

CRIMINAL APPEAL NO 29/82

IN THE COURT OF APPEAL OF BOTSWANA

In the Appeal of:

PHEFA MOKWENA

Appellant

vs.

THE STATE

Respondent

Coram: MAISELS P.
O'BRIEN-QUINN C.J.
VAN WINSEN J.

J U D G M E N T

VAN WINSEN J :

Appellant, together with one Clifford Sedio, were charged in the Lobatse Magistrate's Court with introducing into Botswana a motor vehicle, Combi E 20 Datsun, then registered as D.P.D. 322T being the property of Heullet Packard Company, which it was alleged Appellant and his co-accused had stolen in South Africa. They pleaded not guilty to the charge and were found not

/ guilty ...

guilty. The issue on appeal relates solely to the correctness of an order by the presiding magistrate, made at the conclusion of the trial, that the motor vehicle in question be returned to Heullet Packard Company. Appellant, who claims to have purchased the motor vehicle, lodged an appeal against the latter order. HANNAH J in the High Court confirmed the order of the magistrate. CORDUFF J on an application in chambers granted leave to appeal against the judgment of the magistrate to this Court.

The issue concerns the question of whether the evidence at the trial of Appellant and his co-accused established that the motor vehicle was the property of Heullet Packard Company.

The evidence adduced at the trial in this regard can be summarised as follows:

Fanie Kekana, a driver in the employ of Heullet Packard Company testified that the vehicle, the subject matter of the charge, had been parked by him in Wanderers Street, Johannesburg, on the 2nd of April 1981 and that when he returned to where he had left it he found it to be missing. Some time

/ thereafter ...

thereafter he was told to come to Botswana to see whether he could identify a vehicle in the possession of the Botswana police at Kanye. He took with him the keys of the vehicle and he tried it in the different locks of the vehicle in all of which it fitted. He claimed that he could identify the vehicle by its colour and certain marks on the vehicle which he described to the Court. He said the letters H.P. were marked on the front centre beneath the windscreen. There was a faint but distinct small rectangular sign that was removed or painted over. On the right side of the vehicle

"was lettering which I forget".

The record refers to it in brackets as follows:-

"(sign of larger rectangular sign being removed or painted over)".

The magistrate's minute of this witness's evidence reads further as follows:

"Again the name of the company was on the rear door and in the sliding door (similar signs of larger rectangular signs being removed or painted over)."

I assume that this latter passage in the evidence was intended to convey that the witness had testified that the Huellet Packard Company's name had previously appeared on the vehicle but was no longer visible because they had been removed or painted over by someone. The witness furthermore pointed to a dent in the sliding door of the vehicle and certain scratches on it which he said had appeared on his employer's vehicle.

Detective Sergeant Monyake of the Botswana Police testified that as a result of information received by him in April 1981 he saw a Datsun E 20 vehicle driven by appellant's co-accused Sedio. The witness was told that the vehicle belonged to appellant who subsequently gave the witness an explanation as to how he had acquired it. The police officer was obviously suspicious that the vehicle had been stolen and he circulated the particulars of the vehicle to South Africa. He testified that he received certain documents from South Africa but did not say what they were. He found the chassis number and engine number on the vehicle and wrote them down on a document in his possession at the time he discovered them. He could not remember the

/ numbers ...

numbers but was able to give them to the Court on referring to the document on which he had written them down at the time, "knowing them", as he stated "to have been identical". It is not clear to me what numbers those mentioned by him in evidence were identical.

The minutes of the case then record that the defence attorney stated:

"The numbers are admitted".

It is similarly ^{not}clear to me what it was that the attorney was admitting. On the face of it it would appear that he was admitting that the numbers, which the witness could not, according to his evidence, remember, were in fact the numbers which he had observed on the vehicle and subsequently written down in a document in his possession.

The above then represents the totality of the evidence adduced before the magistrate in regard to the identity of the vehicle. There is no evidence, documentary or verbal to indicate, what the chassis and engine numbers were of the vehicle owned by Heullet Packard Company. If it

/ can ...

can be inferred - which I very much doubt - from Monyake's evidence that he was testifying that the numbers he observed in the vehicle were the same as those on documents sent to him from South Africa, then such evidence is hearsay evidence and not admissible. In either event his evidence does not assist in the identification of the vehicle.

It is apparent from the Magistrate's judgment that the order he made as to the delivery of the vehicle to Hewlett Packard Company was founded in the statement of the defence attorney that "The numbers are admitted". The learned Magistrate interpreted these words as meaning that it was being admitted that the numbers attached to the vehicle were identical to those appearing on the document relating to the vehicle in possession of Hewlett Packard Company. In my view the most that can be said of those words is that they may be capable of such a construction but there is no reasonable certainty that they in fact have meaning attached to them by the trial court.

If the hearsay evidence of Monyake referred to above and the admission by the defence attorney as interpreted by the trial court are left out of

/ consideration ...

consideration, then the only evidence that the vehicle is the property of Huellet Packard Company is that of Kekana. His testimony does not inspire confidence. His evidence as to the date on which the vehicle went missing is obviously incorrect while his identification marks of a dent, certain scratches and odd painted-over rectangular signs do not, with the necessary degree of certainty, establish the identity of the vehicle. The Magistrate's order cannot therefore stand.

It was for the above reasons that this Court, at the conclusion of the argument, made the following order:

- (1) The order confiscating the motor vehicle Combi E 20 be set aside.
- (2) The said vehicle remain in the possession of the police pending any action that may be instituted by Huellet Packard Company against Phefa Mokwena for the recovery of the said motor vehicle, which action is to be instituted within one month of the receipt of notification from

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the Registrar of the Court by means of a registered letter of this Court's order. Should Huellet Packard Company fail to institute such action within the period of one month aforesaid, the police shall return the vehicle to the possession of the said Mokwena.

for L. de V van Winsen
for name

L. de V van Winsen J.A.

I agree:

for name
I. A. MAISELS F.

I agree:

(Signature)
J.A. O'BRIEN QUINN C.J.