**HIGH COURT**
**(BISHO)**

**CASE No. CA & R 21/2000**

**DUMISANI MBEBE** Appellant

and

**THE STATE** Respondent

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## JUDGMENT

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**EBRAHIM J:**

1. The appellant who was accused no. 3 in the proceedings in the court *a quo*, was convicted of the offence of contravening s36 of General Law Amendment Act 62 of 1955 and sentenced to a term of imprisonment of six months. He has appealed against both the conviction and sentence.

2. When the appeal came before the Judge President and myself for hearing there was no appearance on behalf of the appellant nor was he personally present. In view thereof the State sought to have the appeal struck from the roll. However, this was refused since it was evident that the proceedings in the court *a quo* had not been conducted in accordance with justice and that the conviction of the appellant, and those of accused nos. 1 and 2, could not be sustained. In consequence thereof the Court, acting in terms of its

inherent powers of review, set aside the convictions and sentences of the appellant and his co-accused and ordered their immediate release. The reasons for the Court's decision were to be furnished later and these now follow.

3. It appears from the charge sheet, in the record of the trial proceedings, that the offence with which the appellant and his co-accused were charged was framed in the following terms:

'.....charged with the offence of c/s 36 Act 62 of 1955 ( GENERAL LAW AMENDMENT ACT) possession of suspected stolen property in that upon (or about) the 22 day of 03 2000 and at or near Sada Township Hewu in the said district/division the said accused did wrongfully and unlawfully and intentionally possess one door valued at R±300.00 and fail to give satisfactory account of such possession.'

4. All three accused pleaded guilty to the charge and thereupon the learned magistrate, presumably in terms of s112 (1)(b) of the Criminal Procedure Act 51 of 1977, conducted the following questioning:

'By Court

Q - Accused no. 1 were you found in possession of a door?

A - Yes.

Q - With whom were you

A - I was with accused no. 2

Q - Where and how did you obtain this door

A - It was sold to my by accused no. 3 for R30.00

Q - What were going to do with the door

A - I was going to install it in my shack

Q - What was the involvement of Sphiwo in this affair

A - I had asked him to assist me in carrying the door to my shank

Q - Did he assist you

A - Yes

Q - And then what happened

A - We met a certain Amos who is a watchman in one of the factories. He stopped us and

confronted us about the door. He called the police. The police came and we were arrested.

Q - Did you know what you were doing was unlawful

A - Yes

Q - Accused no. 2 do you know what accused no. 1 has said

A - Yes

Q - Accused no. 3 do you confirm what accused no. 1 has told the court

A - Yes

Q - Did you have permission to take and sell the door

A - No

Q - Did you know what you were doing was unlawful

A - Yes'

5. Pronouncing on the guilt of the three accused the magistrate recorded his finding in these terms:

'Court is satisfied that all accused intended to plead guilty and accused are found guilty in accordance with their pleas.'

6. Although he had already convicted the accused the magistrate still deemed it necessary to receive further evidence as the following reveals:

'PP asks the court to call Engelinah Qwesha the mother of accused no. 3.

Engelinah Qwesha dss: I am the mother of accused no. 3. I never gave him a door. I have lost no door from my house.

Q - Do you have any question to ask from your mother accused no. 3

A - No

Q - So what she told the court was true

A - Yes.'

7. Thereafter the State informed the court that it was not proving any previous convictions in respect of any of the accused. After being addressed in mitigation of sentence by the respective accused the magistrate proceeded to impose sentence. In respect of accused no. 1 and the appellant the

magistrate sentenced each of them to a term of imprisonment of six months. In respect of accused no. 2 he imposed a fine of R500,00 alternatively a term of imprisonment of three months.

8. In relation to the appeal counsel for the State has submitted in his Heads of Argument that the '*Appellant was correctly convicted on his plea of guilty after the learned magistrate satisfied himself that he admitted all the elements of the offence*'. Further, that the questioning by the magistrate '*covered all the essential elements of the offence which the State in the absence of a plea of guilty have been required to prove*'.

9. I do not find myself in agreement with these submissions. On the contrary, I consider the convictions of the appellant and his co-accused to have been irregular and not in accordance with justice. In addition to the charge, as put to the accused, being defective the magistrate's questioning of the accused was improper. Consequently the convictions are not in accordance with justice and cannot be permitted to stand.

