

# **IN THE HIGH COURT OF SWAZILAND**

**REVIEW CASE NO.72/08**

**In the matter between:**

**REX**

**VS**

**NCAMISO DLAMINI**

**CORAM**

**MAMBA J**

## **JUDGEMENT**

**21<sup>st</sup> October, 2008**

[1] The accused appeared before the Mbabane Senior Magistrate on a charge that alleged that he was guilty of

"contravening section 12(1) of the Theft of Motor Vehicle Act of 1991 (as amended) in that upon or about May 2008 and at near Ntabamhlophe [he]... did wrongfully unlawfully and intentionally break and enter into [a] motor vehicle, a white Toyota Tazz Registration No. SD 374 TG and steal some motor parts total valued at E9,889.00...the property of or in the lawful possession of Jerry Ndlovu and thus guilty of the offence."

[2] He was duly advised of his rights to be represented by an attorney of his choice if he had both the desire and the means to acquire such services, and he opted to conduct his own defence. His first appearance in court was on the 17<sup>th</sup> August, 2008 wherein he was remanded into custody. He was arraigned eight days later and he pleaded guilty to the charge and his plea was accepted by the crown. He was found guilty and sentenced to pay a fine of E2000.00 or to undergo a term of imprisonment for two years.

[3] From a reading of the charge sheet as stated in paragraph 1 above, the accused was charged with the offence of breaking into the relevant motor vehicle and stealing certain items therefrom, in contravention of Section 12(1) of the Theft of Motor Vehicles Act 16 of 1991 as amended (hereinafter referred to as the Act). That section 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 Emalangeni or imprisonment not exceeding two years or both."

This court had occasion, about 2 years ago to consider these provisions of the Act in the review case of **R v PHUMLANI MHLANGA** (case No. 137/06). The judgement was handed down on the 20<sup>th</sup> November, 2006. In that case the court stated as follows:

"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 even when 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... .

[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."

[4] These remarks apply in equal measure in the present case. I may also mention that section 339(1) of the Criminal Procedure and Evidence Act 67 of 1938 has no application in this case. This section governs the situation wherein the offence with which an accused is charged is an offence under more than one law, such as where it is an offence under the common law

and also under statute. It pertains to one offence only; that is criminalised by both the common law and statute law. The charge sheet under consideration in this case pertains to two offences improperly combined as one crime. I set out hereunder the provisions of the section in full:

"339(1) if an act or omission constitutes an offence under two or more statutes or is an offence against a statute and the common law, the offender shall, unless the contrary intention appears, be liable to be punished under either statute, or (as the case may be) under the statute or the common law, but shall not be liable to more than one punishment for the act or commission constituting such offence."

Section 12(3)(a) of the Act as quoted above puts this view beyond doubt.

[5] For the foregoing reasons, I make the following order:

- (a) The conviction of the Accused for a Contravention of section 12(1) of The Theft of Motor Vehicle Act 16 of 1991 (as amended) for breaking into a motor vehicle with intent to steal and theft is set aside and there is substituted in its stead a verdict of guilty of unlawfully breaking into a motor vehicle with intent to steal in contravention of Section 12(1) of the Act.
- (b) The sentence imposed by the trial Magistrate is set aside.
- (c) The case is remitted to the trial Magistrate to pass sentence anew in accordance with the verdict under (a) above. Thereafter, the court record is to be forwarded to the Registrar for review.

[6] The Registrar is required to forward a copy of this judgement and the **Phumlani Mhlanga** judgement to the Director of Public Prosecutions and to every Magistrate in our courts, trusting that such exercise will stave off similar cases coming before the courts in the future.

**MAMBA J**