

**In the Supreme Court of St. Helena**

**On review of the Magistrates' Court of St Helena**

**Citation: SHSC 23/2022**

**Criminal**

**Review pursuant to sections 261-262 of the Criminal Procedure Ordinance 1975**

**Attorney General**

**-v-**

**Clayton William Thomas**

**&**

**Cody Kyle O'Bey**

**Review dated 17<sup>th</sup> December 2022**

**The Chief Justice Rupert Jones**

1. On 6 December 2022 the Chief Magistrate made a ruling that the St Helena Magistrates' Court had no jurisdiction to hear the prosecution of the Defendants for an offence of aggravated vehicle taking charged under section 12A of the Theft Act 1968 of England and Wales - allowing themselves to be carried in a vehicle taken without the owner's consent or authority and damage being caused to the vehicle.
2. He ruled that neither offences under section 12 of the Theft Act 1968 (allowing oneself to be carried in a conveyance without the owner's consent or authority) nor section 12A apply to St Helena.
3. At the end of his ruling the Chief Magistrate referred the case to the Supreme Court so that, in the absence of any appeal by the Attorney General, the Chief Justice could conduct a review of the decision pursuant to section 261 of the Criminal Procedure Ordinance 1975. S.261(1) provides:

The Supreme Court may call for and examine the record of any criminal proceedings before the Magistrates' Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such court.

4. There has been no appeal against the ruling by the prosecution (the Attorney General) so, at the invitation of the Chief Magistrate, I have conducted such a review to satisfy myself as

the correctness of the order dismissing the charge against the Defendants and the finding that the offence did not apply to St Helena.

5. In addition to the Chief Magistrate’s ruling, I have been provided with the two sets of written submissions on behalf of the Defendants, the Court of Appeal’s judgment in *Sebastian Stroud* and the submissions on behalf of the prosecution (the Attorney General).

Outcome of the Review

6. In short, I am satisfied that there is no error of law in the Chief Magistrate’s ruling and the determination was correct. I also agree with the vast majority of his reasoning. Offences under section 12 and 12A of the Theft Act 1968 do not currently apply to St Helena. Thus, like the Chief Magistrate, I am satisfied that the charge against the Defendants under section 12A must be dismissed.

The charge against the Defendants

7. The facts are set out briefly in the Chief Magistrate’s ruling:

The defendants in this case are charged with knowing that a mechanically propelled vehicle had been taken without the consent of the owner or other lawful authority allowed themselves to be carried in or on the said vehicle, and after the vehicle was unlawfully taken and before it was recovered, damage was caused to the vehicle. This is an offence contrary to s.12A of the Theft Act 1968.

The relevant legislation of England and Wales

8. Sections 12 and 12A of the Theft Act 1968, as amended, are the statutory provisions which applied in England and Wales at the relevant time (the time of the alleged offence in St Helena) and still currently. The relevant subsections provide:

**S.12 Theft Act 1968**

(1) Subject to subsections (5) and (6) below, a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another’s use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it.

(2) A person guilty of an offence under subsection (1) above shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both.

(3) .....

(4)-(5).....

(6) A person does not commit an offence under this section by anything done in the belief that he has lawful authority to do it or that he would have the owner’s consent if the owner knew of his doing it and the circumstances of it.

(7) For purposes of this section—

(a) “conveyance” means any conveyance constructed or adapted for the carriage of a person or persons whether by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it, and “drive” shall be construed accordingly; and

(b) “owner”, in relation to a conveyance which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of the conveyance under that agreement.

[emphasis added]

### **S 12A Theft Act 1968**

(1) Subject to subsection (3) below, a person is guilty of aggravated taking of a vehicle if—

(a) he commits an offence under section 12(1) above (in this section referred to as a “basic offence”) in relation to a mechanically propelled vehicle; and

(b) it is proved that, at any time after the vehicle was unlawfully taken (whether by him or another) and before it was recovered, the vehicle was driven, or injury or damage was caused, in one or more of the circumstances set out in paragraphs (a) to (d) of subsection (2) below.

(2) The circumstances referred to in subsection (1)(b) above are—

(a) that the vehicle was driven dangerously on a road or other public place;

(b) that, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person;

(c) that, owing to the driving of the vehicle, an accident occurred by which damage was caused to any property, other than the vehicle;

(d) that damage was caused to the vehicle.

(3) A person is not guilty of an offence under this section if he proves that, as regards any such proven driving, injury or damage as is referred to in subsection (1)(b) above, either—

(a) the driving, accident or damage referred to in subsection (2) above occurred before he committed the basic offence; or

(b) he was neither in nor on nor in the immediate vicinity of the vehicle when that driving, accident or damage occurred.

(4) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or, if it is proved that, in circumstances falling within subsection (2)(b) above, the accident caused the death of the person concerned, [fourteen years]

(5) If a person who is charged with an offence under this section is found not guilty of that offence but it is proved that he committed a basic offence, he may be convicted of the basic offence.

(6) If by virtue of subsection (5) above a person is convicted of a basic offence before the Crown Court, that court shall have the same powers and duties as a magistrates’ court would have had on convicting him of such an offence.

(7) For the purposes of this section a vehicle is driven dangerously if—

(a) it is driven in a way which falls far below what would be expected of a competent and careful driver; and

(b) it would be obvious to a competent and careful driver that driving the vehicle in that way would be dangerous.

(8) For the purposes of this section a vehicle is recovered when it is restored to its owner or to other lawful possession or custody; and in this subsection “owner” has the same meaning as in section 12 above.

9. As the Chief Magistrate went on to note, correctly:

‘4. Section 12 of the Theft Act 1968 came into force [in England and Wales] on 1st January 1969 in a slightly simpler format but the basic offence read as follows: *Subject to subsections (5) and (6) below, a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it.*

5. This offence would have been in force in St Helena [from 1969 to 1985] as, I am advised by the AG, that there was no provision for similar offences in St Helena law at the time.....’

