

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**REVIEW CASE NO. 216/07**

**& 37/07**

**REX VS**

**SEBENELE KUNENE  
SIBUSISO MADA KHUMALO**

**CORAM**

**MAMBAJ**

**JUDGEMENT**

**October, 2009**

[1] There are two reviews involved in this judgment. In each of these cases the Accused appeared before a Magistrate in Manzini charged for a contravention of section 12(1) of the Motor Vehicle Act 16 of 1991 (as amended) (hereinafter referred to as the Act) in that the Accused did "wrongfully and unlawfully intentionally break into and steal from a motor vehicle" certain specified items.

[2] Both Accused were unrepresented and had their rights to legal representation explained to them on their first appearance. Each opted to conduct his own defence and tendered a plea of guilty to the charge.

[3] The Crown accepted the pleas tendered and offered no evidence in support of its case. Both Accused were found guilty as charged by the respective trial Magistrates and sentenced to varying sentences, which are of no moment for purposes of this review.

[4] Section 12(1) of the Act, (under which each of the Accused was charged) 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."**

[5] The afore-quoted section clearly does not pertain to or actual theft from a Motor Vehicle but rather the mere breaking into a Motor Vehicle with intent to steal. The actual theft itself is a different and separate crime altogether.

[6] The two charges referred to above in these reviews relate to both the crime of theft and the crime of breaking into a Motor Vehicle in contravention of section 12(1) of the Act. There is, however, no crime of theft "in contravention of section 12(1) of the Act." The mere breaking into a motor vehicle with the requisite intent is a stand-alone offence, cognisable under section 12(1) of the Act.

[7] This court had occasion to deal with a similar issue in the case of REX v PHUMLANI MHLANGA, Rev Case 137/06 (unreported and judgement delivered on 20<sup>th</sup> November, 2006). In that case the court stated that;

"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.

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.

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.

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".

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."

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.

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."

[8] Subject to what is said below, these remarks are apposite in these reviews. I do not believe that it would be proper and just to charge the Accused with the crimes of theft again for the Acts under consideration herein. The conclusion is inescapable that they were sentenced for both the breaking in and the theft, although technically the theft was not chargeable under section 12(1) of the Act. They have been punished for both crimes.

[9] That the Crown intended to prosecute the Accused under the Act is clear from the citation of the relevant section of the Act in both cases. It is however difficult to escape the conclusion that the trial court took into account for purposes of sentence the value of the property stolen; and in effect sentenced the Accused for the crime of theft as well.

[10] This conclusion is clearly different from that reached in Mhlanga's case (*supra*), but on reflection, I think the conclusion in the present case is to be preferred. The charge sheets as framed contained all the essential elements of both theft and a contravention of s 12 (1) of the Act. The gravamen of the charge against them was that each had broken into a motor vehicle with intent to steal and had also committed the crime of theft. The Accused were not prejudiced in their defence, moreso because they pleaded guilty.

[11] The court notes with concern the fact that whilst the judgement in **Phumlani Mhlanga** (*supra*) was handed down on the 20<sup>th</sup> November, 2006, it was not followed or applied in the cases under review. **Khumalo's** case was heard and finalized on

the 10<sup>th</sup> October, 2007 and **Kunene's** case was on the 7<sup>th</sup> May 2007. I shall assume that neither of the Magistrates who tried these two cases nor the prosecutors involved therein were aware of the judgement in **Mhlanga's** case (supra) when these cases were heard. This reinforces the need for all judgements of the Superior Courts to be made available to all Magistrates and all other immediate stakeholders in the administration of justice, as soon as these judgements have been delivered.

[12] In the circumstances it would be in the interests of justice that this court should split or disentangle the combined charge faced by the Accused herein into two constituent offences, that is to say, theft and contravention of s 12(1) of the Act and impose the sentence as that meted out by the court a quo on each count and order that the sentences must run concurrently on each case.

[13] In the result the following orders are made:

1. In case no 37/07, Mr Sibusiso Khumalo is sentenced to pay a fine of E2000.00 or to undergo a term of imprisonment for 3 years, on each count. These sentences are ordered to run concurrently.
2. In case no 216/07, Mr Sebenele Kunene is, on each count, ordered to pay a sum of E1000.00; in default of which to serve a term of imprisonment for 10 months. These sentences are to run concurrently.

**MAMBA J**