

CRI/A\38\97

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

REX

Appellant

v

NKOLI MALIA

Respondent

J U D G M E N T

**Delivered by the Hon Mr Justice M L Lehohla on the
16th day of February, 1998**

The accused in the Subordinate Court who is the respondent before this Court faced charges in three counts in respect of each of which he was acquitted and in the result a vehicle subject matter of the counts; to wit; a white Nissan Combi E20 Registration Number : D1206 was released to the respondent. The Chassis number of this vehicle is : 51646 its engine number is : 5-009432 B.

The facts of the case are largely common cause.

The first two counts relate to breaches of the Road Traffic Act 8\81. The last count relates to contravention of Section 343 of the Criminal Procedure and Evidence Act No.7 of 1981 as amended by Section 6 of Act No.13 of 1984.

Count I charged that on or about 24th July, 1996 at or near Lower Thamae in the Maseru District the accused had in his possession the vehicle referred to above in contravention of Section 10(2) of Road Traffic Act 8\81 as amended by Order 15 of 1987 Section 3(a)(2).

Count II charged that on the day and at the place in question the accused was found in unlawful and wrongful possession of the said vehicle whose engine and chassis numbers were obliterated or tempered with otherwise than by registering authority empowered under Section 9.

Count III charged that the accused failed to give satisfactory account of his possession of the said vehicle in respect of which there was reasonable suspicion that it was stolen in contravention of the provision of the Criminal Procedure and Evidence referred to above.

The facts reveal that PW1 Warrant Officer Monoane while on patrol in the

Lower Thamae area at about 4 p.m. on 24th July, 1996 she and her companions tried to stop the white Nissan Combi. This combi came from Sebaboleng direction but it stopped far from W/O Monoane, who on approaching the vehicle, saw the driver thereof get out of it immediately. Any attempts to call that driver to come nearer to the police failed. In short he went behind his vehicle, took advantage of its bulk to gain great distance away from it while obstructed from the police view as he ran away.

The police started examining the vehicle and its particulars as it remained thus abandoned. While engaged in this exercise a boy called Thabang Chalatsi came along and stated that he was the real driver of this vehicle which had disappeared at the bus stop and he was apparently looking for it.

The police and Thabang checked the vehicle together. The police suspected the vehicle was stolen as they observed a hole on its chassis number. The vehicle was driven to the central Charge Office with the help of Thabang. The police showed him this hole and he said he knew nothing about it. They asked him to bring its blue card. Thus he went away seemingly to fetch it. But at about 7.00 p.m. the accused Nkoli Malia came along and informed the police that the vehicle belonged to him. He had brought along a blue card. The police advised that he should come

the following day as it was already dark.

The following day i.e. 25-07-96 the accused turned up with the blue card but it failed to tally with numbers on the engine and chassis of the vehicle. He produced yet another blue card which likewise failed to tally with either the engine or chassis numbers of the vehicle. These blue cards were handed in before the subordinate court marked Exhibits "B" collectively while R.L.M.P. 12 was marked Exhibit "A".

Cross-examination of PW1 revealed that the vehicle had been found in the hands of the actual thief; i.e. the driver who ran away and abandoned the vehicle when the police tried to stop the vehicle he was driving. It was further revealed that the actual thief had taken the vehicle not from the accused's employees; further that he was convicted by the subordinate court. Cross-examination further elicited the fact that the investigations of police had shown that vehicle D1206 was issued with registering authority in T.Y. and that the accused had bought vehicle D1206 as well as vehicle E2846 whose blue card was also part of Exhibit "B" (which consisted of two blue cards).

The Court observes that from this point on the record contains a vast number of points agreed on between *Mr Phafane* the defence counsel and the public

prosecutor Mr Nthako in the Court below. I may just add that these matters agreed on do not constitute evidence even though they are otherwise important.

Thereafter the record shows that *Mr Phafane* addressed the Magistrate for the discharge of the accused. When his turn came to address in response the public prosecutor said "I do not address the Court now but on 16-07-97". Thereupon the matter was adjourned to that day.

On that day the Public Prosecutor was not in attendance. Investigations revealed that he had gone to the Palace. Thereupon *Mr Phafane* applied for the acquittal of the accused in terms of Section 278(b) of the Criminal Procedure and Evidence. The learned Magistrate readily obliged and he further released the vehicle to the accused.

The appeal lodged in the High Court is based on two grounds set out as follows :

1. That the learned Resident Magistrate grossly erred in law when he allowed the trial to proceed without the Prosecutor seized of the matter, without affording the Crown the opportunity to address him on an application made for discharge of the accused at the close of the Crown case.

