

**IN THE HIGH COURT OF SOUTH AFRICA  
(BOPHUTHATSWANA PROVINCIAL DIVISION)**

**CA 202/04**

In the matter between:

BERNARDO ANTONIO MONDLANE                      1<sup>ST</sup> APPELLANT

SELLO BIGONE TSUPING                              2<sup>ND</sup> APPELLANT

AND

THE STATE    RESPONDENT

CRIMINAL APPEAL

LANDMAN J & TLHAPI AJ

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REASONS

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TLHAPI AJ:

INTRODUCTION

[1] The Appellants were charged with the theft of a motor vehicle on the 22<sup>nd</sup> March 2000 at or near Formula One Hotel in the district of Germiston, Gauteng Province. They were found in possession of the said vehicle within the Bafokeng district North West Province and appeared before

the Regional Court sitting in Tlhabane. They were both convicted and sentenced on the 24<sup>th</sup> March 2003 to 10 year's imprisonment.

- [2] The Appellants sought leave to appeal against their conviction and sentences and the appeal came before Landman J and I on the 26<sup>th</sup> August 2005. In respect of the first Appellant the conviction and sentence was set aside and replaced with a conviction of contravening section 36 of the General Law Amendment Act 62 of 1955 and the sentence was altered. The conviction and sentence in respect of the second Appellant was set aside. It was intimated that reasons would follow. These are the reasons.

## FACTS

- [3] The facts are summarized as follows:

3.1 On the 11<sup>th</sup> May 2000 one Van Wyk a captain in the South African Police Services was investigating the theft of a Toyota Hilux Bakkie. Having received certain information of a sale of two Toyota bakkies, he drove towards the Alpha Romeo intersection in Brits and lay in wait next to the Excel Garage.

3.2 He noted the information received concerning the two Toyota bakkies and their registration numbers,

KNG475GP and HXH691GP. While waiting he noticed two white Toyota bakkies, travelling along the Rosslyn Road from the direction of Ga-Rankuwa. They came to a standstill just before the intersection and he observed the drivers of both vehicles alight to meet each other, they conversed with each other, shook hands and later returned to their respective vehicles and drove off; the first vehicle took a direction towards Rustenburg and the second vehicle turned towards Silkaatsnek. He followed the first mentioned vehicle which was travelling towards Rustenburg and summoned assistance from the Highway Patrol Division in Rustenburg.

3.3 On the same day, one Rich who was in the employ of the South African Police Services, attached to the Highway Patrol received a call from a Captain Van Wyk regarding a white Toyota Hi-Lux vehicle stolen in Bedfordview which he was following. Rich was requested to assist in stopping the vehicle and to apprehend the three occupants. At Phola Park near Bospoort Dam he came across the said vehicle and saw Van Wyk driving behind it in a Nissan Sentra.

3.4 The Toyota Hi-Lux was stopped and the occupants/suspects were arrested. While Van Wyk was talking with the three individuals, Rich noticed that

the one who occupied the middle seat could not speak English or Afrikaans and that he was probably a Shangaan or of Mozambican origin. The driver was Tswana speaking. Rich called the control room at Rustenburg and requested details of the vehicle to be checked. Nothing was picked up in respect of the number plate registration, however the chassis and engine numbers were circulated and they were positively confirmed as relating to a vehicle stolen at Germiston.

3.5 The first Appellant was the passenger seated in the middle, the second Appellant was the driver and one Kenneth Dirophelo was the passenger seated on the extreme left who claimed that he had been given a lift from Brits. Although he was initially detained as a suspect, he was not charged.

3.6 Van Wyk conducted a search of the person of the second Appellant and in the pocket of the leather jacket he was wearing, found information noted on paper giving details which suggested to him an intention to change the registration details of the vehicle he had stopped. The second Appellant was also in possession of a Nokia cellular phone, sums of money contained in his trouser pocket, in his purse and in the inside of his leather jacket all amounting to about

R7 000.00. On the person of the first Appellant he found a Nokia cell phone and a sum of R240.00. When the vehicle was searched he found two cell phone chargers and one battery; a blue envelope containing documents; a receipt book; a passport belonging to one Alberto Fransisco Nyamootche; a leather briefcase containing documents in respect of the first Appellant and a temporary identity document. These items were handed over to the Mooinooi police and registered under SAP 1398/2000.

