

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CRIMINAL APPEAL NO. 13/08  
DISTRICT CASE NO. M59/07  
MANZINI**

In the appeal of:

ZANDILE SIMELANE

VS

REX

CORAM

MAPHALALA, J  
MONAGENG, J

FOR CROWN

MR. S. DLAMINI

FOR ACCUSED

MR. L. MALINGA

**JUDGMENT 30<sup>th</sup>  
APRIL 2009**

## **MONAGENG J**

[1] This is an appeal against the decision of Magistrate Msibi sitting in the Magistrates Court in Manzini. The appellant, one Zandile Simelane was convicted of two Counts of wrongfully, unlawfully and intentionally operating a business without a valid licence, thus violating the King's Order-In-Council No. 5 (1) (c) as read with Regulation No. 3 (1) of Order No. 20/1975 of the Trading Licences and Regulations.

[2] In the first Count, she is alleged to have operated a Spaza phone shop without a valid licence. In the third Count she is alleged to have operated a grocery shop without a licence or valid permit. The brief facts of the case are that, on the 6<sup>th</sup> April 2007 at around 16.00 hours, police officers went to a shop, Mathunjwa G.N. Grocery to conduct a raid. They found the appellant. Apparently the appellant was a shop assistant at the said shop. The police asked for a permit or licence authorizing the businesses to be operated. The appellant informed the police that the owner of the business one Dudu Mathunjwa, the wife of the licensee, Josiah Mathunjwa, had submitted the licence, which had expired for renewal to the relevant Ministry.

[3] On searching the premises, the police over and above the goods that are listed on the charge sheet, found crates of beer in a storeroom in the premises.

The police say that they also found tops of beer bottles on the ground and that some three boys were drinking beer outside the shop. When asked for a licence to sell the beer, the accused told the police that the family was going to have a ceremony, hence the crates of beer. The police disbelieved her and warned and cautioned her for selling beer without a licence. The Magistrate acquitted her on this Count, which was the second count in the charge sheet, for

lack of evidence. The police confiscated the beer, subject matter of Count 2 and the goods listed on the charge sheet, Rider "A".

[4] The accused pleaded guilty to Counts 1 and 3, and at that stage she was unrepresented. With regard to the law, Section 2 of the Trading Licences Order 1975 interpretation (2) states that "for purposes of this Order, a person conducts business if he is (1) the owner or part owner of the business or (2) the person controlling or person partly controlling the business." It is on the basis of (2) that is that the appellant was the person controlling the businesses that she was convicted. Before sentencing, the accused engaged an attorney, who recalled the accused to present a licence which was issued three days after the raid on the 10<sup>th</sup> April 2007. The accused also produced expired licences for the years 2006

and 2007, although the magistrate refused to admit the 2007 licence, saying that it was not authentic since it was not clean.

[5] The accused was found guilty on Counts 1 and 3. It does not appear from the record that she was convicted. Her sentence on both Counts was a caution never to operate a spaza shop and a shop without a valid licence respectively.

Her attorney raised the following arguments on appeal:

(1) That as a shop assistant she is not caught under Section 2 of the Trading Licence Order 1975 interpretation (2) since the law does not talk about an assistant, who the accused is, and therefore that she did not have the requisite means *rea* to commit the crime.

(2) That the confiscated property was not produced in Court as exhibits and therefore that there were no exhibits to forfeit. He actually cites Section 324 (3) of the Criminal Procedure and Evidence Act 1938, which provides that "the Court convicting any person of any offence which was committed by means of any weapon, instrument or other article **produced** *[emphasis ours]* to it may, if it thinks fit, declare such weapon instrument or other article to be forfeited to the Government";

(3) That the King's Order-in-Council No. 30/1975 does not have a provision which states that the goods found in a shop, where there is no licence, shall be forfeited to the Crown. Further that the police, like officers of the Ministry of Enterprise and Employment should have locked the premises with the goods inside and only reopen it once the permit is produced, instead of taking the goods.

(4) That the Magistrate did not exercise his discretion judiciously when he ordered the forfeiture of the goods.

(5) That the owner of the shop paid a penalty fee of E45.00 for the three months late renewal, and therefore that the forfeiture order was clearly uncalled for, and that this Court should declare it null and void and of no force and effect.

[6] In response, the Crown raised the preliminary issue that the appeal was noted out of time, it having been noted on the 17<sup>th</sup> October 2007, whereas the judgment and sentence were handed down on the 20<sup>th</sup> June 2007. State Counsel also noted that the Notice of appeal should have been filed within 14 days from 20<sup>th</sup> June 2007, per Order xxxvi Rule 1 (1) of the Magistrate's Court Act No. 66/1938. On those grounds, the Crown urged the Court to dismiss the appeal.

We need to dispose of this point in limine before going into the merits of the appeal. The Magistrate's Court record at page 7 indicates that the case was postponed to the 20<sup>th</sup> June 2007 for judgment and sentencing. This was on the 30<sup>th</sup> May 2007. The record then shows the judgment and sentence having been delivered without a date having been recorded as is procedural. The Crown wished this Court to presume that indeed judgment and sentence were passed on the 20<sup>th</sup> June 2007, even though this does not appear on the record. Counsel's reasoning is that since that was the date given for passing of the judgment and sentence, then it should be the correct date. As a matter of fact, there is no date against judgment and sentence.

