CRI/A/40/96

IN THE HIGH COURT OF LESOTHO

In the matter between

ANANIAS THEMBA RADEBE **APPELLANT**

and

REX **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge,
On the 9th day of December, 1996.

The appellant appeared before the Senior Resident Magistrate of Maseru charged with the crime of theft common it being alleged that upon or about the 7th day of April 1994 and at or near Mabote Police Station in the district of Maseru he did unlawfully and intentionally steal a certain motor vehicle Toyota Hilux Twin Cab white in colour Registration number AE079, engine number 4Y9076059, chassis number YN677003787 the property of the Christian Council of Lesotho.

The Appellant was found guilty as charged and sentenced to four years imprisonment. He appeals on two grounds only, namely:

"(a) that the conviction is against the weight of evidence.

(b) that the sentence is too harsh and induces a sense of shock."

It is common cause in this case that the said motor vehicle was in fact stolen on the date alleged in the charge sheet and was subsequently retrieved by the police from PW1 Daniel Makhele at Maputsoe Ha Chonapase on 24th November 1994. It is not disputed that it had been sent to the latter by the appellant himself for respraying and panel beating.

It is significant that when it was so retrieved the said motor vehicle still bore the same engine numbers and chassis numbers as reflected in its registration certificate EX "A" held by the Christian Council of Lesotho. What had been changed was the registration number of the motor vehicle in that it was no longer AE079 but now bore registration number K0154.

At the trial of the matter Mr. Mentjes who appeared for the appellant conceded that the motor vehicle in question was indeed stolen. He is recorded on page 34 of the record of proceedings as having stated as follows:-

"the accused is not guilty of theft. There is proof that the vehicle is stolen, the vehicle was found in the hands of a panel beater who sent the police to my client. The accused had possession of the vehicle constructively. What is in dispute is that the accused did not know that it is stolen. The accused was a bona fide possessor. The accused was a man.

To conclude what is the charge. There is no prove (sic) that the accused received the goods knowing this vehicle to be a stolen vehicle. The accused was a bona fide buyer"

Mr. Khasipe who appeared for the appellant before me adopted the same approach as Mr. Mentjes by conceding that theft had been proved. Mr.Khasipe submitted however that the appellant had bought the motor vehicle in question from one Michael Selepe without any knowledge that it was stolen. As I see it the fate of this case rests on the explanation that the appellant gave in view of the fact that he was found in possession of a stolen vehicle. In this regard it is important to bear in mind the remarks of Greenberg J quoted with approval by Watermeyer A.J.A. in Rex v Difford 1937 A.D. 370 AT 373 to the following effect:-

"It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he given an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the

> explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

I respectfully agree. I may add however that the explanation must be genuine and not merely a tactical ploy to avoid conviction.

I turn then to consider the appellant's explanation with a view to determining whether it may possibly reasonably be true in the particular circumstances of the case before me.

It was the evidence of the appellant that he stays at Peka in the district of Leribe. He is a welder by profession. He came to know the motor vehicle in question when it was driven by one Michael Selepe who used to pass by his workshop. This Michael Selepe was "just a customer" and not his friend.

The appellant testified that two or three months since seeing the said Michael Selepe driving the motor vehicle in question he asked the latter to sell it to him but "he refused."

Then in his own words the appellant states:-

> "He (Michael Selepe) came again and at that time had broken a front wheel bearing, he asked me to give him money because the vehicle was troubling him. That was in the month of May, 1994.

