

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

REVIEW CASE NO.3624/05
Record No. NHO 310 of 2009

In the matter between:

THE KING

VERSUS

WINILE GAMA KHETSIWE
MOTSA NHLANHLA
HLOPHE

Date of consideration: 30 July, 2009

Date of Judgment: 30 July, 2009

JUDGMENT ON REVIEW

MASUKU J.

[1] The above-named accused persons were arraigned before the Nhlangano Magistrate's Court charged with contravening section 12 (1) (a) of the Pharmacy Act 38 of 1929. It was alleged that on 21 June, 2009, along the Nhlangano/Hlatikulu public road they were found in

possession of a harmful drug *to wit* dagga, weighing 64.2kg without a licence or permit.

[2] All three accused persons pleaded guilty to the offence and evidence proving commission of the offence was led. This evidence was not controverted and the respectable pleas can be regarded as unequivocal in the circumstances. Accused 1 and 2 were each sentenced to E3000.00 fine or three year's imprisonment in default of paying the fine. Accused 3 was sentenced to a fine of E2,000 or two years' imprisonment in default of paying the fine. The dagga was ordered to be destroyed.

[3] I have no ought regarding the conviction and sentence, the latter being primarily within the trial Court's jurisdiction. What has, however, raised my eye-brows are the provisions of section 12 (3) (b) in particular and which appear to be of application in the instant matter. The said section reads:-

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

It is common cause from the evidence that Accused 3 was a driver, who was hired by his co-accused to transport the consignment. He told the Court that was made aware what he was going to transport and further knew that it was illegal to do so. The trial Court simply did not address itself to the above provisions and made no order regarding Accused 3's motor vehicle.

I cannot say that this Court ought to have invoked the provisions of the above section. I say so because the trial Court would appear to have a discretion in that regard but which discretion, as in all other cases, must be judicially and judiciously exercised. In circumstances such as the present, where the consignment of dagga was so large; Accused 3 knew before hand that he was going to transport dagga for a fee and also knew that it was illegal to do so, surely, the trial Court should have stated compelling reasons why it was persuaded not to invoke this subsection, given the entire matrix of the evidence.

[6] The fact that the Lawgiver used "may" in the wording of the section does not mean that the trial Court may simply close its eyes to the section in exercise of its discretion. These are cases of a serious nature and in which the Court would have to justify the exercise of its discretion against invoking the

provision of the section. If it were otherwise, the war against the proliferation of harmful drugs may well be declared lost. The sub-section was designed to discourage persons in the 3rd accused's position from participating in such obnoxious transactions. In the circumstances, with his vehicle safely in his garage, Accused 3 may well try his luck again hoping not to be caught the next time around.

[7] In the premises, the learned Magistrate is called upon, within 14 days from receipt of this judgment, to give

reasons as to why he found it fit not to consider invoking the provisions of the above sub-section.

**DATED AT MBABANE IN CHAMBERS ON THIS THE 30TH DAY
OF JULY, 2009.**



**T.S/1\IASUKU
{JUDGE**