10. Section 36 of General Law Amendment Act 62 of 1955 reads as follows:

'Any person who is found in possession of any goods, other than stock or produce as defined in section *one* of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.'

11. The essential elements which constitute the offence are, firstly, that the

person has to be '*found in possession of (the) goods*'; secondly, there should be a '*reasonable suspicion that they have been stolen*'; and, thirdly the person must be '*unable to give a satisfactory account of such possession*'. It is self-evident that if any of the three elements are absent the person cannot be convicted of a contravention of s36 of General Law Amendment Act 62 of 1955.

12. While the charge sheet reflects that the accused were being charged with a contravention of s36 of General Law Amendment Act 62 of 1955 the allegations in substantiation of the charge are not consistent with the provisions of the section. In the charge sheet it is alleged that the accused '*did wrongfully and unlawfully and intentionally possess one door valued at R±300,00 and fail to give (a) satisfactory account of such possession*'. It is evident that an essential element of the charge was omitted, namely, that when the accused were found in possession of the door there was a reasonable suspicion that it was stolen. It should be noted, too, that this suspicion must obviously have been formed substantially contemporaneously in the mind of the person who found the accused in the possession of the door. See *S v Khumalo* 1964 (1) SA 498 (N) at 499 F-H.

13. It is apparent that the lacuna in the charge escaped the attention of the magistrate. His questioning of the accused confirms that he was unaware that the charge, as framed, was defective since he did not address this issue at all. In any event I cannot see how any replies from the accused could have

remedied this defect since the suspicion that the door was stolen should have been formed in the mind of some other person and not the accused. The magistrate's failure to identify that the charge was defective has resulted in a miscarriage of justice. Since there was an absence of evidence to cure this defect in the charge the magistrate erred in convicting the appellant and his co-accused of having contravened s36 of Act 62 of 1955.

14. A further issue which the magistrate failed to address was whether any of the accused were able to give a satisfactory account of their possession. The explanation by accused no. 1 that he had bought the door from the appellant for an amount of R30,00 was reasonably possibly true and cannot be said to be palpably false. Since neither accused no.2 nor the appellant were asked for an explanation it is evident that there convictions are improper.

15. It is evident that the magistrate's questioning of the accused, particularly that relating to accused no. 2 and the appellant, was inadequate and irregular. In regard to accused no. 1 the questions were of a leading nature and, in certain instances, suggestive of particular replies. The questioning of accused no. 2 and the appellant did not touch on the elements of the offence nor did it establish whether they were admitting any of the allegations in the charge. In asking both the appellant and accused no. 2 merely to confirm what accused no. 1 had conveyed to the court, the magistrate failed to give effect to the purpose of the provisions of s112(2)(b) and thereby rendered the convictions improper. In *Mkhize v The State and Another* 1981 (3) SA (N) at

586H to 587A Broome J outlined the approach to be adopted when questioning an accused person in terms of the provisions of s112(2)(b) of the Criminal Procedure Act 51 of 1977:

'In my view accused persons in proceedings such as this should be invited to explain what happened. An accused should be encouraged to tell his story. Where possible questions from the Bench should be as few as possible, and preferably only those necessary (*a*) to elucidate what the accused has volunteered and (*b*) to canvass any allegations in the charge not mentioned by the accused and, of course, (*c*) to confine the accused to the relevant detail. Leading questions should, as far as possible, be avoided. It is totally inadequate for the court simply to ask the accused whether, one by one, he admits each of the allegations in, or each of the individual components of, the charge. Quite obviously a series of answers from the accused in the affirmative would be entirely consistent with the accused having been forced to plead guilty and told to agree with everything the magistrate asked him or to agree with everything the prosecutor told the magistrate about the case. The magistrate's task is not only to ascertain from the accused whether he admits the allegations in the charge but, and this cannot be over emphasized, to satisfy himself that the accused is guilty of the offence.'

16. In view of the aforegoing the convictions of the appellant and his co-accused cannot stand. In the result, acting in terms of this Court's inherent power of review, the Court ordered that the convictions and sentences of the appellant and of accused no. 1 and accused no. 2 be set aside and the order is hereby confirmed.

**Y EBRAHIM**
**JUDGE OF THE HIGH COURT (BISHO)** **Date: 15 May 2002**

I concur

**B de V PICKARD**
**JUDGE PRESIDENT OF THE HIGH COURT (BISHO)** **Date: 15 May 2002**

MBEBE.RVJ