[7] The defence on the other hand argued that the Magistrate postponed the case many times after the 30<sup>th</sup> May 2007, saying that the judgment was not ready, and that therefore judgment could not have been passed on the 20<sup>th</sup> June 2007. Counsel could also not prove the actual date of delivery of judgment and sentence from his own records. Quite clearly these two divergent views are irreconcilable. The record, if properly kept, should have clarified the situation, unfortunately this was not to be. In the absence of proof of a date, the Court is minded to give the appellant the benefit of the doubt, and presume that the Notice of appeal was filed on time, especially that no prejudice will be suffered by the Crown if we considered the merits of the case. Given the above observations, this Court asks the Magistrate to be more careful with the handling of records in future.

[8] **GROUND 1**

Regarding the first ground of appeal, the Crown submitted that as a shop assistant, conducting the business of selling in the Spaza shop and in the main shop, the appellant was the person in control of the businesses, as the Magistrate held. There was also an observation made to the effect that initially, when confronted by the police, she said that she was the owner of the businesses, but that she later changed her story. It is the view of this Court that the fact that the appellant was initially unrepresented, some things may not have been clear to her. In any case, nothing turns on this submission. What we find important is that in deed there was no licence at that stage, the licence having clearly expired. The appellant was aware of this and confirmed it in Court. It is trite that ignorance of the law is not an excuse, that is if indeed she was not aware that trading without a licence in these two shops was a criminal offence. By her own admission, the appellant was an employee. We find that she was therefore in control of the businesses and there can be no running away from it.

[9] We find that pursuant to Section 2 of the Trading Licence Order 1975 interpretation (2) (2), the Crown has proved its case against her. She was rightly found guilty on Counts 1 and 3.

[10] **GROUND 2**

The Crown in this ground of appeal submits that it is not necessary that the goods that were confiscated should be brought to Court. We find this a very weird submission, to say the least. An allegation was made and goods were listed as forming part of the commission of the, criminal offence. The appellant was not given the opportunity to confirm that those were the goods she was being tried for. This is prejudice of the first order, especially since the appellant was not represented. Moreover, how does the Court satisfy itself that in deed the goods were confiscated, that the goods exist, that they have not been illegally disposed of? This is another illegality that emerges from this case, and this Court sends out a very strong message to judicial officers to act according to the law at all times. The result is that non existent goods cannot be forfeited, unless under certain legal specified instances.

[11] The procedure of not producing goods and having them admitted and properly marked, for them to properly and legally form part of the record, simply brings disrepute to the proper administration of justice. Section 324 (3) of the Criminal Procedure and Evidence Act cited above, is quite certain that all the goods to be used in evidence must be labeled for identification and kept in safe custody. Failure to do so makes a mockery of the proceedings and the forfeiture order in the view of this Court.

[12] **GROUND 3**

This ground of appeal is intertwined with the second ground. The appellant submits that the King's Order-in-Council 30/1975 does not have a provision for forfeiture of these goods. The Crown was adamant that Section 324 (3) of the Criminal Procedure and Evidence Act gives the presiding Judicial Officer the discretion to order that they be forfeited. The Crown further submits that the Act does not say that the goods should be produced in Court for them to be forfeited. Further that since the accused pleaded guilty, there was no need for them to be produced.

[13] The Crown also made another curious submission that the fact that the goods were not handed in does not detract from the issue that they were exhibits. It is trite that for an item to be said to be an exhibit, it should be identified in Court, admitted and marked as such. That is when it forms part of the record and part of the decision and any Order of the Court. In this case, we observe that the trial Court virtually worked in a vacuum, which is highly prejudicial to the accused and the owner of the goods and it also puts this Court in an embarrassing situation.

[14] The appellant raised the interesting issue that the Ministry of Enterprise and Employment, on discovering that a trader is trading without a licence, locks the business up until a licence is produced. This makes perfect sense, especially in this case, when there is evidence that three days after the goods were confiscated, the licence was produced to the Court. Moreover, the appellant demonstrated that a penalty was paid for late renewal of the licence. This latter evidence was not denied by the Crown. This Court is minded to agree with the appellant that the learned Magistrate did not exercise his discretion judiciously, regardless of Section 324 (3) of the Criminal Procedure and Evidence Act.

We come to this conclusion considering the totality of the facts of this case. The Magistrate reached a proper decision by warning and cautioning the appellant, which for all intents and purposes has the effect of an acquittal, except for the purpose of proving and recording previous convictions, and he should have weighed this with the devastating effect of having the goods forfeited to the Crown.

[15] Another surprising feature of this case is the Magistrate's refusal to admit the 2007 licence that had expired. We are of the view that his questioning the authenticity of that licence, without proper justification, was unfair on the appellant and it could have influenced his decision to make the order of forfeiture.



[16] Another observation to make in this case, is that it does not appear as if the beers, which were subject matter of Count 2, of which the appellant was found not guilty and acquitted were restored to him or to the owner of the business.

[17] Another observation, as stated earlier, is that the Magistrate found the appellant guilty but did not convict her on Counts 1 and 3. This is another omission that can have very serious consequences. This Court again reminds the judicial officer to be more careful with records of the Court in future.

[18] Considering the facts and circumstances of this appeal in totality, we reach the following decision:

1. The finding of guilt in Counts 1 and 3 be and is hereby confirmed.
2. The appellant is accordingly convicted in both counts 1 and 3.
3. The appellant be and is hereby warned and cautioned not to repeat these offences in future.
4. The Order of the Magistrate for forfeiture of the goods be and is hereby revoked.
5. The goods be and are hereby restored immediately to the custody of their lawful owner Mathunjwa.
6. Alternatively, the lawful owner should be paid the present sale value of the goods.

Right of appeal to the Supreme Court explained.

S.M. MONAGENG

JUDGE

I agree

S. MAPHALALA

JUDGE