This time he came to me he was not selling it to me. I had to give him R30,000-00 cash. I asked him to let me check the vehicle. First I asked him to drive us to Ficksburg town. I had sent it to the clearance police so as to find out whether it was worth buying or whether it was a stolen one. I was present at Ficksburg when a clearance certificate police said we were not to have it cleared. I found one Brown who took us to one Potgieter who told me that the computer was not functioning, we waited for tem (sic) minutes and left our particulars to Potgieter and we were supposed to come the following day. I said to Michael that I was working and asked him to have it cleared. He did come, he came back with a clearance certificate. I did not go with Mr. Selepe. Now that the vehicle was cleared he sought R10,000-00. I did pay him. I did not pay him the full amount because he needed the money to take the 4x4 vehicle for registration leaving his car at my home, he would have to register the vehicle with his own cash. He could pay for registration. He came back with change of ownership and ask me to sign them. I did sign them. The following day he came with the vehicle and the blue cared (sic). It was in June if I am not mistaken, 1994, I gave him R20,000-00 and gave me the blue cared (sic). I wish to hand in the blue card as an exhibit in this case. The blue card is handed in and marked exhibit "D". This is the blue card I was given by Mr. Selepe. I wanted to register that vehicle because he had charge (sic) me a lot of

money. After two months from the time I bought the vehicle from him he came to me.

Mr. Selepe stays at Vereeniging, he is a dagga dealer."

I observe at once that the appellant's explanation as stated above was never put to the police-woman who actually arrested him namely PW5 Detective Police-woman Kaphe in cross examination. Nor was the appellant's story put to the investigating officer PW6 Detective Tpr. Sengoara. In my view this is a factor to which the court must inevitably have regard in determining the genuineness of the accused's explanation and whether such explanation may possibly reasonably be true and not just an afterthought raised for the first time after the Crown has closed its case and is no longer able to investigate the defence story and to react accordingly to it.

It is true that a question was put to PW1 Daniel Makhele that the appellant had bought the motor vehicle from "Mr. Mitchel Selepe" and that the latter supplied him with the Registration Certificate but in my view this was not the proper witness to put the accused's explanation to particularly as PW1 was introduced as an accomplice. As earlier stated the motor vehicle was found in his possession while in the process of respraying it. In any event I observe that it was never put to PW1 in cross examination what the particulars of the said Michael or Mitchel Selepe were, what his address was or where he could be found.

It is my considered view that a criminal case is not a game of chance whereby one plays one's cards close to one's chest in the hope of springing a surprise upon one's adversary. I consider therefore that the court is entitled to draw an adverse inference from the fact that the accused's explanation was not put to the relevant Crown witnesses in cross examination nor were any particulars and physical address of the said Michael or Mitchel Selepe intimated in cross examination of the crown witnesses in order that the Crown could be able to follow up the explanation.

What then happened was that the Crown heard for the first time when the appellant testified that the said Michael Selepe "stays at Vereeniging, he is a dagga dealer." I observe that even then the address given was decidedly vague. To say that a man stays in Vereeniging without any precise address thereat does not help. It was for that reason that the learned Public Prosecutor put the following questions to the Appellant:-

"Q: Did you tell the police about Michael Selepe

A: I did.

Q: Did you give them his address?

A: I do not have them.

Q: Would you like Mr. Selepe give evidence in this case.

A: Yes.

Q: For long time would you wish him called, two months?

A: He was staying at the flat and a month would suffice."

As I see it there is nowhere in the record of proceedings that the appellant ever made even a token attempt to call for the evidence of the said Michael Selepe nor did he request the Crown to have the latter subpoenaed on his behalf. It is significant for that matter that it is common cause that the appellant was out on bail since the 8th December 1994. In view of the fact that the trial only commenced on 28th February 1996 and was only finalised on 24th October 1996 I am of the view that the appellant had about 22 months within which to call the said Michael Selepe as a witness but apparently he simply did nothing about it. Once more I consider that this is a factor which would entitle any reasonable man to draw an adverse inference against the appellant in the circumstances of the case. It is true there is no onus on an accused person to prove his innocence. That onus is always on the crown throughout to prove the guilt of the accused beyond reasonable doubt. But where, however, the accused's conduct is prima facie incriminating as is the case before me in as much as the appellant was found in possession of a recently stolen motor vehicle then as earlier stated I consider that the accused's inability to give the full address of the alleged seller and to call him in evidence are certainly factors from which the court is entitled to draw an adverse inference against the whole of the accused's explanation in the particular circumstances of this case. To hold otherwise would result in a serious miscarriage of justice and no conviction would ever be possible in cases such as the one before me.

