

IN THE SWAZILAND COURT OF APPEAL

In the matter between:

MNCEDISI MADI First Appellant

DAVID MTHOMBENI Second Appellant

XOLILE LUKHELE Third Appellant

and

REX

Respondent

KOTZÉ J.A.:-

This is an appeal against an order of the full bench of the High Court which dismissed an application for bail by the appellants pending their trial on the statutory charge of the theft of a motor vehicle in contravention of section 3(1) of the Theft of Motor Vehicles Act No 16 of 1991 (the Act). The basis of the High Court's decision was that the Non-Bailable Offences Order No 14 of 1993 (the Order) precluded the grant of bail involving an offence of the contravention of section 3(1) of the Act.

2

The relevant statutory provisions are as follows The order (which received the Royal assent on 18 August 1993) provides in section 3(i) that "notwithstanding any provision of any other law, a Court shall refuse to grant bail in any case involving any of the offences in the Schedule hereto."

"Court" is defined as the High Court or Magistrate's Court. The offences in the . Schedule are termed "Non-bailable offences". They are nine in number and include the three common law offences of murder, rape and robbery and certain statutory offences.

Section 3(ii) provides that

"The Minister (i.e. the Minister of Justice) may amend the Schedule from time to time."

In exercise of the powers conferred by section 3 of the Order the Minister by Legal Notice No 139 of 1994 declared

"The Schedule to the Non-Bailable Offences Order is hereby amended by adding the following 10.A contravention of Section 3(1) of the Theft of Motor Vehicle Act, 1991."

3

In their heads of argument the appellants raised a main submission and an alternative submission.

Crisply stated amend" in section 3(ii) of the Order should be restrictively interpreted as vesting the Minister with limited powers of legislation confined to the introduction of minor improvements, the correction of errors in the Schedule and that a power to add substantive provisions is not conferred.

The alternative submission is that the Act contains a specific provision as to bail, that it adequately provides for bail, is in conflict with the insertion provided by Legal Notice 139 and was by implication not intended ever to be inserted in the Schedule by way of amendment.

In argument before us Mr Fine, on behalf of the appellants, wisely refrained from pressing the main submission. Having regard to the far-reaching effect of the legislative power contained in section 3(ii) of the Order I consider it desirable briefly to deal with the meaning of the term "amend" in the sub-section. Although according to the Concise Oxford Dictionary the ordinary meanings of the term are "(a) to make minor improvements in a text ... (b) to correct an error or errors (c) to make better, improve", in legal terminology, the word has a wider meaning. A cogent and instructive discussion of the term is to be found in the "Right. Word at the Right Time" edited by Dr John Ellison Kahn (sv. emend). The relevant portion reads:

4

"To emend is far more restricted in meaning than to amend. To amend ... can have the general sense of 'to correct, or at least improve, by changing or adding to': to amend the second chapter. More specifically, it means 'to change or add to the wording of' (a parliamentary bill, for instance) ... an amendment is a change forward to a new and better state. Amendments often take the form of additions as well as corrections or alterations: the Amendments to the Constitution of the United States, for instance, include not just alterations to the original ... but also , additions to the original (such as the Bill of Rights)".

The American example is instructive: the original Constitution of the United States was characterised by a manifest weakness viz. the absence of a Bill of Rights. Soon after the Constitution was approved it was amended to include guarantees of private rights and personal liberties. These additions are specifically referred to as amendments. Presently there are in excess of twenty-four such amendments. In conformity with the above, "to add to" is, in my view, the meaning to be assigned to the word "amend" in section 3(ii) of the Order.

I now pass to the alternative submission on which Counsel took his stand. The provision relied on is section 18(1) which provides

5

"Where a person is charged with an offence under section 3 or 5 the amount of bail to be fixed by a Court shall not be less than half the value of the motor vehicle stolen.

The offences referred to in section 3 of the Act are (a) the theft of a motor vehicle and (b) the receiving of a motor vehicle knowing it to be stolen and those referred to in section 5 refer to other dealings in connection with motor vehicles. Basic to the alternative submission is the contention that the addition introduced by Legal Notice 139 is in conflict with section 18(1) of the Act. It is clear that the only impact of Legal Notice 139 is on the theft and receiving offences referred to in section 3 of the Act. The other offences referred to in the Act remain extant. A comparison between the substance of section 18(1) of the Act on one hand and the provisions of section 3 (ii) of the Order on the other hand reveals the flaw in this argument: Section 18(1), earlier in time than section 3 (ii) of the Order, determines a ceiling below which the quantum of bail may not be fixed- for the entire range of the section 3 and section 5 offences whereas the provisions of the Legal Notice is confined in its operation to the provisions of section 3(1) of the Act. Thus it is clear that the two provisions deal with different situations. The Legal Notice is not in conflict with section 18 of the Act. At best it renders nugatory section 13(1) of the Act.

6

Section 3(ii) of the Order vests the Minister with unlimited power to amend the Schedule to the Order. Any amendments or additions therefore become part and parcel of the Schedule. The extended list contained in the Schedule becomes vested with full legal force and effect "notwithstanding any provision of any other law" (emphasis added). The emphasised words are unlimited in their scope and in the view that I take of the matter envisage the conferment of unlimited legislative power to amend the Schedule by adding thereto. In the result I am of the opinion that the alternative submission also fails. The appeal is dismissed.

JUDGE OF APPEAL

I agree

7

I agree

I agree