



**IN THE HIGH COURT OF SWAZILAND**

**RULING**

**Case No: 165/10**

In the matter between

**REX**

**VS**

**BHEKUMUSA DLAMINI**

**1<sup>ST</sup> ACCUSED**

**ZONKE THOKOZANI TRADEWELL  
DLAMINI**

**2<sup>ND</sup> ACCUSED**

**Neutral citation:** *Rex vs Bhukumusa Dlamini and another (165/10)*  
[2012] SZHC 132

**Coram:** **OTA J.**

**Heard:** **13<sup>th</sup> June 2012**

**Delivered:** **14<sup>th</sup> June 2012**

**Summary:** **Admissibility of evidence: Evidence seized during the process of a voluntary pointing out exercise in the accused's house: Whether evidence inadmissible by reason of not having been amongst those pointed out by the accused: Sections 22 (1) and 14 (3) of the Constitution: Section 227 (1) and (2) of the Criminal Procedure and Evidence Act 67/1938 as amended, CP&E, considered.**

**OTA J**

**RULING**

- [1] At the courts sitting on the 13<sup>th</sup> of June 2012, the crown sought to tender in evidence two photographs, one of which shows the 2<sup>nd</sup> accused person in the company of another person, both carrying placards. The placard held by the 2<sup>nd</sup> accused person in the photograph has the slogan "*Mswati stop oppressing by culture and tradition*" emblazoned on it, while the placard held by the 2<sup>nd</sup> accused's companion, in the said photograph, has the slogan "*Release all political Prisoners for a Democratic Swaziland*" inscribed on it.
- [2] PW15, 3004 Detective Assistant Superintendent Sikhumbuzo Fakudze, through whom the crown sought to submit these photographs in evidence told the court, that he seized these photographs which he observed in the 2<sup>nd</sup> accused's house, on the 17<sup>th</sup> of June 2010, on which date the 2<sup>nd</sup> accused, after having been cautioned in accordance with the Judges rules by PW15, voluntarily led PW15, together with other police officers to his homestead, to point out some items to them.
- [3] It was further PW15's evidence, that upon arrival at the 2<sup>nd</sup> accused's homestead, the 2<sup>nd</sup> accused took them into his house, and in the process of the pointing out exercise, PW15 observed

the said photographs which he proceeded to seize of his own motion.

[4] Advocate Sihlali for the Defence, holds the view that the said photographs are not admissible in evidence. His contention is that PW15, did not have a warrant to obtain the photographs which he seized of his own accord, in the sense that the said photographs were not pointed out to PW15 by the 2<sup>nd</sup> accused. The learned advocate questioned whether the photographs in the circumstances were constitutionally obtained by PW15? Whether the evidence is beyond reasonable doubt original and there has been no interference with them and how the photographs related to the incidence before court.

[5] In response, crown counsel Mr P. Dlamini submitted, that nothing prevents an investigating officer, upon stumbling on evidence, from taking or seizing the evidence. He said this is more so as PW15 was in the house of the 2<sup>nd</sup> accused for the purposes of pointing out, when he observed the evidence. Mr Dlamini urged the court to reserve the question of the relevance of the photographs for argument. He further contended that the authenticity of the photographs can still be subjected to expertise.

[6] Now, the question of search is part of due criminal process provided by law and is reasonably necessary in a democratic society, for the purpose of law enforcement, to ensure that the legitimate public expectation of law enforcement is not defeated.

[7] The defence question the constitutionality of the seizure of the said photographs. Now, section 22 (1) of the Constitution of Swaziland Act, 2005, protects the fundamental right of every Swazi against arbitrary search and entry, in the following words:-

*“22 (1) A person shall not be subjected:-*

*(a) To the search of the person or the property of that person*

*(b) To the entry by others on the premises of that person.*

*(c) To the search of the private communications of that person*

*except with the free consent of that person first obtained”*

[8] A search must thus be in accordance with the Constitution, with the consent of the person being searched or in accordance with a law made in the interest of the public, and it is reasonably justified in a democratic society, or as ordered by a court on a search warrant, as required by the Criminal Procedure and Evidence Act 67/1938 as amended. (CP&E)

[9] I hasten to add here however, that there are certain instance where it may not be possible to obtain consent of the person being searched or a warrant, in the sense that if the investigating police officers have to wait to obtain consent or warrant, there is the likelihood that the evidence being sought may be taken away or destroyed. In such circumstance, the consent of the person or a warrant may be dispensed with.