#### St Helena Legislation

10. As the prosecution rightly submitted, and the Chief Magistrate accepted, the section 12(1) offence under the Theft Act 1968 was, on its coming into force in England and Wales on 1<sup>st</sup> January 1969, also the law of Saint Helena at the time. This was by virtue section 25 of the Interpretation and General Law Ordinance 1895 of St Helena which was then in force - local law which applied the law of England and Wales to St Helena in many circumstances. The English Law (Application) Ordinance 1968 of St Helena, which provided for a similar effect, did not come into force until 2<sup>nd</sup> April 1970. This in turn was replaced by successor legislation and the 2005 Ordinance as will be addressed below.

11. In 1985 the St Helena legislature enacted a Road Traffic Ordinance which came into force on 1<sup>st</sup> October 1985. It originally penalised the offence of taking a motor vehicle without owner’s consent in section 38 but as a result of subsequent amendments (which have not altered the nature of offence in substance) it is now proscribed in section 53 of the Ordinance:

53. (1) A person who takes and drives away any motor vehicle without having the consent of the owner of it or other lawful authority commits an offence.

Penalty: A fine of £500 or imprisonment for 18 months, or both.

(2) A person who acts in the reasonable belief that he or she had lawful authority for the taking and driving away of a vehicle, or that the owner would, in the circumstances of the case have given consent, if the owner had been asked for it, is not liable to be convicted of an offence under subsection (1).

[emphasis added]

12. Both section 12(1) of the Theft Act 1968 and section 53(1) of the Road Traffic Ordinance 1985, as amended and currently in force, create an offence for a person knowingly taking and driving away a motor vehicle without the consent of the owner and

equivalent defences in 12(6) and 53(2) that the person had a reasonable belief in the lawful authority to do so or that they would have been given consent by the owner.

13. However, there are a number of differences in the offences created by the two sections (see for example, the different wording such as reference to a 'conveyance' as defined in section 12(7)(a) of the Act in contrast to a 'motor vehicle' in the Ordinance).
14. Other notable differences include that section 53(1) of the Ordinance provides for the greater penalty than section 12(1) of the Act currently does (a maximum sentence of 18 months imprisonment rather than 6 months). Section 12(1) of the Theft Act 1968 when originally enacted carried a far greater maximum sentence of three years imprisonment but section 37 of the Criminal Justice Act 1988, passed three years after 1985 Ordinance in St Helena, subsequently reduced this to the six month maximum currently in force in England and Wales.
15. Further, section 53(1) of the Ordinance only penalises one way of committing the offence: taking and driving away of vehicles that do not belong to a person (without the consent of the owner or other lawful authority) whereas section 12(1) of the Act provides three separate sub-offences: taking, driving or allowing to be carried.
16. It would be fair to characterise the offence under section 53(1) of the Ordinance as narrower in scope (the single way in which it can be committed and requirement that it involve a motor vehicle) than that of section 12(1) of the Act but now carrying a greater maximum punishment.
17. Thus, it is apparent that there is no (sub)offence of 'allowing oneself to be carried' in a vehicle or conveyance taken without consent under s.53(1) of the Ordinance whereas there is under section 12(1) Theft Act 1968.
18. Crucially, it is this form of predicate offence under section 12(1) of the Theft Act 1968 upon which the Defendants are charged under section 12A.
19. Section 12A of the Theft Act 1968 was inserted by the Aggravated Vehicle Taking Act 1992 and came into force in England on 1<sup>st</sup> April 1992. It is to be noted that section 12A offence of aggravated vehicle taking relies upon a predicate offence under section 12(1) to have been committed and does not create a free-standing offence. There is no offence similar, equivalent or identical to section 12A in the Road Traffic Ordinance 1985 or in any other St Helena legislation.
20. The St Helena legislature has subsequently enacted a Road Traffic Ordinance of 2016 which creates a new offence under section 76 which includes allowing oneself to be carried in a motor vehicle without the consent of an owner:

Taking motor vehicle without owner's consent

76. (1) Subject to subsection (2), every person who takes, drives away or allows himself or herself to be carried in any motor vehicle without having either the

consent of the owner of it or other lawful authority commits an offence. Penalty: A fine of £5,000 or imprisonment for 18 months, or both.

(2) Except for another offence under this Ordinance, a person does not commit an offence under subsection (1) if the person acted in the reasonable belief that he or she had lawful authority, or in the reasonable belief that the owner would, in the circumstances of the case have given consent, if he or she had been asked for it.

21. However, while the 2016 Ordinance seeks to introduce to St Helena the offence of allowing oneself to be carried in a motor vehicle without the consent of the owner, the Ordinance has not been brought into force. It does not have the force of law in St Helena as no commencement order has been issued by the Governor, as required under the Ordinance, so the only relevant offence under St Helena legislation remains that under section 53(1) of the Road Traffic Ordinance 1985.

#### The relationship between English and St Helena legislation

22. The reason it has been necessary to compare the St Helena legislation and the English legislation is because both may potentially apply to St Helena. I have already addressed earlier St Helena legislation that applied English law to St Helena in certain circumstances.

23. On 1<sup>st</sup> January 2006, the English Law (Application) Ordinance 2005 ('the 2005 Ordinance') came into force in St Helena. The relevant provisions read as follows:

2. In this Ordinance, "Adopted English Law" means:

- (a) the common law of England, including the rules of equity; and
- (b) the Acts of Parliament which are in force in England at the time of commencement of this Ordinance.

3. (1) Subject to subsection (2) and other provisions of this Ordinance, the Adopted English Law applies in St Helena.

(2) The Adopted English Law applies to St Helena only in so far as it is applicable and suitable to local circumstances, and subject to such modifications, adaptations, qualifications and exceptions as local circumstances render necessary.

