CRI/A/50-51/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MPHO RAMONO — 1st Appellant
ABRAHAM RAPHUTHING — 2nd Appellant

V

R E X — Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Acting Mr. Justice M. Lehohla
on the 28th day of August, 1986.

On 4th August 1986 I made an order upholding the above appeals and stated that reasons would follow.

These do now follow. The appellants were charged with the crime of theft set out in the charge sheet in the following form: That the accused are charged with the offence of theft of motor vehicle in that on or about 23rd day of May 1985 and at or near Mafeteng urban area in the Mafeteng district, the said accused did wrongfully, unlawfully and intentionally steal the motor vehicle E.20 Registration No. H.0216 the property or in the lawful possession of Thabo Ntahe."

They pleaded not guilty and were convicted and sentenced to twelve months' imprisonment each. It is against such conviction and sentence that they are appealing. The facts adduced in evidence disclosed that both accused were employees of complainant. Complainant had failed to pay their monthly salaries for periods of

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four months in respect of appellant 1 and five months in respect of appellant 2 antecedent to the crime charged. Each was earning M150 salary per month.

Having been annoyed with their employer's failure to effect payment of their salaries despite several approaches to him and negotiations coupled with entreaties that he pay, they decided to take their employers motor vehicle; the type popularly known as the E20, and drive it away without his knowledge and permission in order to make enough money through using it for purposes of satisfying their claims against their employer.

They drove it from Mafeteng to Butha-Buthe where they gave a lift to P.W.1 one Paseka Makoa who had known them from Mafeteng. From Butha-Buthe they were bound for Mokhotlong where P.W.1 had some relatives whom he wanted to see. The three of them did a spell of driving the vehicle until they reached Butha-Buthe. The following day while busy conveying passengers and having temporarily stopped at a fare-stage were they rudely surprised when accused 1 was dealt a thumping blow with a quart bottle on the head by the complainant. P.W.1 ran away.

From the facts disclosed it seems to me that the offence committed, if any, by appellants is that of unauthorised borrowing.

In Regina v. Lesenyeho Motlatsi 1961-62 H.C.T.L.R. quoting with approval R. v. Sibiya 1955(4) SA. at 247 by Schreiner A.C.J., Watkin Williams C.J. re-iterated". I have come to the conclusion that the law requires for the crime of theft, not only that the thing should have been

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taken without belief that the owner (where it is the owner whose rights have been invaded) had consented or would have consented to the taking but also that the taker should have intended to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership. The intention may be inferred from evidence of various kinds and in particular from abandonment of the thing in circumstances showing recklessness as to what becomes of it."

In R. v Dier, 3 E.D.C. 436 Smith J. dealing with a case where the accused had been convicted of stealing two boats, which he had used for the purpose of crossing the Kowie River said at p. 438, (this appears in Schreiner A.J.C's judgment in S. v Sibiya supra) at 251)-

"I have come to the conclusion that both under the Colonial Law and under the English law there must be a taking with an intent to deprive the owner wholly of his property in order to constitute theft. In this case the accused took the boats merely for the purpose of making a temporary use of them, and without any intention whatever of permanently depriving their owners of them; or, in common parlance, he never intended to steal them. The act was wrongful, and a trespass for which the owner may maintain a civil action to recover damages for the injury sustained; but neither in law nor in common sense can it be called a crime. I do not intend by anything that I have said to lay down that - if a man takes away anything belonging to another and applies it to his own purposes, and then abandons it with a reckless disregard as to whether it is destroyed or not, and it is destroyed - such an act is not criminal. On

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the contrary, I am of opinion that a man so acting can clearly be found guilty of theft". (My underlining) See Mohale v Rex 1967-70 by Evans J. at pages 39-40.

It is significat that in reference to the words underlined i.e. "and it is destroyed" Schreiner A.C.J. says they are superfluous.

The Roman rule penalising furtum usus beyond the measure of the owner's actual loss was declared obsolete by the Roman Dutch Law.

Referring to R. v Fortuin B.A.C. 290 in R. v. Sibiya supra at 252 Schreiner A.C.J. summarised the facts briefly as follows:

> "The accused was travelling with a wagon and a span of oxen. One ox fell sick and the accused substituted for it an ox which he took from the veld. In the town to which he was travelling the ox was identified by its owner. The accused was charged in the magistrate's Court with theft of the ox and acquitted. He was at once charged again, this time with the theft of the use of the ox. He was convicted by the magistrate but, on the records coming up for review, the question was referred to the Court of Appeal, "Is the theft of the use of an ox a crime?" The Court unanimously answered the question in the negative."

It should thus be clear that furtum usus is authoritatively declared to be not a crime. What about its close cousin, the unauthorised borrowing? (My underlining).

