



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE

Review Case No. 33/13

In the matter between

REX

and

**SIBUSISO SIBIYA
SIBUSISO KHUZWAYO**

Neutral citation: *Rex v Sibusiso Sibiya & Another* (33/13) [2014] SZHC
05 (6th February 2014)

Coram: Mamba J

Considered: **6 February, 2014**

Delivered: **6 February 2014**

- [1] Criminal law and Procedure – court convicting accused of possession of dagga and ordering motor vehicle in which dagga was found forfeited to the State. Such order irregular for lack of a proper enquiry before it was made.
- [2] Criminal law and Procedure – after making forfeiture order, court reversing that order on the application of the owner of the motor vehicle and releasing motor vehicle to him. Court had no power to reverse or recall its own final forfeiture order. On review, forfeiture order set aside and release of the motor vehicle to its registered owner confirmed.

- [1] The two accused persons herein appeared before the Pigg's Peak Magistrate's court on 03 July, 2013 on a charge of being found in unlawful possession of 17kg of dagga in contravention of section 12(1)(a) of the Pharmacy Act 37 of 1929. The first accused also faced a charge of contravening section 14(2)(c) of the Immigration Act 17 of 1982 (as amended). The crown alleged that he was a citizen of the Republic of South Africa but had unlawfully remained in Swaziland without the necessary documents permitting him to do so.
- [2] The charge sheet alleged in count one that the dagga was found in the possession of the accused whilst they were driving or they were the occupants of a Ford motor vehicle with registration number HXN 238 GP. In essence, the crown alleged that the dagga in question was being conveyed in the said motor vehicle. The first accused pleaded guilty to the second count and not guilty on the first count, whilst the second accused pleaded guilty on the first count.

- [3] The crown led the evidence of 3745 Constable Bheki Lushaba in support of its case. The evidence led by the crown established to the satisfaction of the court that the second accused was guilty of the crime of being found in unlawful possession of dagga and that he was the driver of the motor vehicle in question.
- [4] After passing sentence, the trial magistrate ordered that the dagga shall be forfeited to the state together with the motor vehicle in which it was being conveyed at the time of the commission of the offence.
- [5] Before making the forfeiture order in respect of the vehicle, the court a quo did not make any enquiry whatsoever relating to the ownership of the motor vehicle or on the circumstances under which it was being driven by the second Accused. However, on 10 September 2013, about two months after making the said order, an application was made, verbally, before the same presiding Magistrate, by Sikhumbuzo Khuzwayo for the release of the said motor vehicle to him. He claimed that the vehicle was his and he was not involved in the conveyance or transportation of the dagga for which the second accused had been convicted.

- [6] In support of his application Sikhumbuzo submitted the certificate of Registration of the vehicle. Therein, the registered owner is S.T. Khuzwayo.
- [7] The crown did not oppose the application and it was granted by the court. I do not think this was proper for the court to do. The forfeiture order was final in its nature. Having made the initial forfeiture order, the learned magistrate was no longer competent to hear or grant this application. He was *functus officio* on the issue and the release of the motor vehicle to Sikhumbuzo Khuzwayo was a reversal of his earlier order.
- [8] Whilst the forfeiture order was flawed and irregular for lack of an enquiry preceding it, I do not think that the court was competent or empowered to regularize or legalise it by reversing it in the manner it did. Both orders were wrong and incompetent or irregular.
- [9] A forfeiture order is a drastic one. It adversely affects the rights of the owner of the property in a very significant way. It is precisely for this reason that it should not be made without first affording the owner of the property the opportunity to be heard thereon. In *Siboniso Innocent*

Ndzimandze Review case No. 30/2010, judgment delivered on 20th

September 2010, the court noted as follows:

“[8] With due respect to the learned Magistrate, she erred in ordering the forfeiture of the motor vehicle in the manner and for the reasons stated by her. Both the defence and the crown had a right to be heard on the issue before the forfeiture order was made. The court had indeed promised that “the issue of the car will be addressed later.” Surely, the presiding officer did not mean that this shall be done by the presiding officer alone. But as it turned out on sentencing day, the promised “later” never came. The ownership of the motor vehicle had been put in issue by the parties. The accused disavowed ownership of the motor vehicle and said (through his counsel) that it was owned by Nomsa Dlamini. Whatever impressions the learned Magistrate may have gathered from inspecting it, in particular the existence of the secret compartment, this should not have influenced her to make the forfeiture order without hearing the protagonists or contestants in that battle.

[9] For the above reasons, the forfeiture order is materially flawed and irregular and is hereby set aside on account of lack of a proper enquiry preceding such order.”

[10] The motor vehicle is now in the possession of its registered owner, S.T. Khuzwayo and is perhaps in the Republic of South Africa. I do not think that it would be in the interests of justice to reverse, set aside or undo or

recall the order releasing the vehicle to its rightful owner. The costs, inconvenience or prejudice to him, the crown and the administration of justice in general far outweigh any prejudice if any, that was occasioned by the order releasing the motor vehicle to him.

[11] The egg has, however, not been scrambled to any appreciable degree. The yolk can still be separated from the egg white. The proper order to make in the circumstances is to set-aside the forfeiture order; because it was irregular, and confirm the release of the motor vehicle to Mr S.T. Khuzwayo and this is the order that I make.

[12] This ruling may admittedly appear merely academic, but, it is of real intrinsic value and practical importance as a guide on the issues to which it relates.

MAMBA J