imposed on him by the law, that this discretion could only be used by the policeman responsible and that all of us were helpless if the policeman as in this case, used his discretion the way he did we could not interfere with his discretion.

It seems to me that, if the above submission were followed to its logical conclusion, when everything is said and done, although section 52 in its entirely is not inflexible and allows considerable elbow room as to the disposal of seized articles

before a trial, the mere fact that the statute gives a policeman seizing an article to dispose of it as he deems fit amounts to a court of law not being able to question such a discretion.

If this is the interpretation by which Mr. Mapetla construes the application of S.52 above, it would be both unfortunate and untenable in my view. Unfortunate because once a policeman had seized an article for use in criminal proceedings and used his discretion as to its disposal that would be the end of the matter and no court of law could question this. Untenable because in the event it effectively means that the jurisdiction of the court would in such matters be ousted.

In some of the judgments I have made so far, I have ruled that if a statute intends doing so, it must specifically, expressly or impliedly exclude such jurisdiction - it must not be inferred. See Main Line Transport v. Durban Local Board Transportation Board, 1958(1) S.A. 65 (D. & C.L.D.

Mr. Sooknana referred me to Ngubani v. Divisional Commissioner, South African Police, Witwatersrand Division, 1963(1) S.A. 316(W) his sole contention being that as the crime in respect of which the motor vehicle is detained is not a property related case the police had no right to seize the motor vehicle. I have already said that Mr. Sooknanan is wrong in this respect because provisions of section 51 of the Criminal Procedure and Evidence Act, authorises a policeman to seize any

vehicle or receptacle in possession or custody of an arrested person if the offence is in pursuance of Part I of the First Schedule and Robbery is a specified offence in terms of the schedule.

In Ngubani v. Divisional Commissioner, S.A.P. Witwatersrand Division above, Mr. Justice Kuper found that although the vehicle had been delivered to the Magistrate the vehicle had nevertheless not been seized in terms of the Act. Moreover, he found that the proper person to decide whether an article should be an exhibit at the trial is the State Prosecutor himself. Further, he was of the view that if the release was opposed an affidavit should have been obtained from the State Prosecutor.

While I partially subscribe to Mr. Justice Kuper's reasoning, I find myself at odds with some of his findings for in my opinion he did not go far enough.

I have referred to Sections 51 and 52 of the Criminal and Procedure Evidence Act, 1981 extensively. Section 51 gives a policeman the right to seize a vehicle and Section 52 gives him discretion as to the disposal of a seized article before trial. This is the discretion nobody may interfere with as Mr. Mapetla submitted. Once, however, the policeman has used his discretion not to release the vehicle, he is bound by Section 55 of the Act quoted above to deliver the article to the Registrar of the High Court or the Clerk of Court as the case may be.

Consequently, a policeman refusing to release a vehicle before trial cannot keep it in his custody for if he does so he operates outside the requirements of Section 55. The delivery to the Registrar of the High Court or Clerk of Court effectively means that he has parted with the possession and control of the vehicle. According to Bell's South African Legal Dictionary. 3rd Ed. delivery is described as:

> 'The placing another person in Legal possession of a thing so that he may deal with it as his own; the ceding or giving to another power over a thing in such a way that the physical control thereof is united to the legal right of disposing of it. (I have underlined).

When a policeman delivers a motor vehicle to the court (as was done in this case) it was not authority to rubber stamp police custody as Dt/Sgt. Mosili would have us believe; it is transfer of physical control or custody of a vehicle from the policeman to the court and the accompanying unity to the legal right of disposing of the thing or article by the court seized of the case as is contemplated by Section 56 of the Criminal Procedure and Evidence Act, 1981. These sections 55 and 56 are, to my mind, masterpieces of legal draftsmanship, they flow and read easily forming a perfect syllogism from which logical deductions can be drawn.

Just to rub it in, perhaps an analogy will shed light on what I am propounding:

In a criminal case a policeman may detain a suspect; at this stage he has a discretion whether to release him on summons or 7 or to detain him. If he releases him on summons, it is a discretion which may not be interfered with. But if he detains him, he is obliged to take him timeously before a magistrate to be remanded in custody. If he does not do so, an application that he be released or remanded in custody will succeed barring draconian laws such as prevail in military juntas and totalitarian governments. Once, however, a suspect has been delivered to the court and remanded in custody, the police have nothing to do with him for it is the State Prosecutor who will decide whether or not the suspect may be released on bail.

The application was brought against the Commissioner of Police to release applicant's vehicle on the assumption that the commissioner is in control and possession of the vehicle. The vehicle having been delivered to court in terms of Sec. 56 aforesaid is no longer in possession or control of the commissioner and the commissioner having parted possession with the vehicle cannot release something he does not have.

When, in February, 1994 the applicant made an application for release of vehicle it had been delivered to the court on 12 October, 1993.

From a reading of R.L.M.P., it appears as if the court has authorised the police to keep the motor vehicle in their custody. For the avoidance of confusion, section 55(2) of the Act reads:

> 'If it is by reason of the nature, bulk or value of the article in question impracticable or undesirable that the article should be delivered to the Clerk of Court in terms of sub-section (1), the Clerk of Court may require the police officer concerned to retain the article in police custody or in such other custody as may be determined in terms of section 52(c).'

This section is self-explanatory as it in no way waves actual and physical possession of the article seized by the Clerk of Court pending the result of the trial.

I have read some decisions pertaining to release of vehicles with interest and would only comment that surely one does not have to be apologetic to the police for keeping suspected stolen property for a long time outside provisions contemplated by section 55 of the Criminal Procedure and Evidence Act, 1981 for the law requires the police to exercise their discretion as to the disposal of the article seized before trial and failing

release to deliver such articles to court.

The applicant would succeed only if he had cited the Clerk of Court of where the vehicle was delivered for this is the right and proper person to release the vehicle which was surrendered to him by the police.

In the circumstances the application to release vehicle is dismissed.

There will be no order as to costs.

G.N. MOFOLO
Acting Judge
6th June, 1995.

For Applicant: Mr. Sooknanan
For Respondents: Mr. Mapetla