CRIM. APPEAL NO. 8/2001

In the matter between

MBONGISENI LUCKY SIMELANE

And

REX

Coram	MAPHALALA J, ANNANDALE J
For the Crown	Mrs Wamala
For the Defence	In person

JUDGMENT
(17/08/2001)

Maphalala J:

The appellant was on the 31st October 2000, convicted in the Magistrate's Court, Manzini of contravening Section 3 (1) of the Theft of Motor Vehicle Act No. 16 of 1991. He was sentenced to four (4) years imprisonment without the option to pay a fine. The sentence was backdated to the 30th October 1999 when he first appeared before court.

The appellant, who pleaded not guilty, appeals against conviction and sentence. His grounds of appeal are cited ***ipsissima verba*** as follows:

1. AD CONVICTION

a) The court a quo erred in law and in fact in finding and holding that the explanation given by the appellant is fanciful and should be disregarded, as it could be reasonable true.

b) The court a quo erred in convicting appellant with car theft yet he himself went to report at the police station that he had a break down at or near Manzini Central High School and had gone to look for help and on his arrival where he had left the car, he could not find it after police had taken it.

i) The appellant submits that if he had stolen the vehicle he would not have gone to report it as missing where he had left it to the police.

ii) The appellant further submits that if he had stolen the vehicle, he would not have used an original key to drive or start it.

c) The court a quo erred in law and in fact in finding and holding that appellant stole the said vehicle yet appellant was from complainant and had taken the vehicle with complainant's permission.

d) The court a quo erred in law and in fact when it dragged its feet and tried only once to look for the appellant's defence witness despite the appellant's pleas to fetch his witness for the second time.

i) The appellant submits that the court refused and or neglected purposely with intention to convict appellant to fetch appellant's defence witness.

ii) The appellant further submits that the court did not conduct a fair trial under the circumstances as the conviction was against the evidence adduced at the trial.

e) The totality of the crown's evidence shows an inherent improbability and the court erred in convicting the appellant on such evidence.

2. AD SENTENCE

a) The sentence of 4 years was excessive as even if appellant had committed the offence, the sentence would have been two (2) years for first offenders.

b) The court did not place any weight to the personal circumstances of the appellant.

The evidence led by the crown in the court a quo proved the guilt of the appellant beyond all reasonable doubt. The complainant told the court how his motor vehicle a Mazda van was stolen during the night on the 5th October 1999, whilst parked in the veranda. The motor vehicle was found by the police abandoned on the 12th October 1999, near a petrol station. This motor vehicle had an inscription of the name of his company on the bonnet. When it was recovered that inscription had been removed and the spot was painted with a sky blue paint on the bonnet. One PW2 Bhekithemba Dlamini told the court how the name of the company was removed from the bonnet of the motor vehicle. That evidence was not in dispute as the appellant confirmed that this happened. The appellant came to the home of PW2 together with one Mthunzi Siziba where they removed the inscription on the bonnet. When the appellant was arrested he led the police to PW2's homestead where certain items he had left there prior were recovered.

There was also evidence led before the court ***a quo*** that the appellant and Mthunzi disclosed to PW2 that the motor vehicle was stolen from Manzini. This evidence was not challenged in cross-examination and thus stood uncontroverted.

The appellant put up the defence that he did not steal the motor vehicle but took it from the complainant. The learned Magistrate correctly rejected this defence as an after thought as it has not been put to the crown witnesses.

Further, on the issue of conviction the appellant when he appeared before us argued that the chassis number as it was observed by the court in the inspection ***in loco*** differs from the one reflected in the blue book which was entered as exhibit "A" as part of the crown's evidence. The appellant is correct in this regard in that the chassis number deposed by the complainant was NR 566296 and that reflected in the blue book as NR 601666. However, in my view this discrepancy does not go to the root of the charge in that from the evidence it is clear that the ***corpus delicti*** is the motor vehicle which had an inscription on its bonnet. Evidence showed clearly, that the appellant stole that motor vehicle.

Turning to the question of sentence. It is trite that this court sitting as a Court of Appeal the ambit of the court's jurisdiction in relation to sentence is relatively restricted. This is because the question of sentence, the appropriateness of it, what particular sentence should be passed, is primarily the responsibility of the trial court. On appeal it is clearly established that, in the absence of misdirection or irregularity, the Court of Appeal will only interfere if, as it is sometimes expressed, there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the Court of Appeal would itself have passed.

In the present case there is no irregularity suggested; there is no misdirection worthy of such a designation. In the grounds of appeal it is averred that the learned Magistrate paid insufficient attention to the fact that appellant is a first offender and the sentence would have been two (2) years. In my view, that is not so, Section 3 (1) (a) of the Act only creates a minimum sentence to be imposed for a first offender and the learned Magistrate had the discretion to impose any sentence above two years depending on the facts of the case.

In the result, the appeal against conviction and sentence fails.

S.B. MAPHALALA
JUDGE

I agree

J. ANNANDALE
JUDGE