3.7 Van Wyk was told that the vehicle belonged to the first Appellant and no documents pertaining to the vehicle were handed over to him. He realised that this Appellant was not conversant with the Afrikaans language and most of the conversation at the time of the arrest was between the second Appellant and himself.

3.8 Harris Lambrose testified that he was the owner of a Toyota Hi-Lux bakkie with registration number DKB775GP. His vehicle was stolen while parked on the premises of a hotel in Germiston on the 22<sup>nd</sup> March 2000. He reported the matter to the police at Bedfordview. The vehicle was recovered and he was summoned to identify it at Rustenburg Police Station. He took the original registration documents along. Although the disc and registration number had been changed it still retained the original chassis and engine numbers. He further identified the vehicle by other features. These facts were confirmed by Gouws the

investigating officer. The Appellants were not known to the owner and he had never offered the vehicle to anyone for sale. He had been compensated by his insurer who later took possession of the vehicle.

The investigating officer testified that the Appellants failed to give any explanation as to where the vehicle came from.

[4] The first Appellant testified that he bought the vehicle from one Phillip Ngomane for R47 000.00 and paid a deposit of R16 000.00 the balance of which was to be settled in monthly instalments of R1 500.00. He was arrested before the first instalment was due. The seller had given him photo copies of the relevant documents of the vehicle and proof of payment of the deposit and agreement of sale. He alleges that these documents were confiscated by the police on his arrest. He used to communicate with the seller telephonically and went to the seller's residence on several occasions but could not find him.

The first Appellant explained that the second Appellant had nothing to do with the purchase of the vehicle. He requested the latter to drive him to Pretoria to purchase a trailer. He requested the second Appellant to drive the vehicle because he had lost his driver's licence and identity document.

He also testified that none of the Police officers conversed with him during the arrest. They assaulted him, spoke in Afrikaans, a language he did not understand and there was no enquiry into the language he preferred at the

commencement of the trial. A Tsonga interpreter was only availed as at the time that he testified.

- [5] The second Appellant testified that the first Appellant was a long standing acquaintance who used to deliver beer at his place. He accompanied the first Appellant to Pretoria where he wished to purchase a trailer. On the way he was requested to take over the driving because the first Appellant alleged that he had lost his driver's licence and identity document. On their return along the Rosslyn Road he was stopped by a white man seeking directions to Krugersdorp. After driving off and near the dam at Kanana they were stopped by the Highway Patrol police.

The police assaulted him and confiscated more than R7 000.00 which he had in his possession and certain documentation. The first Appellant had informed him of his wish to purchase a vehicle and though he was not involved in the purchasing of the vehicle he had seen the first Appellant driving the vehicle a while before their arrest. He also testified that Van Wyk and the first Appellant communicated in Fanakalo.

## SUBMISSIONS

- [6] The appeal revolves around the following grounds:

Ad Conviction:

- 6.1 That the Magistrate had erred in finding that the State had proved the theft of the motor vehicle beyond a reasonable doubt. Further that the Magistrate erred in not finding that the said motor vehicle was the property or in the lawful possession of the true and real owner thereof.
- 6.2 That the Magistrate erred in denying the first Appellant the services, of a qualified Tsonga\Shangaan interpreter from the commencement of the proceedings.
- 6.3 The Magistrate erred in denying the Appellants' request for legal representation at a crucial stage of the trial when the State led the evidence of one Lambrose the alleged owner of the vehicle.
- 6.4 That the Magistrate erred in denying the defence the right to an order against the State to discover the entire contents of the relevant Police docket and especially those documents that bore proof of the sale transaction of the motor vehicle between the first Appellant and a certain Phillip Ngomane.



6.5 The Magistrate erred in not finding that the version of the Appellants with regard to their defence was not reasonably possibly true.

#### Ad Sentence

6.6 The Magistrate failed to take into account adequately the Appellants' personal circumstances.

6.7 The Magistrate overemphasized the seriousness of the offence and the interests of the community; he placed too much weight on the prevalence of the offence in his jurisdictional area; he erred in finding that such offence does not merit the imposition of a fine and or a suspended sentence and that imprisonment was the only appropriate sentence.

6.8 The Magistrate erred in overemphasizing the aspect of deterrence where no facts were placed before him indicating that the Appellants could be rehabilitated.

