

IN THE HIGH COURT OF SWAZILAND

REVIEW CASE NO. 137/06

In the matter between:

REX

V

PHUMLANI MHLANGA

CORAM:

MATSEBULA J
MA MB AA J

JUDGEMENT

20th NOVEMBER, 2006

[1] The accused, a seventeen (17) year old male of eMvutjini area appeared before the Principal Magistrate on the 6th day of October, 2006 on a charge of contravening section 12 (1) as read with section 12 (2) of the Theft of Motor Vehicle Act number 16 of 1991 (hereinafter referred to as the Act). He was not represented and after his rights to be legally represented were explained to him, he informed the court that he would conduct his own defence.

[2] The charge against the accused alleged that the accused was guilty of "contravening section 12(1) as read with section 12(2) of the Theft of Motor Vehicle Act No. 16/1991 in that upon (or about) during the month of September 2006 and at (or near) LIVE MOTORS, Manzini... the said accused did wrongfully and unlawfully break into a motor vehicle with intent to steal and theft and did steal a car radio Sony silver brown in colour valued at E800.00, the property of or in he lawful possession of Nathi Nyamane" (the underlining or emphasis is mine).

[3] On being arraigned, he pleaded guilty. The plea was accepted by the crown; meaning that the crown led no evidence and he was found guilty as charged by the learned Principal Magistrate and sentenced to a term of 3 years of imprisonment of which 1 year was suspended for a period of 3 years on condition that the accused is not found guilty of an offence of which theft is an element, committed during the period of suspension.

[4] In mitigation, before sentence, the accused said the following:

"I am very sorry for what happened. I was tempted by the devil. The radio was recovered. The Motor Vehicle was not locked. I intended to sell the radio."

[5] A mere glance at the charge sheet herein reveals that the Crown's case was that the accused had contravened the relevant section of the Act by:

a) unlawfully breaking into a motor vehicle and with intent to steal, had in fact stolen a radio from that motor vehicle.

[6] The plea of guilty and the statement of the accused in mitigation confirmed and or established these facts.

[7] Section 12 of the Act provides that:

"12 (1) Any person who breaks into a Motor Vehicle with intent to steal commits an offence and is liable on conviction to a fine not exceeding five thousand Emalangenis or imprisonment not exceeding two years or both."

Subsection 12 (1) prohibits the mere breaking into a Motor vehicle with intent to steal. It does not deal with the theft of either the motor vehicle broken into or theft from the said vehicle. The theft and the breaking into the Motor vehicle with intent to steal are separate and distinct offences. The breaking into a motor vehicle with intent to steal is an offence akin to that of Housebreaking with intent to steal, without actually stealing anything. The Housebreaking is committed with intent to steal but nothing is stolen at the end. This view finds support in subsection 3 of section 12 which states that;

"[a] Sentence imposed in terms of subsection (1) shall be served independent of any other sentence that may be imposed for a theft from the vehicle or theft of the vehicle itself"

[8] From the foregoing, it is my considered judgement that the charge sheet as framed herein went beyond the strict perimeters of the

offence created by section 12(1). It charged or alleged not only the breaking into the motor vehicle with intent to steal, as prohibited by the said section, but also the theft of the radio from the motor vehicle.

[9] Whilst the theft of the radio from the motor vehicle following the breaking into the motor vehicle undoubtedly remains a crime under the common law, it is clearly not chargeable or indictable under section 12(1) of the Act. The accused could and should have been charged with the two offences separately; namely (a) The offence of breaking into the Motor vehicle with intent to steal in contravention of 12 (1) of the Act, and (b) the crime of theft (of the radio) at common law.

[10] The accused was not charged with theft, as such offence does not fall under section 12 (1) of the Act. He was, however, convicted and sentenced for both the theft of the radio and the breaking into the motor vehicle with intent to steal. The verdict says so because it says "guilty as charged"

[11] The general rule of our law is that an accused may not be convicted of any offence other than that with which he or she has been charged, unless such other offence is a competent verdict on the offence charged. My reading of the Act suggests that theft is not a competent verdict on a contravention of section 12 (1) of the Act. An accused may not competently be found guilty of theft "in contravention of section 12 (1) of the Act."

[12] The court **a quo** erred in this regard and the Crown Prosecutor was in error in framing the charge against the accused in the manner quoted above. It was not necessary in the circumstances to include the crime of theft (of the radio) on the charge for a contravention of the relevant section of the Act.

[13] I turn now to the issue of sentence. The court **a quo** sentenced the accused to a term of three years of imprisonment without the option of a fine. With all due respect to the learned Principal Magistrate, he again erred in this respect. The maximum sentence for a contravention of section 12 (1) of the act is "a fine not exceeding five

thousand Emalangeneni or imprisonment not exceeding two years or both", as quoted in paragraph 7 herein above.

[14] In casu, the accused pleaded guilty to, was convicted of and sentenced for unlawfully breaking into a motor vehicle with intent to steal and theft. The crime of theft was at the very least surplusage to the charge of contravening the relevant section and it clearly influenced the magistrate to impose the sentence he imposed on the accused.

[15] In view of the technical irregularity committed by the trial court; in combining two offences under one charge and also bearing in mind that the accused pleaded guilty to such "combined charge", the accused did not in my judgement suffer any injustice thereby and the crown is at large to charge him for the crime of theft of the radio should it be so minded.

[16] In the result I make the following orders :

1. The conviction of the accused for a contravention of section 12 (1) of the Theft of Motor vehicle Act, number 16 of 1991 with intent to steal **and theft of a radio** is set aside. Instead a verdict of guilty of breaking into a motor vehicle with intent to steal in contravention of section 12 (1) of the Act is returned or substituted.
2. The sentence of 3 years' imprisonment imposed on the accused by the trial magistrate is set aside.
3. The case is remitted to the trial Principal Magistrate to pass sentence anew in accordance with section 12 (1) of the Act.

MAMBA, AJ

I AGREE

MATSEBULA J