4. The Adopted English Law applies to St Helena only insofar as it is not inconsistent with—

- (a) any enactment of the Parliament of the United Kingdom which extends to St Helena otherwise than by virtue of this Ordinance;
- (b) any Order of Her Majesty in Council which extends to St Helena otherwise than by virtue of this Ordinance; or
- (c) any provision made by or under any law enacted by a legislature in St Helena.

5. The Governor in Council may, by Order published in the Gazette, do any or all of the following:

(a) declare that any specified part of the Adopted English Law is not suitable to local circumstances; and that such part is accordingly excepted from the provisions of section 3 by subsection (2) of that section;

(b) direct that any part of the Adopted English Law is to have effect subject to any modifications specified in the Order;

(c) direct that any Act of Parliament which is not within section 2(b) is (subject to any modifications prescribed in the Order) to be in force in St Helena.

[Emphasis Added]

24. There have been no orders published by the Governor in Council for the purposes of section 5 of the 2005 Ordinance. Therefore, the effect of section 3(1) and 4(c) is that section 12 and 12A of the Theft Act 1968 apply to St Helena only insofar as they are not inconsistent with section 53 of the Road Traffic Ordinance 1985 (a provision under any law enacted by a legislature in St Helena).

The issue in the case

25. The issue in the case is whether sections 12(1) and 12A of the Theft Act 1968 are inconsistent with section 53(1) of the Road Traffic Ordinance 1985 such that they should not apply to St Helena by virtue of section 4(c) of the 2005 Ordinance.

The Prosecution's argument

26. The prosecution provided helpful and lengthy written submissions in this case submitting that the offence of allowing oneself to be carried in a vehicle taken without the owner's consent or without lawful authority under section 12(1) of the Theft Act 1968 applies to St Helena. It therefore also submits that the offence with which the Defendants are charged under section 12A applies to St Helena and the prosecution may proceed.

27. I set out below the concluding paragraphs of the prosecution's submission:

50. It is respectfully submitted that the correct approach is one that interferes with the Theft Act 1968 to a minimal extent faithfully requiring it to be applied:

a. 'only insofar as it is not inconsistent' with provision made by the St Helena legislature, and

b. that if it can be done it should be allowed that both provisions are reasonably construed so that both can be put into effect in as far as possible.

51. In applying such an approach it is suggested that the full relationship between the provisions can be seen, and can be characterised, as it stood in St Helena in 1985, as being:

a. A general rule whereby:

i. A person who takes a conveyance (whether a for conveyance by land sea or air), for his own or another's use, or knowing such has been taken allows himself to be carried in it, and in either case does so without the consent of the owner (or without the belief of lawful authority or prospective consent had the owner known of the circumstances) commits an offence.

ii. That such offence is triable on indictment with a sentence of imprisonment for three years.

iii. The section 12 offence is an alternative to a jury at trial of a section 1 Theft offence, and

iv. That a separate offence exists for a person who likewise takes a pedal cycle. The maximum penalty on summary conviction is £50; and

b. A specific rule, eclipsing the general rule only for:

i. drivers (c.f. persons being carried or driving a vehicle after the initial taking),

ii. of motor vehicles intended or adapted for use on roads (c.f. any conveyance except that controlled by a person not carried on it),

iii. where the same absence of owner's consent, other lawful authority, belief in such consent or belief in such prospective consent prevails,

and

iv. Where for such an offence there is only summary trial and sentence of five hundred pounds and, or, imprisonment for 18 months.

52. Seen in this light it is submitted that section 38 of the Road Traffic Ordinance did, on coming into force, fall to operate side-by side with the section 12 Theft Act offence in a relationship highly akin to that of a general rule (at section 1 2 Theft Act) and specific exception, or further provision, to the limits of the section 38 offence but no further.

#### *Subsequent changes to section 12 Theft Act 1968*

53. It is submitted that since 1985 there have been some three amendments to section 12 Theft Act 1968 but that neither affects the analysis of the application of the offence in St Helena as contended for in these submissions,

54. As an aside, it may be worth noting that the more substantial of these amendments carried three new subsections that have the effect of imposing a bar to prosecution for a 12(1) offence as relates to a mechanically propelled vehicle. Such bar requires the commencement of the prosecution within six months. Considering this addition, occasioned by section 37 of the Vehicles (Crime) Act 2001, in the context of the statutes it can be neatly summarised as having the in total the effect, in St Helena, of:

a. the general rules (as above),



- b. a specific rule for drivers of motor vehicles taken without owners consent in St Helena
- c. a further specific rule as to prosecution time limits as relates to mechanically propelled vehicles overall.

*Relevance of coming into force of section 12A Theft Act.*

55. As said above the offence at section 12A of the Theft Act fell to be adopted English Law within St Helena when the relevant date for application of such legislation was, in 1999, changed to encompass acts of parliament from time to time in force. That released St Helena from applying only the law as it was in England on 1st January 1987 but continued with the ability to subject such application to modifications, adaptations, qualifications and exemptions as local circumstances render necessary.

56. Section 12A of the Theft Act applies, in respect of mechanically propelled vehicles, an aggravated version of the offence attaching to the 'basic offence' of section 12(1) Theft Act 1968 where the circumstances presented additional public danger or damage to the vehicle taken.

57. In line with the above analysis, the circumstances of St Helena's law require that:  
a. The 12(1) offence exists generally in St Helena as far as concerns persons allowing themselves to be carried in vehicles taken without the owner's consent or subsequently driving such vehicles, and

b. The section 53 Road Traffic Ordinance offence exists specifically as concerns the drivers taking such vehicle.

As such a due modification or adaption envisaged by the English Law Application Ordinance would be to allow, for the purposes of section 12A Theft Act, for the basic offence to be considered to be either section 12(1) Theft Act 1968 or section 53 Road Traffic Ordinance as may be relevant. This approach would be consistent with that advanced above, and particularly in properly allowing the provision to apply in the absence of any express intention to the contrary and without being drawn into an improper exercise of guessing at the legislature's intent.

