

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CR. APPEAL NO.4/93

In the matter of:

JUICE ZONDUMUNTU MZIYAKO

Appellant

VS

R E X

RESPONDENT

C O R A M : DUNN J.  
FOR THE APPELLANT : MR A. LUKHELE  
FOR THE RESPONDENT: MR D. WACHIRA

ORDER ON APPEAL

5th May 1993

The appellant in this matter was charged before the Senior Magistrate (Mr Huysamen) with the theft of a motor vehicle and 4 further charges of forgery; uttering and fraud related to the issue of a police clearance certificate and the subsequent registration by the appellant of the motor vehicle. The motor vehicle alleged to have been stolen, was produced as an exhibit at the trial. At the conclusion of the crown case, the appellant was acquitted and discharged on all the counts preferred against him. Immediately after the acquittal the Senior Magistrate ordered that "the motor vehicle in question is forfeited to the crown".

The present appeal is concerned solely with the question of the forfeiture order. The appellant sets out in his notice of appeal that -

The learned magistrate erred in law in holding that the motor vehicle must be forfeited to the state without giving the Appellant or his counsel an opportunity to make representations on the question of forfeiture.

Section 52 of the Criminal Procedure and Evidence Act No. 67/1939 as amended by Act No. 14/1991 provides -

"(5)(a) At the conclusion of a summary trial or if the Director of Public Prosecutions declines to prosecute, the Magistrate shall, in respect of the property or thing seized make one of the following orders:-

- (i) that the property or thing be restored to the person from whom it was seized if that person satisfies the Magistrate that he is lawful owner of the property or thing or that he is lawfully in possession of the property or thing;
- (ii) if that person fails to prove that he is the lawful owner or has lawful possession of the property or thing, that the property or thing be restored to any other person who is lawfully entitled to it upon proof to the Court;
- (iii) if no person claims ownership or possession of the property or thing or if the person lawfully entitled to it cannot be traced or is unknown, that the property or thing be forfeited to the Crown;

(b) the Court shall for the purposes of an order under paragraph (a) hear such further evidence (whether by affidavit or orally) as it may consider necessary."

It is clear from subsection 52(5)(a)(i) that the person from whom property is seized bears the onus of satisfying the Magistrate of his ownership or lawful possession of the property. An adequate opportunity of leading evidence and/or addressing the court must in the circumstances be given to such a person before the Magistrate makes an order under the section. The Senior Magistrate has set out in reasons which he filed after making the forfeiture order that he was satisfied from the evidence in the main trial that the motor vehicle had been stolen. That finding did not per se empower the Senior Magistrate to make a forfeiture order. A forfeiture order can only be made under the circumstances set under section 52(5)(a)(iii). The appellant should have been given the opportunity of addressing the court and of leading any evidence he might have had particularly in view of the fact that he did not testify at the trial following his acquittal at the close of the crown's case.

Mr Wachira who appeared for the crown indicated that the crown did not support the forfeiture order. The forfeiture order must, in the circumstances, be set aside and the matter remitted to the Senior Magistrate for purposes of complying with Section 52 of the Act. I understand that the Senior Magistrate has since left Swaziland and cannot deal with the matter. It is ordered in the circumstances that the matter be placed before the Senior Magistrate, Mbabane for purposes of dealing with and making an appropriate order in terms of Section 52 of the

Act. Attempts should be made for an early hearing date convenient to the Court and counsel. The case should thereafter be forwarded to this court on review.



B. DUNN

JUDGE