



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL APPEAL CASE NO. 39 OF 2018**

VERIAN DUWA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

Coram: Hon. Justice M L Kamwambe

Salamba of counsel for the State

Maele of counsel for the Appellant

Amos...Official Interpreter

JUDGMENT

Kamwambe J

The Appellant was charged with two counts in the Senior Resident Magistrate Court sitting at Blantyre of illegal possession of drugs under section 19(1) (d) of the Dangerous Drugs Act as read with regulation 14 and illegal importation of dangerous drugs contrary to section 19 (1) (d) of the Dangerous Drugs Act as read with regulation 11 of the Act. The Appellant was found with 25 plastic wrappers containing drugs called Ephedrine which were brought to Malawi without a licence. The Appellant was found with no case to answer and was acquitted, however, the drugs were forfeited under court order for destruction. The Appellant appealed against forfeiture because the Appellant was acquitted and that there was no legal basis for the forfeiture.

Section 17 (6) of the Dangerous Drugs Act provides that:

"If on the trial of any person for contravening or failing to comply with any of the provisions of this Act or any condition of any authority or licence issued thereunder it is proved that any drug, pipe, receptacle, appliance or plant seized under this section was produced, possessed, kept, used, sold, distributed or cultivated in contravention of this Act, it shall be forfeited."

Professionally it is accepted that Ephedrine is a dangerous drug, but it is not one of the drugs listed under dangerous drugs, as such, it is legally not one of the dangerous drugs. More likely the forfeiture order was made under section 17 (6) of the Act which empowers the court to make a forfeiture order. But the Act requires that there should first be a contravention or failing to comply with any provision of the Act or any condition of any authority or licence. I could not see any contravention or failure to comply as stated above. Further, Ephedrine is not a prohibited drug in Malawi although it may be dangerous. That laboratories prove that it is a dangerous drug does not make it legally a prohibited drug until it is so listed at the appropriate place in the Act. People should be protected from wanton forfeiture as dictated by section 21 (b) of the Constitution which provides that every person has the right not to be subject to the seizure of private possessions. There is certainly no legal basis for forfeiture.

It must clearly be understood that forfeiture is a form of punishment and it becomes absurd that such punishment is inflicted on an acquitted person. This raises many unanswered questions as to how logically it can be so if legally it cannot be tenable. If there is any policy that Ephedrine should be forfeited as a dangerous drug, such policy is not before this court and I doubt very much that even if it were there, it would override the law. I keep on wondering how professionals agree that it is a dangerous drug and yet refrain from listing it as such. This laxity will not help

Malawians and it is my hope that the Pharmacy and Poisons Board will be prompted to move fast to include the drug on the list of prohibited drugs if they deem it necessary.

In the case of **Kennedy Msamala v The Republic** HC PR Criminal Appeal No. 15 of 2014 Potani J acquitted the Appellant of the offence of Transporting Liquid Fuel without a licence contrary to section 16 (2) as read with section 17 (d) and section 42 of the Liquid Fuels and Gas (Production and Supply) Act of the Laws of Malawi and ordered that the diesel which was forfeited from the Appellant be returned to him.

This appeal is allowed.

Pronounced in open court this 25th day of October, 2018 at Chichiri, Blantyre.


M L Kamwambe
JUDGE