58. In the circumstances before the court, where both defendants are charged with allowing themselves to be carried in a vehicle taken without the owner's consent the aggravated form of the offence at section 12A will attach to the general rule for such persons that is the application section 12(1) Theft Act 1968, rather than the specific rule provided only for the drivers of such vehicles at section 53 of the Road Traffic Ordinance 1985.

*Conclusion*

59. For all the reasons above the Crown contends that section 12A Theft Act 1968 properly applies in St Helena.

Discussion and Analysis - Inconsistency for the purpose of section 4(c) of the 2005 Ordinance?

28. I agree with the Chief Magistrate that there is an inconsistency between section 53(1) of the 1985 Ordinance and section 12(1) of the 1968 Act, and consequently section 12A, and that in those circumstances the 1985 Ordinance prevails and the English offences do not apply to St Helena by virtue of section 4(c) of the 2005 Ordinance.

29. I begin by examining whether the (sub)offences of taking or driving a conveyance without consent under section 12(1) of the Act is inconsistent with section 53(1) of the Ordinance such that they do not apply to St Helena. I agree with the analysis and reasoning provided at those parts of paragraphs 9 and 10 of the Chief Magistrate's ruling set out below:

9. One issue for me to decide is whether s.12 of the Theft Act 1968 is inconsistent with any provision made by or under any law enacted by a legislature in St Helena, in this case s.53 of the Road Traffic Ordinance 1985. Offences contrary to s.12 of the Theft Act 1968 and that of s.53 of the Road Traffic Ordinance 1985 are both designed to address the same problem, namely taking cars that don't belong to the takers but where there is no theft. The St Helena legislature has taken upon itself the task for legislating for this type of offending and has done so by virtue of s.53 of the Road Traffic Ordinance 1985. The St Helena law uses differing wording than the offence that was in existence in St Helena at the time s.53 was passed, namely s.12 of the Theft Act 1968. St Helena therefore enacted its own legislation to address the problem of people taking cars without the owner's consent.

10. The next issue is that s.12 of the Theft Act 1968 creates 3 offences, that of taking a motor vehicle, that of driving a vehicle which has already been taken and that of allowing oneself to be carried in a vehicle so taken.

30. I am satisfied that there is a material inconsistency between that part of section 12(1) which creates the two (sub)offences of taking or driving a conveyance and section 53(1) which creates one offence of taking and driving a motor vehicle. For example, the English Act requires only taking or driving but the St Helena Ordinance requires both acts to have been performed. The English Act applies to a wide range of conveyances whereas the St Helena Ordinance applies only to motor vehicles. The St Helena Ordinance carries a far greater maximum penalty. These are material inconsistencies for the purpose of section 4(c) of the 2005 Ordinance: differences which give rise to divergent, contradictory requirements for the offences or sentences to be imposed. Therefore, section 53(1) of the 1985 Ordinance applies to St Helena but those parts of section 12(1) of the 1968 Act do not apply.

31. This much does not seem to be in dispute between the parties.

*Intention of the legislature*

32. However, I do not agree with the final reasoning at the end of paragraph 10 of the ruling: St Helena chose not to legislate for allowing oneself to be carried in or on a vehicle, that had been taken in breach of s.53 of the Road Traffic Ordinance 1985. Whether this was by error or design is not really a matter for this court. The

legislative intention at the time is not known and whether this would help me is a not clear. I simply have to interpret the law as it applies to St Helena.

33. Although the Chief Magistrate refers to St Helena choosing ‘not to legislate’, both the prosecution and the Chief Magistrate suggest that there is nothing explicit from which the intent of the legislature in enacting the 1985 Ordinance can be divined and the Court should not and does not need to engage in any speculation.
34. I do agree with the Chief Magistrate that it may not ultimately be necessary to divine the purpose of the legislature in 1985 and whether the lack of offence of ‘allowing to be carried’ was by design or not (given the legislature could but chose not to replicate the offences under section 12(1) of the Theft Act 1968). However, it is helpful, for the reasons set out below in relation to statutory construction, to attempt to understand the legislative intention behind the 1985 Ordinance.
35. I also agree that there is an absence of explanatory notes to the 1985 Ordinance or other legislative documents (such as a record of proceedings in the legislature equivalent to Hansard in the UK Parliament) explaining the purpose behind the offences created therein such that one cannot be absolutely certain as the legislature’s intent in limiting the terms of section 53(1) of the Ordinance compared to that of section 12 of the Act. It is not surprising that no offence equivalent to section 12A was contained in or contemplated by the 1985 Ordinance when this was only introduced some seven years later (in 1992) in England.
36. Nonetheless, in my view, it is reasonable to infer, and more likely than not, that the St Helena legislature in 1985 chose not to replicate the scope of section 12 of the Act in local legislation and this was its intent. Before the time it passed the 1985 Ordinance it had not legislated to address the mischief of this type of offending and simply relied on the application of section 12 of the Theft Act 1968 to St Helena for the prior 16 years. If its intention was for the scope of section 12 of the Act to continue to have force in St Helena, the legislature might simply have not enacted any equivalent offence in local law and relied upon the application of section 12 of the Act by virtue of the English Law (Application) Ordinance 1968 or it might have chosen to enact the wording of section 12 in identical terms within section 53 of the 1985 Ordinance. It did not do so.
37. Further, it appears a more than reasonable inference that there was a subsequent legislative intent to remedy the absence of an offence of ‘allowing to be carried’ in section 76 of the 2016 Ordinance (although this has not been brought into effect). This evidences a) a possible understanding that section 12(1) Theft Act 1968 did not apply in St Helena; but b) the legislature intended a new offence under section 76 to have effect from the time of enactment (although this intention has not been brought into law).

