CRIM. CASE NO. 31/99

In the matter between

REX

Vs

PATRICK PAT LUKHELE AND THREE OTHERS

Coram	S.B. MAPHALALA – J
For the Crown	MR. M.SIBANDZE
For Accused 1 & 2	MR. Z. MAGAGULA
For Accused 3 & 4	MR. MAGONGO

RULING AT THE CLOSE OF THE CROWN CASE
(17/05/2000)

Maphalala J:

Accused no. 1 to 4 are charged with two counts of contravening the provisions of the ***Theft of Motor Vehicles Act 1991 (as amended)*** as follows:

COUNT 1

The accused persons are guilty of contravening ***Section 3 (1) of the Theft of Motor Vehicles Act (as amended)*** in that upon or about the 6th day of May 1998 and at or near Mbabane in the District of Hhohho, the accused persons acting jointly with a common purpose did wrongfully and unlawfully steal one motor vehicle registration number SD 952 VM a Toyota valued at E16, 000 – 00 the property or in the lawful possession of Simon Ngwenya.

ALTERNATIVE TO COUNT 1

Accused no. 1 and 4 are guilty of contravening Section 3 (1) of the Theft of Motor Vehicles Act, 1991 (as amended) in that upon or about 12th May 1998, and at or near Hlathikulu area in the Shiselweni District the said accused persons acting jointly and in furtherance of a common purpose did receive a motor vehicle registration number SD 952 VM knowing the same to be stolen.

The accused persons pleaded not guilty to the charges. A total of seven witnesses were led by the crown in support of the indictment. At the conclusion of the crown's case an application was made by both Mr. Magagula and Mr. Magongo representing accused no1 and 2, accused no. 3 and 4 respectively, in terms of ***Section 174 (4)*** of the ***Criminal Procedure and Evidence Act No. 67 of 1938 (as amended)***, for the discharge of the accused persons on the ground that the crown has failed to establish a ***prima facie*** case to place the accused persons on their defence. Mr. Sibandze for the crown opposed the application advancing reasons for such opposition.

Section 174 (4) in terms of which the present application has been made reads as follows:

> "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 or any other offence of which he might be convicted thereon, it may acquit and discharge him".

This section is similar in effect to ***Section 174 (4)*** of the ***South African Criminal Procedure Act No. 51 of 1972.*** The test to be applied it has been stated as whether there is evidence on which a reasonable man acting carefully might convict. (See ***R vs Sikhumba 1955 (3) S.A. 125; R vs Augustus 1998 (1) S.A. 75,*** not should convict (see ***Gascoyne vs Pal and Hunter 1917 T.P.D 170 and R vs Stein 1925 A.D. 6).***

Defence counsel advanced a number of arguments in support of this application and for the sake of brevity I shall fuse the arguments of both defence counsel into one as they are in the main complimentary. I shall only indicate points of differences as they relate to their respective clients.

The opening salvo by the defence is that the accused persons are charged under the doctrine of common purpose but it has not been proved by the crown that the accused persons conspired with each other in the commission of the offence. Mr. Magagula for accused no. 1 and 2 contended that evidence which purports to implicate accused no. 1 with the commission of the offence comes from two sources that is the evidence of PW4 Phillip Chumba and that of PW7 Sergeant John Dlamini. PW4 was commissioned by accused no. 1 to spray paint a motor vehicle and he did his job in broad daylight. There is no evidence that PW4 was warned not to tell anybody that he had spray painted the motor vehicle. It cannot be inferred that accused no. 1 knew that the motor vehicle was stolen. There is also no evidence to show that accused no. 1 knew that the motor vehicle was stolen but he proceed to receive it in his possession. There was no suggestion that the said motor vehicle being spray painted was hidden by PW4 from the public to suggest that there was something wrong with the motor vehicle.