[7] The Respondent conceded that documents pertaining to the alleged sale of the vehicle had been seized by the Police who later failed to avail the documents to the Appellants for the preparation of their defence. The Appellants had not been given further particulars on the day that the trial commenced which had a bearing on the Appellants' right to a fair trial.

- [8] The Respondent stated that it could be argued that the first Appellant was not provided with the services of a Shona interpreter and also conceded that the Magistrate erred in insisting that the trial should proceed in the absence of an Attorney.
- [9] The Respondent contended that should this Court find that the Appellants were correctly convicted it should also find that the sentence was appropriate in the circumstance.

#### ISSUES RAISED

- [10] In as far as it is submitted that the court a quo denied Appellants crucial information contained in the docket it is important to have regard to the role played by the different legal representatives in this trial.

The Appellants were initially represented by Mr Nel who during the course of the trial indicated that it was not the content of the docket that he was interested in because these were availed to him. He used statements obtained from the docket during cross-examination of Van Wyk.

Van Wyk testified regarding the nature of the documents found during the search of the vehicle and he said that some documents related to the first Applicant and included a copy

of his identity document. The said documents were handed in with the possessions of the Appellants to the Police. These documents were not part of the case docket. Further no mention was made of any document that bore proof of purchase of the vehicle, neither was he cross-examined by Mr Nel on this aspect. It was also not disputed that one of the documents related to the identity document of the first Appellant.

After Mr Nel a Mr Steenkamp appeared on behalf of the accused. Again the issue of the content of the docket arose. The matter was postponed to give Mr Steenkamp the opportunity to consult with the Appellants and to obtain the information that he required to proceed. The court mentioned to him the importance of obtaining the documents that would prove purchase of the vehicle.

After Steenkamp came a Ms Jonker. She appeared when the investigating officer Gouws testified. She enquired about the documents which were listed on the SAP 13 and kept at the Mooinooi Police Station. He stated that he knew that there were certain items but that he had not appraised himself of the content thereof. It was never suggested to him that among the items were documents of relevance to the vehicle.

It is my view that the State was not relying on these items to

prove its case. If the defence required such information then they could have taken the initiative to obtain the required items from the Mooinooi Police Station. It should also be borne in mind that among such items was a sum of R7 000.00 found on the person of the second Appellant who should have taken interest to collect his belongings from the Police.

[11] The absence of legal representation for the accused during the testimony of Lambrose should be seen against the following background:

11.1 When the trial commenced the court was made aware that the complainant, Mr Lambrose immigrated to Greece and the investigating officer had problems in locating him. The State applied for a postponement to secure his attendance to which Mr Nel on behalf of the defence objected. The postponement was nevertheless granted. On the 5<sup>th</sup> July 2001 the complainant was present and Mr Nel did not attend but sent a certain Mr Mokoteng to proceed with the defence on his behalf. The accused declined his representation and demanded Mr Nel's presence. The matter was again postponed to the 7 August 2001. On this day Lambrose indicated that he was due back in Greece. Mr Nel made no appearance. Attempts were made to contact him and one Mr Van Vuuren gave indication to the State that he would attend but

gave no indication of the time; given the circumstances of the imminent departure to Greece of the complainant the State proceeded with the case.

Then a Mr Steenkamp arrived from Mr Van Vuuren's office after this witness had testified and when the court was already engaged in other matters. He informed the court that the first Appellant had phoned him on the morning of the 7 August 2001 to inform him that his legal representative had withdrawn from the matter. This information was never communicated to the court by the Appellants at the time that Lambrose took the stand.

It can therefore not be alleged in these circumstances that the accused were denied legal representation.

### THE LAW

[12] The question now is whether the evidence for the State proved the theft of the motor vehicle by the Appellants. In my view, the Magistrate misdirected himself in finding that the evidence proved beyond a reasonable doubt that both the Appellants were guilty of the theft of the motor vehicle. I find that the facts do prove an offence under section 36 of the General Law Amendment Act 62 of 1955, this being a competent verdict in respect of the charge of theft. The

evidence shows in my view the lack of a satisfactory explanation from the first Appellant of how he came into possession of the vehicle thereby creating a reasonable suspicion that the motor vehicle was stolen.