*Conclusion on whether section 12(1) offences of ‘taking or driving’ apply in St Helena*

38. In conclusion, I agree with paragraph 15 of the Chief Magistrate’s Ruling:  
15.I find that the part of s.12 of the Theft Act 1968 that applies to taking a vehicle does not apply to St Helena. It is inconsistent as the St Helena legislature has decided to legislate in a differing way to England for what is a very similar, if not almost identical,

offence. The circumstances that exist for taking and driving away and taking without consent are those that involve taking another's vehicle without consent for your own use.

39. In my view, the Chief Magistrate must be correct. The single offence of taking *and* driving a motor vehicle without consent under section 53(1) of the Ordinance is inconsistent with the offences of taking *or* driving a conveyance without consent under section 12(1) of the Act. As above, the St Helena legislation is inconsistent in the requirement for taking *and* driving before an offence is committed, providing for a different (higher) penalty and that it only applies to motor vehicles. There is no question that these are relevant inconsistencies for the purposes of section 4(c) of the 2005 Ordinance such that those parts of section 12(1) that creates (sub)offences of taking or driving do not apply to St Helena.

*The issue in dispute – whether the offence of allowing of oneself to be carried under section 12(1) of the 1968 Act is inconsistent with section 53(1) of the Ordinance*

40. I now turn to the crucial question of whether, notwithstanding that parts of section 12(1) (the (sub)offences of taking or driving) do not apply in St Helena, whether the (sub)offence of allowing oneself to be carried contrary to section 12(1) does nonetheless apply.
41. I agree with the Chief Magistrate's ultimate conclusion that such a (sub)offence under section 12(1) does not apply in St Helena. However, I do not agree with all of his reasoning. For example, at paragraph 11 of the Ruling he considers the possibility that this part of section 12(1) of the Act might apply in St Helena, although it would be unsatisfactory:
11. The situation may well be that the part of s.12(1) of the Theft Act 1968 that deals with allowing oneself to be carried applies to St Helena, but the part of that subsection that deals with taking the vehicle in the first place does not. On any view if that were the case the situation would be an unsatisfactory one, one that would be remedied by s.76 of the Road Traffic Ordinance 2016 which has been enacted but not brought into force.
42. I agree with the Chief Magistrate that there is no rule requiring the St Helena legislation to take an 'all or nothing' approach to a provision under English legislation. Therefore, part of section 12(1) of the Act might apply to St Helena while part does not (so long as this did not give rise to uncertainty, injustice or absurdity).
43. In principle, section 3(1) of the 2005 Ordinance might allow for part of a provision within an English Act to apply and part of it not to. Indeed, section 3(2) of the 2005 Ordinance contemplates flexibility when applying English legislation to St Helena – for example modifications and adaptations suitable for local circumstances.
44. However, this must also be balanced against the need for certainty – predictability and foreseeability – in statutory construction, the avoidance of absurdity or injustice and the need to take a narrow or strict approach, particularly when it comes to construing penal legislation (that which creates criminal offences).

*Meaning of an inconsistency*

45. The question arises of what constitutes an ‘inconsistency’ between St Helena and English legislation for the purposes of section 4 of the 2005 Ordinance (‘in so far as it is not inconsistent’).
46. The prosecution submits that the word ‘inconsistency’ must be construed narrowly but I disagree. In my view, inconsistencies do not simply arise where there are contradictions, divergences or dissimilarities in the wording, meanings, requirements or outcomes between provisions in English and St Helena legislation (in this case, criminal offences) that are otherwise similar. ‘Inconsistencies’ do not have to go so far as be classified as ‘irreconcilable differences’. ‘Inconsistencies’ may also include the omission to create the type of (sub)offence of allowing to be carried in a vehicle without consent under section 53(1) of the Ordinance. Any other interpretation might also cause uncertainty as to what parts of an English offence (or sub-offences) are to be applied and what parts are to be disapplied.
47. I am satisfied that the part of s.12(1) of the Theft Act 1968 that creates an offence of allowing oneself to be carried does not apply to St Helena because that part of section 12(1) is ‘inconsistent’ for the purposes of section 4(c) of the 2005 Ordinance with section 53(1) of the 1985 Ordinance where no such offence is created.
48. I am satisfied that this is the proper statutory construction for four reasons:
- a) The legislative intention behind the 1985 Ordinance;
  - b) The plain and ordinary construction of the language in the 1985 and 2005 Ordinances – the natural meaning;
  - c) The absurdity and injustice that any other interpretation would give rise to; and
  - d) The need to interpret penal legislation strictly, narrowly and to avoid uncertainty.

*Legislative intention as an aid to construction – the purpose of the provisions*

49. I have already addressed the legislative intention behind the 1985 Ordinance above. On balance, and even in the absence of the legislative documents, I am satisfied from the history and language of the English and St Helena legislation that it was not the intent of the St Helena legislature to provide for an offence of ‘allowing to be carried’ in enacting the 1985 Ordinance (and section 12(1) of the Theft Act 1968 was thereafter intended no longer to apply).
50. I am fortified in this conclusion by the fact that the legislature sought to fill this gap or omission by enacting section 76 of the 2016 Ordinance (however, it has not been brought into effect). The legislative intention to remedy this in the 2016 Ordinance has therefore not been brought into law.

*Plain and ordinary construction of the language*

51. I then turn to the ordinary and plain language of the 1985 and 2005 Ordinances – their natural meaning. There is no question but that no provision within the 1985 Ordinance (including section 53) creates the offence of ‘allowing to be carried’.

