

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NUMBER 95 OF 2005

(Being Criminal Case No. 269 of 2005 in the Senior Resident Magistrate Court sitting at Dalton Road, Blantyre)

The Republic

versus

Mahommed Aslam Khan

CORAM: KATSALA J

D. S. Mpango/H. C. Ngutwa/D. B. Daka for the State

C. Ngwira of counsel for the respondent

Ngwale – official interpreter

JUDGMENT

Katsala J,

This is an appeal by the State against the order made by the Senior Resident Magistrate at Dalton Road court releasing goods smuggled into the country by the respondent despite the respondent's conviction for offences under the Customs & Excise Act.

The facts of the case are that the respondent, Mohammed Aslam Khan was convicted on his own plea of guilty on four counts relating to offences under the Customs & Excise Act. The offences were smuggling, concealing goods which are subject to customs control, submitting framed documents so as to deceive, and using false documents with intent to deceive. The goods involved were 540 bales of fabrics. He was sentenced to pay fines of K25,000.00 on each count. He was also ordered to pay the sum of K3,000,000.00 being the balance on the duty he was supposed to pay if he had cleared the goods as required under the Act. The court also ordered that the 540 bales of fabrics seized by the appellant should be returned to the respondent. It is this order of release that the appellants are appealing against.

Counsel for the State have argued that the order of release is unlawful as it is contrary to Section 159(1) of the Customs & Excise Act and it ought to be set aside. On the other hand counsel for the respondent has submitted that forfeiture of seized goods is at the discretion of the court as such there is nothing wrong with the order of release made by the lower court. This is the view held by the learned Senior Resident Magistrate. At page 5 of the sentence he said, "No order as to forfeiture is made as the same is discretionary. The convict must be given back his goods".

Section 159(1) provides as follows:

“(1) Where any person is prosecuted for any offence against the customs laws and any goods or any conveyance have been seized by reason of the commission of such offence, then, on the conviction of such person of such offence, such goods and conveyance shall without further order, be forfeited.”

With due respect, it is clear from this provision that the court does not have a discretion on the question of the forfeiture of the seized goods or conveyance. The forfeiture is automatic upon conviction. It is by operation of law. And there is no need for a specific order to that effect – see

also *Ibrahim v Republic* 10 MLR 157, *Republic v Kanyoza* 9 MLR 249, *Republic v Chakanaka* 14 MLR 426. Thus there is no doubt at all that the order of release made by the learned magistrate is illegal. It cannot be allowed to stand. I therefore set it aside. Though it is not necessary, but for the avoidance of doubt, I order that the 540 bales of fabrics seized from the respondent herein be forfeited.

The question that arises now is whether the State can lawfully retain the duty on the 540 bales of fabrics in the sum of K4,316,280.94 paid by the respondent. Counsel for the State have argued that the duty should not be refunded. They referred the court to Section 159(2) of the Customs & Excise Act in support of their argument. They said the intention of the legislature is to punish an offender severely and it is their belief that such intention can only be achieved if the duty paid is retained. On the other hand, counsel for the respondent has submitted that to retain the duty paid would amount to punishing the respondent twice for the same offence. No case authorities were cited by counsel to support their arguments and I have not found any on this point.

Section 159(2) provides that:

“If any goods or conveyance liable to forfeiture under Section 145 cannot be found or recovered, the court convicting the offender may order him to pay to the controller an amount equal to the duty-paid value of such goods or conveyance at the time of the offence”.

In the course of the arguments counsel for the State conceded that when goods are forfeited under Section 159(1), the Controller, (nowadays the Commissioner General) sells them at their market value. This means that he recovers not less than the duty-paid value of the goods. In my judgment this explains why Section 159(2) prescribes that the convict must be ordered to pay to the Commissioner General the duty-paid value of the goods or conveyance. The idea is that the Commissioner General must be put in the same position he would have been if the goods or conveyance had been seized and forfeited in terms of Section 159(1). It therefore follows in my view, that when the goods are forfeited, you cannot order the convict to pay duty on the goods. To do so would mean that the Commissioner General would receive duty on the goods “twice”,

since he will sell the goods at their market price as aforesaid. I do not think this is what the legislature intended. If what counsel for the State submitted were true it would mean that a convict whose goods have been seized and forfeited (under Section 159(1)) would be punished more severely than one who has disposed of the goods and there is no recovery of the same (under Section 159(2)). I do not think the legislature would have wanted such disparity to exist. If such were the case, it would have specifically said so.

I would therefore agree with counsel for the respondent that in view of the automatic forfeiture of the goods under Section 159(1) it was erroneous of the Senior Resident Magistrate to order that the respondent pays the sum of K3,000,000.00 the balance of duty he would have paid had he cleared the goods appropriately. If anything the magistrate should have ordered a refund of the K1,316,280.94 initially paid as duty on the goods. In the circumstances I set aside the order for the payment of duty and instead I order that the sum of K4,316,280.94 paid by the respondent as duty for the 540 bales of fabrics be refunded to the respondent.

Pronounced in open court at Blantyre this 2nd day of December 2005.

J. Katsala

JUDGE