JRL Milton: South African Criminal Law and Procedure Vol. II states at p651:-

> "usually an explanation is unlikely to assist X unless it gives particulars, such as the name and address of the person from whom he says he obtained the goods."

I agree.

It is significant that despite the fact that the appellant claims to have bought the motor vehicle in question for R30,000-00 there is no receipt for this huge amount. Once again any reasonable man is entitled to draw an adverse inference against the appellant on this aspect. Nor does it make sense that despite the fact that on appellant's own version the said Michael Selepe was not selling the motor vehicle in question the appellant would nevertheless still give him R30,000-00.

There is then the appellant's evidence that he went to Ficksburg to find out whether the motor vehicle in question was stolen. As earlier stated this was never put to the crown witnesses. What is more I find it significant that nowhere does the appellant suggest in his evidence that he ever approached the Lesotho Police for clearance. One would have imagined that the starting point for clearance of a motor vehicle for registration in this country is Lesotho police.

In any event this is exactly how I understood the evidence of PW9 Grace Malisebo Tsutsubi where she states at page 32 of the record of proceedings :-

> "I am working at Berea Sub Accountancy. I am acting as a Sub Accountant. I have been working at the Sub Accountancy for 20 years one of my duties is to register vehicles. I should have change of ownership before I can register road worthy certificate, Lesotho and RSA sales tax certificate from Sales Tax. Then I register a vehicle - Registration Certificate."

I cannot see then how the Lesotho police can ever be side-stepped in the registration of a motor vehicle. I find that this is yet another factor which any reasonable man would be entitled to take into account in drawing an adverse inference against the appellant in this case. Judging from the circumstances of this case, I am of the firm view that appellant's explanation that he approached the police at Ficksburg for clearance was no more than an attempt to pull the wool over the learned trial Magistrate's eyes.

I observe that even the appellant's blue card itself was withheld from the crown who saw it or heard about it for the first time when the appellant was testifying in the witness box. The appellant was then taken to task on this aspect in cross examination:-

> "Q. Why did you not give the police the blue card?
> A. My lawyer had instructed me not to."

For my part I find it hard to imagine that if the appellant seriously believed that he had a genuine blue card in respect of the said motor vehicle he could have been led to withhold it from the police and thus effectively hamper police investigations as to the authenticity thereof.

As it turned out the crown led evidence in rebuttal which clearly established that appellant's aforesaid blue card was nothing but a forgery. This was the evidence of Charles Libetso who is the Chief Plant Superintendent at Lesotho Government Printing. It was his evidence that the appellant's blue card was not printed by the Government Printer.

Although appellant's blue card gives the outward appearance that it was issued by Berea Sub Accountancy it was disowned in rebuttal by Berea Sub Accountant PW9 Grace 'Malisebo Tsutsubi in the following words:-

> "I see EX "D" it is a Blue Card but according to my records it does not come from my office. This serial number which appears in ex "D" does not appear in my records and the nature of the Date Stamp is not the one we use in my office."

There is then the fact that appellant's blue card is supposed to have been issued by Berea Sub Accountancy despite the fact that the appellant lives at Peka which is in Leribe district. Nor does the discrepancy end there.

Appellant's blue card indicates that the registration number of the motor vehicle is K0154 which belongs to Thaba-Tseka district yet as earlier

stated the date stamp thereof is supposed to be that of Berea Sub Accountancy and not Thaba-Tseka.

In my view this discrepancy was enough to have put the appellant on inquiry and/or at least to have aroused his suspicion if he had no knowledge that the motor vehicle in question was stolen.

To compound the appellant's problem it then turned out that the registration number K0154 in fact belonged to Lesotho Highlands Authority and that it was a caterpillar.

In contrast to the blue card belonging to the Christian Council of Lesotho in respect of the motor vehicle in question, Appellant's blue card does not describe the motor vehicle as a 4x4. I find that this is a huge difference as it relates to the make of the motor vehicle in question and that once more this discrepancy would certainly have put the Appellant on inquiry and/or aroused his suspicion if he did not know that the motor vehicle was stolen.