The second attack on the evidence of the crown is directed against the evidence of PW7 Sergeant John Dlamini where Mr. Magagula pointed out three difficulties with his evidence. Firstly, that he deposed that he warned the accused persons in terms of the Judges Rules, however, contends Mr. Magagula the caution fell short of the requirement of the law. In that the police officer failed to tell the court what warning he gave to the accused persons. The court cannot surmise that the caution was a proper caution. To support this contention the court's attention was drawn to the case of ***Rex vs July Mhlongo and another Criminal Case No. 185/92 (unreported case).***

The second difficulty highlighted by Mr. Magagula against the evidence of PW7 is that the officer did not tell the court that the accused freely and voluntarily pointed out the glasses to him (see the case of ***July Mhlongo and another (supra).*** There is no indication or allegation that accused no. 1 and accused no. 2 freely and voluntarily pointed out the glasses. Mr. Magagula urged the court to view this evidence as inadmissible and thus of no legal consequence. The crown cannot assume that anything that the accused will say in their defence will cure the evidence of the pointing out. Thirdly, he argued that PW7 failed to identify to the court the glasses, or windows retrieved from accused no. 1's homestead. The court cannot surmise that they are the same glasses. The fourth and last difficulty experienced by Mr. Magagula on the evidence of PW 7 is that he admitted before court that it has been some time since the commission of the offence that his memory was very bad. He could not recall any pertinent dates or the sequence of events in a month as it related to this case. That, therefore his evidence is not trustworthy and should not be relied upon. To buttress this proposition I was directed to the case of ***Rex vs Govu Dladla and others Criminal Case No. 168/98.***

When dealing with accused no. 2 Mr. Magagula pointed to the evidence of PW6 2639 Constable M. Ndlangamandla who told the court that he stopped a certain motor vehicle driven by accused no. 2 and ordered that it be driven to the police station at Hlathikulu. That is all that is said in respect of accused no. 2 when he was asked who was the owner of the motor vehicle he said it belonged to accused no. 4. The evidence of Ndlangamandla does not prove that accused no. 2 stole the motor vehicle which is the subject matter of this case. There is no suggestion that accused no. 2 knew that the motor vehicle was stolen by the way he was driving it.

Mr. Magongo for accused no. 3 and 4 dealing with accused no. 3 contended that the only evidence that purports to implicate him is that of PW6. That accused 3 was seated in the motor vehicle. The court has to answer whether this evidence is ***prima facie*** that he stole the motor vehicle.

As regard accused no. 4 the crown has not proved common purpose as per the indictment (see ***S v Nkwanyane 1978 (3) S.A. 404***. On the question of pointing out he argued on the same lines as Mr. Magagula did. He urged the court to dismiss the evidence of pointing out in view of the ***dicta*** in the case of ***Alfred Shekwa and another (supra).***

Mr. Magongo further challenges the ownership of the motor vehicle that it cannot be said with certainty that the motor vehicle belonged to PW1 the complainant. He further argued that accused no. 3 and 4 cannot even been called to their defence in respect of the alternative charge. It was also argued that there is no evidence to show that any of the accused persons were in Mbabane on the day of the theft at New Checkers.

The crown as represented by Mr. Sibandze argued ***per contra.*** He argued that there is sufficient evidence that portions of the motor vehicle which was exhibited before court belonged to the complainant's (PW1) motor vehicle. The motor vehicle was found in the possession of accused no. 1 and accused no. 2. If they did not steal the motor vehicle where did they find the portion of the motor vehicle? Accused no. 1 took the police to his home where he pointed out other parts of the motor vehicle,

which was stolen from the complainant. Accused no. 4 took the police next to Mkhondo river to show them the bakkie of the motor vehicle stolen from the complainant. Mr. Sibandze submitted that proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The body of the chassis belonged to the complainant. The manner in which the accused persons dealt with the motor vehicle showed that it belonged to them. The engine number had been tampered with. The visible numbers of the engine number are traceable to the original number. PW1 pointed out things which are peculiar to his car. The identification of the bakkie is sufficient. Further in terms of Section 4 of the Act a presumption is created that the onus of proof shift to a person who is found in possession of a stolen motor vehicle to show that he did not commit the theft. Accused no. 1 and 2 were found in possession of the motor vehicle and when the police asked who the owner was. They left the motor vehicle at the police station and disappeared.