52. The question then arises as to what is meant by an ‘inconsistency’ for the purposes of section 4 of the 2005 Ordinance. An inconsistency includes a contradiction or dissimilarity where the language of the Ordinance and Act address the same objective or mischief (such as an offence) but do so in differing ways or with divergent outcomes. I have addressed the differences, contradictions and divergences between section 53(1) and section 12(1) above.
53. However, in my view, an inconsistency may also (but does not have to) arise through an absence or omission where both the English and St Helenian legislative provisions are otherwise directed to the same objective but one is silent on a certain aspect or element thereof. For example, when considering this legislation, a failure to create equivalent sub-offence of ‘allowing to be carried’ within section 53(1) to that in section 12(1) which gives rise to a dissimilarity in an otherwise materially similar offence. This is a material inconsistency.
54. Importantly, in this case the ‘inconsistency’ is limited to circumstances where a St Helena offence is created in local legislation and is otherwise directed to the same mischief as the English offence and covers part of the same offending but not the full extent (where the omission of the part or sub-offence is therefore significant) and where it can also be properly inferred that the St Helena legislation has had the opportunity to legislate to create a similar or identical offence to that already in existence in England and which previously applied in St Helena, but has specifically chosen not to legislate to create precisely the same offence, sub-offences or scope of the offence.
55. Ultimately, the question of what constitutes a material inconsistency between pieces of legislation, beyond merely a difference, is a matter of fact and degree. It will require a fact specific examination of all the circumstances of each case and the specific English and St Helenian legislation in question. Therefore, I do not seek to lay down any wider rules of general application. Sometimes an omission in St Helena legislation may not give rise to a material inconsistency with the English legislation. Each case will have to be decided on its own facts in light of the legislation (or common law) in question.
56. For example, the general and well-established principle and practice, consistent with section 3 of the 2005 Ordinance, remains that in the absence of any offence directed to a particular mischief within St Helena legislation, the English legislation will apply and a criminal offence in St Helena can be charged under an English Statute (or common law). It is clear that much of the time the prosecutor in St Helena (the Attorney General) will rely on English criminal offences where there is no relevant provision for an offence under St Helena legislation. This is rightly not viewed as giving rise to any ‘inconsistency’.
57. Therefore, I am satisfied that section 4(c) of the 2005 Ordinance does not allow St Helena to disapply the part of the offence under section 12(1) of the Act of taking or carrying but apply the part of the offence of ‘allowing to be carried’.

*Absurdity and injustice*

58. I next turn to the question of needing to avoid absurdity and injustice in construing legislation. I am satisfied that if I were to interpret section 12(1) as not inconsistent with St Helena's legislation and decide that the offence of 'allowing to be carried' applies in St Helena despite the terms of section 53(1) of the Ordinance, this would give rise to absurdity and injustice.

59. The Chief Magistrate arrived at the same conclusion, that the part of section 12(1) which creates the offence of 'allowing to be carried' does not apply to St Helena. He did so by a slightly different line of reasoning - relying upon fairness. He stated at [12]-[16]:

12. The circumstances that exist for these two defendants is similar to that in *Sebastian Stroud v The Crown* heard on 20th November 2002 before the St Helena Court of Appeal. In Mr Stroud's case however there was local legislation that was intentionally repealed and replaced with another Ordinance that did not cater for a set of circumstances that had existed in the repealed Ordinance. In these defendants' circumstances there was a piece of English legislation (s.12 Theft Act 1968) that was not disapplied to St Helena when s.53 of the Road Traffic Ordinance 1985 was brought into force.

13. The issue as I see it is whether the principles in *Stroud* extend to these defendants. Namely that as a matter of strict interpretation half of s.12(1) of the Theft Act 1968 applies to St Helena along with so much of the balance of that section as is relevant, and therefore by extension s.12A.

14. However my view is that the issue of fairness is one that must be relevant. If I find that the part of s.12 of the Theft Act 1968 that deals with actual taking cannot apply by virtue of the existence of s.53 of the Road Traffic Ordinance 1985 then it would be, to my mind, unfair to find that the part that deals with allowing oneself to be carried does apply. The unfairness arises especially as, if that were the case, there could be no aggravated offences for the taker but could be for the person allowing themselves to be carried, leaving the taker subject to a lesser maximum penalty than the passenger.

..

16. That being the case I find that as a matter of strict interpretation the part of s.12(1) that deals with allowing oneself to be carried can apply to St Helena but it would be unfair to allow it to do so applying the thrust of *Stroud v The Crown*. Using the phrase of Mr Justice Benson it would bolt up a hole that has arisen in local legislation. A hole that was filled in 2016 but not brought into force. Not only does that make application of s.12 unfair, and by extension s.12A, but the logical conclusion would be that takers cannot commit aggravated offence but the passengers and any subsequent drivers can. That state of affairs would likewise be patently unfair when, as has already been referred to, the maximum penalty for a driver might be lower than for a passenger.'

60. I agree with each of the Chief Magistrate's observations and reasons about the potential unfairness at [14]-[16] (and uncertainty) that any other interpretation would give rise to.

61. There are additional anomalies that he might have described. For example, on the prosecution's interpretation a person 'allowing themselves to be carried' would be subject to a maximum sentence of only six months imprisonment under section 12(1) of the Act whereas a person 'taking and driving' could be sentenced to a far greater sentence of 18 months imprisonment under section 53(1) of the Ordinance. Between 1985 and the amendment to section 12 of the Theft Act in 1988 the reverse anomaly would have applied (the passenger could have received three years imprisonment under section 12 as then enacted but the driver could only have received 18 months imprisonment under section 53 of the Ordinance).
62. Another anomaly is that a person who only takes or drives (one offence or the other) a vehicle without consent could not be prosecuted whatsoever in St Helena because section 53(1) requires both for an offence to be committed (and that part of section 12 of the Act is accepted to be inconsistent and not apply to St Helena).
63. Thus, I agree with the Chief Magistrate that it may be unjust to apply that part of section 12(1) to provide for allowing to be carried as an offence in St Helena. Strictly speaking, 'fairness' may not be the proper way to characterise this principle of statutory interpretation – the need to avoid absurdity and injustice is more apt. Although not fully expounded by the Court of Appeal (whose line of reasoning in *Stroud* the Chief Magistrate was simply following), relevant general principles of statutory interpretation include: construing the natural and ordinary meaning of the words in legislation – the text or language used; considering the context – the legislative intent and purpose of the legislation; and avoiding unjust or absurd results.
64. Therefore, for the reasons I have set out above, I am satisfied that the Chief Magistrate did not express himself as precisely as he might in concluding that the part of s.12(1) that creates an offence of 'allowing to be carried' can apply in St Helena but it would be unfair to allow it to do so.
65. The conclusion is better expressed this way. The offence of allowing to be carried under section 12(1) of the 1968 Act does not apply to St Helena because as a matter of statutory construction, it is inconsistent with section 53(1) of the 1985 Ordinance for the purposes of section 4(c) of the 2005 Ordinance.
66. In construing the Ordinances, I have already taken into account a) the legislative intent behind the 2005 Ordinance; b) the meaning of an inconsistency and its application to section 12(1) of the Act and s. 53 of the 1985 Ordinance; and c) the absurdity and injustice that any other interpretation would give rise to.