Section 36 of Act 62 of 1965 provides:

“Failure to give a satisfactory account of possession of goods:

Any person (i) found in possession of any goods. . . .(ii) in regard to which there is a reasonable suspicion that they have been stolen and (iii) is unable to give a satisfactory account of possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.” (My numbering)

In *Osman and Another v Attorney General of Transvaal* 1998 (1) SACR (TPD) 28 at 30 D-G, McCreath J says:

“The onus rests on the State to prove all three elements beyond a reasonable doubt. . . . There must be proved by the State an inability of the accused at the time of being found in possession of the goods which are reasonably suspected of having been stolen, to give a satisfactory account of possession.”

In *S v Khumalo* 1964 (1) SA 498 (N) it was emphasized that the State must prove that at all material times the accused was unable to give a satisfactory account of his possession. This extended from the time of being found in possession of the motor vehicle up to the conclusion of the trial.

[13] There is sufficient evidence to prove that the vehicle was

stolen:

13.1 Lambrose testified that his vehicle was stolen on the 22<sup>nd</sup> March 2000 on the premises of a Hotel he had booked into in Germiston. He was later called to identify his vehicle by the police in Rustenburg. He identified the vehicle by certain features and confirmed the chassis and engine registration numbers of the vehicle. The only changes were in the number plate registration and the disc.

13.2 Van Wyk went out to investigate the alleged theft. He came across the vehicle driven by the second Appellant and after he had stopped the vehicle he circulated the chassis and engine number and confirmed that the vehicle bearing these details tallied with those of a vehicle belonging to one Lambrose reported stolen in Germiston. This information was confirmed by one Mr Rich who also circulated these particulars and came back with the same results.

13.3 The details of the disc and number plate had been changed. Van Wyk testified that the details on the disc were not the deciding factor in determining whether or not a vehicle had been stolen. He also stated that it was possible that a new ignition had been installed and the fact that the vehicle had its own key did not take

the matter any further. Of importance was that the fact that the chassis and engine numbers had not been tempered with and that these numbers related to a vehicle reported stolen (my underlining).

- [14] In my view, a conviction in terms of section 36 of the abovementioned Act is therefore appropriate only in respect of the first Appellant. The second Appellant gave a satisfactory explanation of why he was in the company of the first Appellant and the reason why he drove the vehicle. I give the following reasons for arriving at this conclusion.

14.1 According to the first Appellant the said vehicle was purchased from a Phillip Ngomane for R47 000.00. He paid a deposit of R16 000.00 and that he was still obligated to pay the balance in monthly instalments of R1 500.00 per month. He had been given a document proving the purchase of the vehicle. He claimed that these documents were confiscated by Van Wyk. During his evidence Van Wyk in turn gave a clear description of the items retrieved from the Appellants as well as from the vehicle. These facts were at no stage disputed by the Appellants, neither was it put to him that among the documents described were the registration documents of the vehicle. The first Appellant had ample opportunity even before the trial was proceeded with to avail to the court information explaining why his version as to ownership or lawful possession should be believed. He could have



obtained fresh copies of the registration particulars of the vehicle from the registration authorities.

The first Appellant did not display any form of diligence in finding the seller. He was content with the fact that Phillip Ngomane could no longer be traced.

14.2 The second Appellant testified that he had been requested by the first Appellant to accompany him to Pretoria to purchase a trailer. The first Appellant had informed him that he had purchased a vehicle and that he had seen the first Appellant driving the said vehicle when delivering beer in the village. On their way to Pretoria the first Appellant requested him to drive the vehicle because he had lost his drivers licence and identity document. This was confirmed by the first Appellant.

[15] For the reasons stated above:

15.1 the conviction and sentence in respect of the first Appellant is set aside and replaced with a conviction of contravening Section 36 of the General Law Amendment Act 62 of 1955.

The sentence imposed upon the first appellant is altered to read:

“The accused is sentenced to four years imprisonment of which two years is suspended for five (5) years on condition the accused is not found guilty of a similar offence or any other offence involving dishonesty committed during the period of suspension.

The sentence is to run from the 24 day of March 2003”.

15.2 The conviction and sentence in respect of the second Appellant be and is hereby set aside.

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V V TLHAPI

ACTING JUDGE OF THE HIGH COURT

I agree

A A LANDMAN

JUDGE OF THE HIGH COURT

Date of Hearing	:	26 August 2005
Date of Reasons	:	27 October 2005

Appearances:

For the Appellants	:	Adv Mametsa
For the Respondent	:	Adv Khumalo