Mr. Sibandze during the heat of his submissions when quizzed by the court as to whether the crown in the face of the evidence had proved common purpose and also how was the court to treat the evidence of PW7 that of pointing out. Mr. Sibandze conceded that the crown has not proved that the accused persons were acting in concert and thus the indictment on both the main count and the alternative count cannot stand, however, the accused person may be found guilty of theft ***simpliciter*** which according to the crown is a competent verdict in the circumstances. On the evidence of pointing out deposed by PW7 the crown also conceded that in terms of the law that evidence is inadmissible. On the evidence of common purpose the crown told the court that the witness who was to be introduced as an accomplice witness who was to link each accused to the commission of the offence died last year.

These are the issues before me. I have considered the evidence of the crown in view of ***Section 174 of the Criminal Procedure and Evidence Act (as amended).*** I have also considered the submissions made by both sides. It is without question that the complainant had his motor vehicle stolen on the night in question. It is common ground that both counts cannot be sustained in view of the fact that the crown on its own admission has not proved common purpose. This state of affairs has been caused by the death of one of the crown witnesses who has dealt a death knell to the crown's case.

The motor vehicle which is the subject matter of this case as we have seen on several occasions when we conducted an inspection ***"in loco"*** has been mutilated beyond description. However, it appears to me that a large portion of this motor vehicle belongs to the complainant who I am convinced has shown to the court peculiar marks which he could identify his motor vehicle with. It is further common ground that the evidence of pointing out made by accused persons as conceded by the crown is inadmissible. In the case of ***Alfred Shekwa and another vs Rex Criminal Appeal No. 21/1994 (unreported)***. A warning had been given in terms of the Judges Rules to an accused by a police officer subsequently the accused pointed out certain items linking him to the crime which he was charged to another police officer, detective Sergeant Mamba, who did not give him a similar warning prior to the pointing out to be inadmissible. Browde JA who gave the judgement of the court referred to the case of ***July Petros Mhlongo and others vs Rex Case No. 155/92*** where this court approved the decision of the Appellate Division in ***S vs Sheehama 1991 (2) S.A. 860 (AD)*** where the following was expressed:

> "A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute in extra-judicial admission. As such, the common law, as confirmed by the provisions of Section 219 of The Criminal Procedure Act 51 of 1997, requires that it be made freely and voluntarily".

For a pointing out to be made freely and voluntarily, a warning to the accused in terms of the Judges Rules would be necessary. In the case in ***casu*** the warning given by PW7 was lacking in this respect and thus renders all the evidence, which might have implicated the accused persons with the commission of the offence inadmissible. The crown in any event conceded the shortcomings of PW7's evidence. The court may perhaps be left with evidence which tends to associate the accused with the said motor, but the court has to be satisfied that these remaining pieces of evidence prove a ***"prima facie"*** a case to put the accused to their defence. It appears this is not possible if one has regard to the totality of the crown evidence. The two counts the accused persons are faced with they cannot be called to their defence as the crown itself has conceded. Further for the presumption in terms of Section 4 of the Act to come in to operation the crown need to have laid a ***"prima facie"*** case and I agree with Mr. Magagula for accused no 1 and 2 in his submissions in this regard. On the point of finding the accused guilty of the competent verdict of theft it appears to me that the Act itself has created competence verdicts for offences under Section 3, 8. 11and these are spelt out in Section 5 (1) (a) – (d). The evidence of the crown in the present case cannot be slotted in any of the listed competent verdicts.

Finally, it appears to me that the crown case was torn asunder by the evidence of the witness who had died who might have linked the accused persons with the commission of the offence. In the circumstances I rule that the crown has not prove a ***prima facie*** case in terms of the Criminal Procedure and Evidence Act (as amended) and they are therefore, in law, entitled to their discharge.

As I have found earlier on that the bulk of the motor vehicle belongs to the complainant in law he is entitled to its return.

S.B. MAPHALALA
JUDGE

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