*Narrow or Strict approach to interpreting penal legislation – avoiding uncertainty*

67. The final aid to statutory construction is the need for a strict or narrow construction of a penal statute (for example, one that creates a criminal offence) and which avoids uncertainty. I am satisfied that the above analysis is consistent with a strict and narrow construction of section 53(1) of the 2008 Ordinance and avoids any uncertainty in the



application of the criminal law (which should be foreseeable and accessible to members of the public).

68. Therefore, for all the reasons set out above, I am satisfied that there is an inconsistency between section 12(1) of the Act and 53(1) of the Ordinance and the English law, the English offence of ‘allowing oneself to be carried’ in section 12(1) does not apply in St Helena. This accords with a) the legislative intent of the St Helena legislature; b) the ordinary and natural meaning of the language in section 53(1) of the 1985 Ordinance and section 4(c) of the 2005 Ordinance; c) the need to avoid absurdity and injustice in statutory construction; and d) the need to construe penal statutes strictly or narrowly and so as to avoid uncertainty.
69. In the circumstances where section 12(1) of the Theft Act 1968 does not apply whatsoever to St Helena then neither can section 12A apply to St Helena because the aggravated vehicle taking offence is wholly predicated on an offence under section 12(1) being committed and does not create any free-standing offence which could apply to St Helena independently.
70. I therefore agree that the Magistrates’ Court has no jurisdiction to hear the charges against the Defendants under section 12A of the Theft Act 1968 as they are charged under legislation that does not apply to St Helena. The charge must be dismissed.
71. I wish to commend the quality of the arguments made both by the prosecution and lay advocates on behalf of the Defendants in this case whose written submissions I have read and considered. Out of respect for the work of the lay advocates and for the assistance they might give in future cases, I have reproduced extracts from their arguments in the Appendix below.

Rupert Jones, The Chief Justice  
17<sup>th</sup> December 2022

## Appendix 1

1. Should S12(1) to be “in force” on St Helena, this would on the face of it result in the same offence being legislated for twice.
2. Furthermore, to introduce S12(1) and more specifically the 2<sup>nd</sup> offence contained therein of “allowing to be carried” would be contrary to the clear intentions of the St Helena Legislature. It is submitted that it would be fair to conclude that in 1985 when considering the introduction of the Offence of Taking a Motor Vehicle without owner’s consent offence the Legislature had reference to the S12(1) of the Theft Act 1968; enacting as they did some 17 years after the creation of the offence in England & Wales a single offence of “driving”. Arguably the omission was intentional. In the alternative, should the Court be satisfied that the omission was not intentional, we respectfully refer to the Court of Appeal decision of **Sebastian Stroud -v-Crown Appeal No2 2/2001** is supportive of the Defendants submission. This Court of Appeal decision supports the submission that where the Legislature has departed from an offence in England & Wales law, it is not a matter for the Court to “bolt up a hole” on St Helena with reference to English legislation.
3. In Sebastian Stroud the Court of Appeal were asked to determine whether or not the Crown could proceed against a person using the English Telecommunications Act 1984. The Appellant in this matter having argued that St Helena having legislated for “indecent calls” in S40 of the Telecommunications Ordinance 1989 , the Crown could not therefore use S43 of the Telecommunications Act 1984 (which contained similar provisions for misuse of the telecommunications system).The English offence contemplated a one off situation, the St Helena law anticipated more than one (persistently).
4. Mr Justice Benson, (line 12 page 2)  
*“Now it seems to me, the courts are concerned with above all else, fairness and it seems to me to be profoundly unfair that due to an error on the part of those responsible for drafting the local legislation a particular type of offence namely a one off menacing phone call was left out of the Ordinance, as a consequence of that messy omission, resort is made to the 1984 Telecommunications Act....in the spirit of fairness I take the view that it would be wrong ...to as it were bolt up a hole that had arisen in the local legislation [and] until such time as the local Ordinance has been changed and one off events are included in it, recourse should not be had to the English Legislation”*
5. Mr Justice Appleby in the Court of Appeal President adding (line 3 page3)  
*“ In my judgment we are not the right vehicle to correct an omission.....This is more appropriately done in my view by the legislature on this island and not by us”*
6. This approach was restated by Mr Justice Woodward QC in his judgment in Larry Francis -v- AG No1 2008 (at page 24 para48 attached Judgements)-  
  
*“The power of the Court in identifying the relevant legislation is not to alter it or interfere with its essential nature or to produce a result contrary to the clear intentions of the legislature or to the express wording of the statute”*

His Lordship adds that “*it is important that the law should, so far as can be, be clear and certain. The Courts role is to declare and, so far as possible, without doing violence to the intention of the statute and its provisions, to endeavour to make the Statute work without in effect legislating. In so doing it is not the Courts task to re-write legislation*”

7. It is further worth noting in relation to offences of “Taking without Consent” the local legislature has indeed taken action and corrected the omission in the enacted, but yet to come into force, Road Traffic Ordinance 2016 where S76 provides for the two separate offences of driving and allowing to be carried.
8. It follows then that once S76 of the Road Traffic Ordinance 2016 is in force then S12A of the Theft Act 1968 will properly apply to offences of allowing to be carried and until that time we respectfully submit that S12A Theft Act 2022 cannot apply to St Helena as there is not yet in force the necessary “basic offence” of allowing to be carried.