2. That the learned Resident Magistrate further erred in law by making an order releasing to the accused the vehicle forming subject matter of the charge in the light of admitted and exhibited documentary evidence which clearly do (*sic*) not relate to the vehicle in question and do (*sic*) not point the accused as the person who may lawfully possess the said vehicle under the law.

With regard to the first ground of appeal Section 278(1)(b) reads:

“If a prosecutor..... in the case of a trial by a subordinate court, does not appear on the court day appointed for the trial the accused may move the court to discharge him and the charge may be dismissed,”.

The record shows that on 23-04-97 the accused was remanded in custody to 23-05-97. The date of hearing was fixed as 26-0-97, on that day because the prosecutor so chose at least as far as the record reveals the matter was postponed to 14th July 1997. On this day he didn't show up or inform the learned magistrate or the opposite side of his likely failure to be present. In any case the wording of the above section is very clear in that it indicates that the learned magistrate may dismiss the charge facing the accused. In doing so he uses judicial discretion. In the light of the facts set out above accounting for the prosecutor's failure to be in attendance in court I cannot be persuaded that the learned magistrate in dismissing the charges did not exercise his discretion properly.

Indeed *Mr Lenono* very properly conceded during argument that ground one of his appeal must fall away. In my view it is highly improper of an officer of Court to leave court business on a day appointed to suit him and not bother to do the court the courtesy of asking for an excuse before so leaving. There may be valid reasons why a man may fail to meet his obligations or may find himself torn away from his duty in court. The one that cannot be questioned is when he had to obey a summons or subpoena to another Court. None such has been proffered in the instant case.

It should be noted that in both counts I and III the relevant offence is constituted by an element of either being found in wrongful and unlawful possession or being in unlawful and wrongful possession of an object or article in question. In neither of these instances was the accused in possession. In the first instance the vehicle was found in possession of the thief who ran away. In the next instance it was the police who were in possession. Thus even if the Court had not acted in terms of Section 278(1)(b) the accused would still have been acquitted. With regard to Count II it cannot be excluded that the tempering and obliteration of the numbering on the chassis could have been the work of the thief who deprived the employees of the accused of the vehicle. Here too the accused would have legitimately been entitled to benefit of doubt and acquitted.

The only remaining point of interest is whether the accused could in the end be regarded as lawfully entitled to have the vehicle released to him after his acquittal. It seems in all accounts he is not. First the vehicle was not found in his possession. So it would not be correct to release it to him. At best it could have been released to the police instead of him. But even though the police acquired custody of this vehicle it seems they could not at this stage be lawfully entitled to its possession while they were engaged in a battle to charge whoever was in possession of it. Thus at this stage this Court is unable to make a determination in terms of Section 56(1) of the Criminal Procedure and Evidence as to the disposal of the vehicle Exhibit "1". The Court regrettably is hamshackled by absence of the collective exhibit "B" i.e. the two blue cards from the record.

Mr Phafane argued that the blue cards would bear out that they related to two vehicles bought by the accused. The two vehicles being D1206 and E2841. Even at the risk of giving evidence from the bar he pointed out that the Engine of E2841 was mounted on the chassis of D1206 without the accused meeting the requirement of the law that he should inform the registering authority and obtain their approval.

This otherwise brilliant argument was demolished by *Mr Lenono's* submission that the chassis number in any of the blue cards should have tallied with

the chassis number of D1206. But in the circumstances none of the recorded chassis numbers in the blue cards remotely approximated the chassis number of D1206 as is. The chassis number as is was 51646 while the Engine number assuming it belongs to an Engine that was mounted anew is 5009432B.

One blue card showed : D1206

Chassis number : 951646

Engine number : H20674782

Another blue card showed : E2841

Chassis number : 006910

Engine number : L185009432B.

Thus the learned magistrate erred by indiscriminately ordering that D1206 Engine number 5009432B Chassis number 51646 unsupported by corresponding numbers in the blue books should be released to the accused.

In sum then this Court -

- (I) confirmed the Subordinate Court's order acquitting the respondent\accused;
- (ii) upheld the appeal to the extent that the Subordinate Court's Order releasing the vehicle to the respondent\accused is set aside.

Accordingly the order for the disposal of the vehicle shall be in terms of Section 56(2) i.e. to the effect that the Subordinate Court is directed to hear such additional evidence, either orally or by affidavit as it may deem fit for purposes of disposing of the vehicle as provided in Section 56(1).

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J U D G E
16th February, 1998

For Appellant : Mr Lenono
For Respondent\Accused : Mr Phafane