-

THE HIGH COURT OF SWAZILAND

Rex
Appellant

v

Wara Dlamini & 2 Others
Respondents

Cri. Appeal 44/99

Coram	*Sapire, CJ* *Masuku, J*
For the Crown	*MR. P.L.K. N'GARUA*
For Respondents	*NO APPEARANCE*

JUDGMENT

The Director of Public Prosecutions has appealed against a decision of the Magistrate. The Director of Public Prosecutions by way of a stated case as contemplated in Section 86(1) of Act 66/1938 brings the appeal. Although the Magistrate in the stated case expresses the view that the application for a case to be stated did not comply with the provisions of the section he did not specify the particulars of non-compliance. The application is not part of the record. The stated case clearly enunciated the question in issue. The Accused concerned appears to have been given notice of theses proceedings

The accused was jointly charged with another with contravening Section 7 read with Section 8(1) of the Opium and Habit Forming Drugs Act 37/1922 as amended. Accused No 1 pleaded not guilty while his co-accused, Mhlanga, pleaded guilty. The prosecution opted not to lead any evidence against accused no. 1. He was acquitted immediately.

The prosecution opted to lead evidence of the commission of the offence, to which Accused 2 had pleaded guilty. There was sufficient evidence of the accused having been found in possession of the offending substance and further evidence that the offending substance was in fact dagga.

The point of contention is whether there was any obligation on the prosecution to prove the unlawfulness of the possession. In other words that did the prosecution have to exclude reasonable possibility that the accused may have had a licence to possess the substance concerned. The Magistrate found that that had not been proved and in fact excluded some evidence that may have gone some way to establish the lawfulness of the possession by the accused of the substance.

Section 271 of the Criminal Procedure and Evidence Act 67/1938 appears to answer the question raised. This Section creates a presumption that where the possession of a licence is necessary to convert an unlawful act into a lawful act the onus of proving the holding of a licence is on the accused. The section is a deeming one and provides that on a charge of possession once the act is proved then the accused is deemed not to be in possession of a licence.

The Magistrate seems to have had in mind that before the provisions of Section 271 come into operation the crown has to prove that a demand for production of a licence had been made. In the Magistrate's words "*without demanding the permit or licence, the presumption may not come into operation.*" The magistrate cited no authority for this proposition. Our own perusal of all the reports in Swaziland has not brought forth any decision favouring that interpretation. We can find no support for this view of the law, as the section does not mention any demand having to be made before its terms become operative.

Similar deeming provisions exist in South African legislation. The courts have consistently interpreted such provisions as imposing an onus on the accused to rebut the presumption of unlawfulness or absence of licence.
See S v KURZ [1]

> For the purposes of section 28 (a) of Proclamation 17 of 1939 (S.W.A.) possession need not be anything more than mere detention coupled with an intention in some way to exercise control over the diamonds concerned (even if only for a matter of minutes or seconds). There is no provision in the Proclamation to indicate that "possession" in section 28 (a) should bear a more technical meaning.

[1] 1971 (1) SA 833 (SWA)

Appellant, a first offender was charged with a contravention of section 28 (a) of Proclamation 17 of 1939 (S.W.A.) in that he unlawfully possessed rough and uncut diamonds. He pleaded guilty. Only one witness was called by the State. The appellant was convicted and sentenced to six months' imprisonment of which three months were suspended. He appealed.

Held, that it was not necessary to prove the identity of the possessor: it was sufficient in terms of section 233 (1) (h) of Ordinance 34 of 1963 (S.W.A.) to prove that someone was in possession.

Held, further, that the onus was on the appellant to show under section 296 (2) (b) of the Criminal Procedure Ordinance, 34 of 1963 (S.W.A.), that he had the authority of or had been licensed by the Diamond Board.

This being so the question raised must be answered in favour of the Director of Public Prosecutions. The acquittal of the Accused was irregular and not in accordance with the provision of the law. The acquittal is set aside. The magistrate, in terms of section 86(4) is, after giving proper notice as therein provided for, to reopen the case, and deal with the matter on the basis that the unlawfulness of the possession had been proved.

Sapire CJ

Masuku J.