Nor can the court overlook the fact that there is undisputed evidence that the motor vehicle in question had been sent by the appellant to PW1 for respraying and panel beating. I imagine that that in itself would certainly make identify of the motor vehicle by the true owner very difficult indeed and is as such a factor against the appellant in this case.

I am satisfied that the cumulative effect of the above mentioned factors are such that it cannot be said that the appellant's explanation may possibly reasonably be true. In my view these factors point to the sole reasonable inference that the appellant is the thief. I find therefore that the accused's guilt has been proved beyond reasonable doubt.

I am fortified in the view that I take in this matter by the remarks of Diemont JA in S v Sauls and others 1981 (3) S.A. 172 at 182 wherein he states as follows:-

> "The State is not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the court is called on to seek speculative explanations for conduct which on the face of it is incriminating."

I respectfully agree.

It is significant that the learned judge quoted with approval a passage in a minority judgment given by Malan JA in R v Mlambo 1957 (4) S.A. 727 at 738 to the following effect:-

> "In my opinion there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged.

> An accused's claim to the benefit of a doubt when it may be said to exist must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by the proved facts of the case."

These remarks commend themselves to me in this case and I respectfully adopt them herein. I observe that Rumpff J.A. expressed a similar view in S v Rama 1966 (2) S.A. 395 AD 395 at 401.

Mr. Khasipe then submitted that the court must take into account the fact that the learned trial magistrate did not file reasons for rejecting appellant's explanation.

I agree that in a proper case this is a valid consideration to take into account but then each case must be decided on its own merits including the nature and the strength of the crown case. Obviously if the crown case gathered from the record of proceedings is very strong against the appellant as is the case here it is of no consequence that the trial magistrate has not filed reasons of judgment although this must never be encouraged. There is however a better reason for rejecting Mr. Khasipe's submission in this regard. It is this.

It emerged during argument before me and this is common cause, thanks to the diligence of the Director of Public Prosecutions Mr. Mdhuli who brought my attention thereto, that the record of proceedings in this matter was

not prepared by the Clerk of Court as is the usual case but was instead prepared by appellant's attorney Mr. Khasipe at his office. Mr. Mdhuli submits therefore that it would be wrong to blame the learned trial magistrate for not having filed reasons in as much as there was no way he could be able to file same in the absence of the record of proceedings which had been taken away from him by Mr.Khasipe. I agree. It is for this reason that preparation of records of proceedings in criminal cases is best left to the Clerk of Court. Otherwise there is bound to be miscarriage of justice somewhere along the line. Important exhibits are likely to be misplaced or destroyed by the uncanny and genious criminal if this practice is to be followed.

In the result therefore the appeal against conviction is hereby dismissed.

Regarding sentence it is trite law that this is a matter preeminently within the discretion of the trial court. I find however that this court is at large to interfere with the sentence imposed by the court a quo in this matter by reason of the fact that there are no reasons furnished for the sentence. While I gave the learned magistrate the benefit of doubt for failing to file reasons for conviction I am not prepared to do so in respect of sentence. This is because this court has stated time and again that reasons for sentence must be given at the time when the sentence is actually being imposed and not after the accused has noted an appeal the reason being that it is of paramount importance for the accused to know the reasons why he is so sentenced.
See Mojela v Rex 1977 LLR 321 at 324.

I have seriously considered the personal circumstances of the appellant as fully set out in the record of proceedings. As against this there is the fact that theft of motor vehicles is rampant in this country. The appellant's counsel himself submitted in mitigation of sentence at the trial :-

"the community views crimes with wrath."

I agree. It means therefore that courts would be failing to protect the community if their sentences were seen to be too lenient. A deterrent sentence is called for here. The court must therefore anxiously seek to strike a balance between the interests of the individual and society as a whole.

In all the circumstances of the case I am of the view that the appeal on sentence partly succeeds and that the appropriate sentence is one of four (4) years imprisonment half of which is suspended for a period of five years on condition that the appellant is not found guilty of the crime of theft committed during the period of suspension.

M.M. Ramodibedi

ACTING JUDGE

For Appellant : Mr. Khasipe

For Respondent : Mr. Mdhuli.