[10] Although there is no such dispensation in the Constitution, but such a search and evidence, albeit unlawful evidence obtained as a result therefrom, will be admissible in the public interest, to avoid a situation where the legitimate expectation of law enforcement will be defeated. This position appears to accord with the provision of section 14 (3) of the Constitution, which makes the fundamental rights and freedoms of the individual *“subject to respect for the rights and freedoms of others and for the public interest”*

[11] It is in the pubic interest that relevant evidence that will ensure an effective and efficient criminal prosecution should not be excluded, for the reason that it was obtained without the consent of the person searched or without a search warrant. An effective and efficient criminal prosecution is inarguably, the *sine qua non*

for an efficient law enforcement, without which there will be a climate of impunity for crimes, resulting in a state of lawlessness and anarchy and the attendant insecurity of life and property.

[12] In casu, the evidence on record shows that the 2<sup>nd</sup> accused voluntarily led PW15 and his team of investigating police officers, into his house to conduct the search, by way of a pointing out exercise. I am inclined to view the 2<sup>nd</sup> accused's conduct, as consent to search his premises. There is nothing to show that 2<sup>nd</sup> accused refused or resisted the entry into his premises. This accords with the requirement of section 22 (1) of the Constitution. I hold the view, that the consent to enter into the said premises for the pointing out exercise covers any other investigative activity inside the house concerning the alleged crime. Once the entry was with consent, PW15 was not precluded from carrying out his investigative duty in any direction he chose. The paramount issue is that the entry was with consent. It was when the 2<sup>nd</sup> accused took the investigating officers into his house to point out to them the existence of certain materials concerning the crime, that PW15 now saw other evidence which he thought was connected to the crime and seized it. To suggest as is being done here, that the police officers should have ignored material evidence seen by them, leave it and walk away, is certainly unreasonable. They did

what is reasonably expected in the circumstance. Such fact obtained as a result of entry permitted by the accused, is clearly within the confines of the provisions of section 22 (1) of the Constitution and is admissible.

[13] Furthermore, assuming without conceding, that the said entry or search was not permitted or the photographs taken were not pointed out by the accused and therefore the facts were obtained by unlawful means, so far as they are relevant to the facts in issue, this court can admit them in evidence by virtue of section 227 (1) and (2) of the CP&E, which state that:-

*“ 227 (1) Evidence may be admitted of any fact otherwise admissible in evidence notwithstanding that such fact was discovered and came to the knowledge of the witness giving evidence respecting it, only in consequence of information given by the accused in a confession or in evidence, which by law is not admissible against him, and notwithstanding that such fact has been discovered and come to the knowledge of the witness against the wish or will of such accused*



(2) *Evidence that any fact or thing was discovered in consequence of the pointing out of anything by the accused person or in consequence of information given by him may be admitted notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him"*

[14] The paramount consideration in the admissibility of the said photographs, is therefore relevance. A fact is said to be relevant to the facts in issue, if it is directly or indirectly connected with the issue in the case or has a bearing on its resolution one way or another or seeks to throw light on the connection of the accused to the facts of the case.

[15] To my mind, the relevance of the photograph that shows the 2<sup>nd</sup> accused and his companion respectively, holding placards with the inscriptions:- *"Mswati stop oppressing by culture and tradition"* and *"Release all political prisoners for a democratic Swaziland"* when juxtaposed with the facts of this case, where it is alleged that three homesteads belonging to top government officials were bombed within a short space of time, is to demonstrate, that the 2<sup>nd</sup> accused has engaged in anti government protests before. The

weight to be attached to such evidence is a matter for argument, taking together the totality of the facts and circumstances of the case, and does not derogate from its admissibility .

[16] It remains for me to observe, that the question of the authenticity of the photographs does not arise. The evidence of PW15 is clear, that the photographs were found in the 2<sup>nd</sup> accused's house. The argument on their authenticity to my mind is baseless.

[17] For the foregoing reasons, I overrule the objection and admit the photographs in evidence as exhibits N and NI respectively.

**For the crown:**

**P. Dlamini**

**For the accused:**

**Adv. C. Sihlali**

**Instructed by Mary Da Silva**

**DELIVERED IN OPEN COURT IN MBABANE ON THIS**

**THE ..... .. DAY OF .....2012**

**OTA J.**

**JUDGE OF THE HIGH COURT**