IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO: 08/2011**

In the matter between:

VUSUMUZI MALINGA **1st APPELLANT**

SIPHO MNTJALI **2nd APPELLANT**

AND

THE KING **RESPONDENT**

CORAM: **SEY, J**
FOR THE CROWN **MR. S. FAKUDZE**
FOR THE APPELLANTS **MR. LEO GAMA**

J U D G M E N T

04 JULY 2011

SEYJ.

[1] The appellants were charged together with four others for contravening **Section 12 (1) (a) of the Pharmacy Act 38 of 1929 (as amended).** They were all found in unlawful possession of 147.2 kg of compressed dagga, a

potentially harmful drug. The dagga was discovered inside two motor vehicles driven by 1st and 2nd Appellants respectively. The Appellants were convicted and sentenced to a fine of E6000 or in default of payment thereof imprisonment for a period of six (6) years.

[2] After pronouncing the sentence, the learned Magistrate went on to state at page 20 of the records as follows:

> ***"Before the matter commenced trial, an application was brought before me unsupported by affidavit in terms of Section 52 of the Criminal Procedure and Evidence Act 67/1938 as amended for the detention of both Exhibit '1 'andExhibit '2 'as well as the two motor vehicles belonging to Accused No. 5 and 6.***
>
> ***It is hereby ordered that Exhibit 1 and 2 be destroyed through incineration under the supervision of the Nhlangano Station Commander or anyone delegated by him.***
>
> ***The two motor vehicles ably described in the aforementioned order for detention are hereby ordered to be forfeited to the State. " (Underlining mine)***

[3] It is only against the forfeiture order that the appellants have noted an appeal.

[4] Although the learned Magistrate did not state under which law he issued the order, one may safely assume that the order was issued in terms of **Section 12 (3) (b) of the Pharmacy**

Act which provides as follows:

> ***"the court convicting a person under this section may order to be forfeited to the Government, any motor vehicle, conveyance, receptacle or thing which is used for the purpose of or in connection with the contravention of this section ".***

[5] It is apparent from the afore mentioned section that the Court has a discretion to make a forfeiture order. However, such discretion must be exercised judiciously and the accused must be given a fair hearing in relation to the question of forfeiture.

[6] In **R v Dedekind 1960 (4) SA 263,** the Full Bench of the Transvaal Provincial Division held that an accused person ought to be given an opportunity to address the Court in connection with an application for forfeiture of a vehicle with the audi alteram partem principle. They also held that, although it was desirable in certain cases to give an accused notice that such an application was going to be made, that was not obligatory, but before the order is made the Magistrate must first consider whether the probability exists that the vehicle might again be used by the accused for illegal purposes.

[7] The appellants' counsel has argued that the learned Magistrate did not have sufficient evidence on which to form an opinion as to whether the motor vehicles, if not forfeited, would be used for the possession of dagga. Counsel also contended that the said motor vehicles were only incidentally used for the possession of the dagga, and therefore it was not proper for he trial court to order forfeiture.

[8] Counsel further submitted that the learned Magistrate did not judiciously apply his mind to the question of forfeiture and that he seemed to have wrongly taken the position that upon convicting the appellants he was obliged to make the forfeiture order. In support of his argument, counsel cited the case of **R V SAMUEL 1958 (4) SA 314** where the Court, amongst other things, stated that in considering the question of forfeiture the Court must consider whether the motor vehicle was incidentally or dominantly used for the purpose of and in connection with the commission of the offence.

[9] In the more recent case of the ***National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*** **2004 (2) SACR 208 (SCA)** it was held that where a forfeiture order is sought, the Court undertakes a two-stage enquiry. First, it ascertains whether the property in issue was an instrumentality of an offence. Once that has been confirmed the property is liable to forfeiture and the Court then proceeds to the second stage of the enquiry, viz, whether

certain interests in the property would be excluded from the operation of the forfeiture order.

[10] In interpreting the term "instrumentality", the Court held that "the connection must be such that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In real or substantial senses the property must facilitate or make possible the commission of the offence."

[12] It is worthy of note that the respondent's counsel has conceded all the points raised by the appellants' counsel. However, where both counsel are at variance is as to what should be the outcome of this appeal. Mr. Leo Gama's argument is that not only did the trial court not grant the appellants the opportunity to address it on the forfeiture, but it also failed to exercise its discretion judiciously and thus the order should be set aside and the appeal

allowed. On the other hand, Mr. Fakudze strenously argued that this Court should remit the case back to the learned Magistrate for him to follow the correct procedure.

[14] Judging from all the circumstances of this present case, it does not appear that any such procedure was followed. I have perused the record before me but there is nothing therein to show that any opportunity was afforded the accused persons, who were unrepresented, to argue the question as to whether or not the two motor vehicles with registration numbers SD 970 KN and SD 677 FN should be forfeited to the State.

[15] In this regard, I am of the considered view that the Court ***a quo*** erred in not applying its mind to the circumstances under which the appellants were found in possession of the dagga before issuing the order for forfeiture of the two motor vehicles. The learned Magistrate should have undertaken the enquiry and the appellants should have been specifically asked to address the Court in relation to the question of forfeiture.

[16] I would add that it might be advisable that in cases under the Pharmacy Act, when the Crown intends to apply for an order of forfeiture of a motor vehicle, it should give the accused adequate notice thereof in the charge sheet. This could be done by adding words to the following effect: ***"in the event of a conviction, application will be made on behalf of the Crown under Section 12 (3) (b) of the Pharmacy Act for the forfeiture to the Crown of motor vehicle registration "***

> This would not only take away the element of surprise for accused persons, particularly those who are unrepresented, but it would also ensure that the Court adheres to the principle of audi alterem partem before making any forfeiture orders.

[17] On the issue of the exercise of a Court's discretion, suffice it to say that I am mindful of the fact that Appellate Courts are invariably slow to interfere with the lower Court's exercise of discretion but may do so if the discretion is exercised on the wrong basis. In this present case, I am of the firm view that since the Magistrate did not have sufficient material before him to form an

opinion on the question of forfeiture, he failed to exercise his discretion judiciously.

[18] I have examined the cases that were urged upon me and I must state that it is inexorably clear that in all the cases where the appellant had not been given an opportunity of arguing the question as to whether or not there should have been a confiscation, the said forfeiture orders were set aside. See **R V Mchunu 1961 (1) SA 101; Amos Gama & Others v R 1982-1986 LR at page 53.**

[19] In the final analysis therefore, it is my considered opinion that the order of forfeiture ought not to stand. In the circumstances the appeal against the forfeiture order is hereby allowed**.**

M M ***SEY(MRS)***

JUDGE OF THE HIGH COURT