### **Crown’s Argument – No Inconsistency with Local Law**

9. The Crown advance 3 distinct arguments- the first of which is that there is no inconsistency between the two pieces of legislation and in so finding then S12 must apply to Motor vehicles on St Helena.
  - (a) The Crown argue that the enactment of S53 (reference is made to S38 which may be an earlier section numbering for this provision) Road Traffic Ordinance 1985 did not displace the application of S12 of the Theft Act 1968 as the local law does not create an inconsistency with the English legislation on the subject.
  - (b) To support this contention the Crown sets out a table of comparison at para 38 of its submissions. Thereafter the Crown undertakes an exercise in determining whether or not the different language used in each piece of legislation counts towards their argument of consistency. Concluding at 43(b) that “*it is not at all clear that different language intended a different meaning as far as the taking of a motor vehicle is concerned.*” – In other-words there is no inconsistency?
  - (c) What the Crown does not address is the inconsistency with the provision of each legislation on the question of sentence upon conviction. The English law provides for a maximum of 3 years imprisonment and the local legislation provides for only 18 months. Not only does the difference in sentence create an inconsistency for the offence for the driving offence (TWOC) but an even greater inconsistency arises for the offence of “allowing to be carried”. Were it to be accepted that S12 only applies to St Helena for the “second” offence of allowing to be carried then arguably a defendant who is the driver faces a lighter sentence than a passenger in the same vehicle. This cannot have been the intention of the St Helena legislature when enacting the provisions in the Road Traffic Ordinance 1985.
  - (d) We submit that the correct interpretation of whether a law is inconsistent with local legislation is that where there is a local law on a particular subject then this local law creates an inconsistency *per se*. If this is correct, then S12 Theft Act 1968 is inconsistent with local legislation when dealing with the subject of Taking a Motor Vehicle Without Consent and cannot therefore be considered law on St Helena on that particular subject.
  - (e) As an addition point but not one that turns on the facts, S12 would also not apply to the taking of a vessel at sea without the owner’s consent. There being local legislation covering this offence (see S17 Ports Ordinance 2016). It could be

argued that S12 still applies in relation to conveyances that are not Motor Vehicles or Vessels such as Airplanes. However, the applicability of S12 to Motor Vehicles and Vessels is inconsistent with local legislation. It is submitted that any prosecution for taking a motor vehicle or vessel without consent must use local laws.

### **Crown's Argument - Legislative Intention**

10. A further argument for the Crown looks to address the question of legislative intention. Namely that in the absence of a disapplication Order or law- S12 must apply. (Para 44)
11. To support their argument the Crown turns to the words of Coke in 1614 suggesting that repeal by implication has no place in legislative interpretation. This is of course correct however it is respectfully submitted that there is a difference between interpreting the actions of a legislative body enacting multiple laws in their own jurisdiction (where repeal and saving provisions within the Act is expected) and the position on St Helena when dealing with laws that are applicable only through the provisions of the English Application Ordinance rather than through local enactments.
12. Where local legislation is enacted, there is a clear Government intention that local laws will take precedence over English laws. An example must be The Marriage Ordinance 2017. This Ordinance sets out the law on the subject of marriage on St Helena without the need to specifically disapply the English law on marriage provided for by The Marriage Act 1949. Using the same example and returning to the Crown's point on inconsistency- the English Marriage Act 1949 is inconsistent with local legislation not through a careful analysis of each provision but rather by the very fact that there is local legislation on the subject.
13. A further spin on the argument of intention advanced is set out in para 49 of the Crown's submission namely that having failed to make "allowing to be carried" an offence under S53 RTO the Court should accept that it was the implied intention of the Legislature to preserve the second offence under S12 Theft Act even though this is not expressly set out by the Legislature.
14. To this argument we ask the Court to consider our submissions served on the 3 November 2022 on the risks of the Court stepping into the role of the legislature to fill a lacuna in the local law and the Court of Appeal Judgment of Stroud set out therein.

### **Crown's Argument – General Law vs Specific Law**

15. A third heading of argument by the Crown is on of general law and specific law. That s12 and s53 operate side by side and in so doing the Crown contends that apart from the specific offence provided for in S53 RTO (and we presume S17 of the Ports Ordinance) the Crown can prosecute for the general offences not otherwise provided for in local legislation contained in S12.
16. Again, we respectfully submit that this argument ignores the clear and over-riding principle that St Helena law makers, when legislating on this subject and this type of offending have determined what the law will be on St Helena on that particular subject. The variance in sentence upon conviction demonstrates that they reviewed the English legislation and took

from it what they regarded as necessary for island life and in so doing did not adopt the English legislation in its entirety including the establish sentencing framework for S12.

17. From this the better argument must be that it was their intention to not follow the law as it was in England in 1985 on the subject. The “specific offending” addressed by S53 is offences of Taking a Motor Vehicle Without Consent, which we submit intended to cover all manner of offending within this subject. S53 amounts to a definitive guide to what the law is on the subject in St Helena.
18. Any efforts by the Court to follow the “general rule” argument for the purpose of filling a legislative lacuna is, we respectfully submit stepping into the role of the Legislature. Something that the Law Lords in Stroud ruled would be unfair and not the purpose of this Court.
19. Finally at their conclusion the Crown submits that S12A applies to St. Helena. It may be a small point but the issue is not the applicability of S12A but whether or not there is a “basic offence” as referred to in S12A of allowing to be carried in a motor vehicle on St Helena. We submit that the Crown have failed in their submissions to establish that there is a basic offence of “allowing to be carried” in a motor vehicle on St Helena and consequently regardless of S12A’s applicability to S53 RTO offence and to S17 Ports Ordinance Offences it cannot apply to an offence that does not exist on St Helena.