In R. v. Sibiya supra at page 253 it has been laid down that the Court having considered whether conduct like Fortuin's amounted to a crime ....." It was undoubtedly accepted by the Court that taking of thing with the intention of returning it was not theft, though abandonment with reckless disregard of whether the

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owner recovered it or not would evidence an intention to deprive the owner of the whole benefit of his property and would suffice to establish theft." The answer to the case under consideration has been underlined.

The learned magistrate in the instant case has in his reasons for judgment taken issue with appellant's act of removing the mirror the number plates and the carrier from the vehicle and concluded that such removals geared at altering the identity of the object indicated that appellants meant "to steal the vehicle." It seems to me that the indications which the learned magistrate has properly pointed out would be of use in a case where the charge had been brought under section 345 of the C.P. & E. 1981 Act. In the instant case the existence of such indications does not derogate from the fact that appellant all the while intended returning the property to the owner as soon as their claims had been met.

It is important to be aware that the offence created by section 345 supra is not part of the Common Law offence of theft and that therefore where the Common Law theft fails to stand but facts or evidence adduced points to the existence of an offence under section 345 a conviction under the latter section cannot stand either; because an offence revealed under it where Common Law theft is charged is not a competent verdict or vice versa.

Removal of appendages to a vehicle such as the mirror, number plates and carrier do not constitute such damage or destruction as is envisaged by the expression repeatedly made in Sibiya above namely "abandonment of the

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thing unlawfully taken in such circumstances as show a reckless disregard as to what may become ot it," in order to ascribe theft to the appellants' act. Evidence was abounding to show that the unlawful taking was not coupled with an intention to terminate the owner's enjoyment of his rights. In any case when asked if the vehicle was still intact when it was recovered the complainant who was present when it was, said "It was still in the same condition as it was when it was in my possession before it disappeared." See S. v Coller 1970(1) SA. 417 and R. v. Mtaung 1942(4) SA. 120 overruled in Sibiya (supra)

It would thus be clear that the court a quo laboured under some misapprehension in basing its conclusion on absence of owner's consent in convicting the appellants. On the dictum of authorities consulted it would be safe to say in the circumstances of a case of this nature the absence of the owner's consent has no bearing on the matter.

It is noteworthy that the learned magistrate's fears are coincidental with those of the distinguished Lord Justice - Clerk Alness in Strathern vs Seaforth 1926 J.C. 100 (a Scottish case) involving Clandestine taking possession of a motor car well knowing that accused had not received permission from and that he would not have received it from the owner for so doing, and that he did drive and use the said motor car in the streets.

Lord Justice - Clerk Alness said even without authority he would have been convinced of the Criminality of the charge, his reason being that otherwise an article "may be taken from its owner, and may be retained for an

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indefinite time by the person who abstracts it and who may make profit out of the adventure, but that, if he intends ultimately to return it, no offence .... has been committed .. ... if that were so, in these days ..... when motor cars are openly parked in the public streets, the result would be not only lamentable but absurd." But Burnett and Alison have categorically stated that Scots Law does not recognise the furtum usus of Roman Law. The application of the rule laid down in Strathern vs. Seaforth may not be tested since taking and driving away motor vehicles without authority is now a statutory offence in that country.

A similar remedy in Lesotho is to be found in section 345 of the 1981 C.P.E. Act although needless to say authorities cited above show that the said Act came in the wake of a trail which had long been blazed as to what the correct position was and is in our law.

While I do appreciate that the occasional likelihood is not minimal for the unwary to march blindfold into the ancient trap I find it fitting to observe that despite the correct statement of law in Sibiya supra and subsequent authorities the former misconceptions still pose as perennial pitfalls.

It is therefore necessary to point out that the unlawful taking required in the Common Law theft should not be equated to the wrongful taking and using as visualised in the Roman Law furtum usus; for even under the Roman Law this fell under a class of delictual wrongs actionable against for instance bailies, pawnbrokers and their exclusive class. I hope this will help to avoid

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the unconscious invocation of the furtum usus doctrine whenever it rears its ugly head in the future.

Complainant has not gainsaid appellants' allegation that he owed them at least four months' salary. Not only has he failed to do so, but in my judgment had no reason to say their story is not true. It has been pointed out that unauthorised borrowing becomes theft immediately the intent to return the thing of another in the taker's control ceases and the taker changes his intention into an intention to terminate the owner's enjoyment of his rights. Theft of the thing commences at the monent of such change of intention. In Sibiya supra Van den Heever A.J. at page 258 says it is regarded "as theft instances where a non-owner already in possession of another's property fraudulently arrogates to himself the rights comprised in ownership."

Finally, complainant's failure to controvert appellants' story as to their intent to return the vehicle cannot be read as buttressing any contention that appellants meant to terminate complainant's ownership. On the contrary this failure lends credence to appellants' contention.

It was for the foregoing reasons that this appeal was allowed. I may add that the crown is in agreement with this result.

ACTING JUDGE.
28th August, 1986.

For the Appellants : Mr. Mda
For the Crown : Mr. Seholoholo.