TAWANDA MUNGATE
and
KENNETH MUSHAIKWA
versus
GLORIA TAKUNDWA (N.O)
and
THE STATE

HIGH COURT OF ZIMBABWE
MUZOFA & CHIKOWERO JJ
HARARE, 20 May & 5 July 2021

Criminal Appeal

L Ziro, for the appellants
No appearance, for the 1st respondent
R Chikosha, for the 2nd respondent

MUZOFA J: This is an appeal against the first respondent's order to forfeit two motor vehicles in respect of which the appellants claim ownership.

The facts

One Richard Tafirei 'Richard' illegally acquired goods without paying excise duty or surtax from a company in Harare. The goods were transported to Beitbridge in two motor vehicles. The motor vehicles were intercepted along the way but the drivers escaped. Eventually Richard was arrested and charged with contravening s 184 of the Customs and Excise Act [*Chapter 23:02*] 'hereinafter referred to as the Act'. He pleaded guilty to the charge. A fine of $2000 was imposed in default of payment 10 months imprisonment. The goods and the motor vehicles were forfeited to the State.

The appellants lay claim to the motor vehicles. They have unsuccessfully applied for the setting aside of the forfeiture order and release of the motor vehicles[1]. Undeterred by the dismissal of their application, the appellants approached this court on appeal. This appeal was initially heard in March 2020 and a preliminary point was taken for the 2nd respondent. The preliminary point was dismissed[2] .This judgment addresses the merits of the appeal.

[1] Tawanda Mungate and Another v Gloria Takundwa and Another HH 265/19
[2] Tawanda Mungate and Another v Gloria Takundwa and Another HH 335/20

The grounds of appeal

The grounds of appeal were set out as follows:

1. The Court *a quo* erred on a point of law and fact by ordering seizure and forfeiture of the appellants' vehicles to the State without affording the appellants an opportunity to be heard.
2. The Court *a quo* erred on a point of law and fact by ordering seizure and forfeiture of the appellants' vehicles to the State when none of the appellants were charged or convicted of any wrong doing.
3. The Court *a quo* erred on a point of law and fact by ordering seizure and forfeiture of the appellants' vehicles to the State without proving negligence or intention to commit an offence on (sic) part of the appellants thereby the court a quo applied strict liability without premise to do so.

Before addressing the grounds of appeal I must address two salient issues that arise in this case.

Initially it occurred to us that the trial court might have been unaware that the motor vehicles belonged to the appellants. We therefore directed parties to file supplementary heads of argument on a question of law *viz* whether the right to be heard is absolute in circumstances where the court is unaware of the owner of the item it seeks to forfeit. We are grateful to Mr *Ziro* who filed supplementary heads of argument timeously incorporating a detailed background to the case. *Mr Chikosha*, who appeared for the second respondent opted not to comply with the directive. This judgment was written without the benefit of the second respondent's input.

The point made in the appellants' supplementary heads of argument is that the trial Court was indeed aware that the motor vehicles did not belong to the accused persons before it and made a conscious decision to forfeit the motor vehicles without hearing the owners. I will revert to this pertinent issue later in the judgment. In the absence of submissions controverting these facts as set out by the appellants, we accept the point that the trial court was aware of the fact of ownership. To that extent the point of law raised becomes irrelevant in the determination of this case. On a proper consideration, the facts no longer raise the issue. Addressing it would amount to dealing with an abstract point.

The second issue is on the forfeiture order. The trial court in its reasons for sentence did not set out the law in terms of which it ordered the forfeiture of the motor vehicles. When the matter was referred on automatic review, the reviewing Judge requested for the justification

for the order. The response is captured in the judgment by Justice MANGOTA in the application already referred to as follows,

> '…with regard to the two vehicles, the court relied on s188(2) (b) of the Customs and Excise Act when forfeiture was ordered.
>
> The forfeiture meets the criteria laid down in s 209(3)(c)(ii) of the Customs and Excise Act. The Court was satisfied that there are good reasons why the owners of the two vehicles concerned can (sic) be given an opportunity of being heard. The reason being that when the accused hired the vehicles in Harare the owners were aware of the nature of the goods to be transported in contravention of the Customs and Excise Act. This is the reason why the court did not give (sic) an opportunity to be heard.'

Thereafter the proceedings were confirmed to be in accordance with real and substantial justice. Unfortunately, the Magistrate failed to stick to her guns in her response to the notice of appeal. When the appeal was noted and in accordance with practice the Magistrate was requested to comment. Her response was alarming to say the least.It was as follows,

> 'In ordering forfeiture of the vehicles to the State, the court was guided by s62 (1) (b) of the Criminal Procedure and Evidence Act.'

Now it remains uncertain on what basis the forfeiture was made. Generally, a Magistrate's response to a ground of appeal is not at the same level as the findings in the matter forming the subject of appeal. It only assists the appeal court and the parties to appreciate the Magistrate's reaction and opinion to the grounds of appeal. The rationale is based on the position that an appeal is based and must be determined within the four corners of the record of proceedings of the trial court.

It is trite that where a statute provides for forfeiture the court is required to make an order in terms of that statute. The court must not look to other laws to make such an order[3].In this case a forfeiture in terms of s 62(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] would be inappropriate.

It is within a court's discretion to order forfeiture of goods and this discretion must be exercised judiciously. The Act has a couple of provisions which give a court the power to forfeit goods. The court therefore has to carefully consider the provisions that apply to the circumstances of the facts placed before it. The magistrate referred to both s 188(2)(b) and 209 of the Customs and Excise Act in her response to the reviewing Judge. Section 188 provides for forfeiture of goods that are subject of an offence under the Act and any mode of transport

[3] The State v Chakandiwa and Others HH57/13

used to transport the goods. Section 209 also provides for forfeiture of goods. However, s 209 is elaborate and self-contained and the power to forfeit goods is set out as follows ,

> "(3) A court shall not, in terms of subparagraph (i) of paragraph (*b*) of subsection (1), declare forfeited to the State— (*a*) ……
> (*b*) any ship, aircraft, vehicle or other thing if it is proved that the ship, aircraft, vehicle or other thing is not the property of the person convicted and that its owner was unaware that—
> (i) the ship, aircraft, vehicle or other thing was being used for the removal of goods referred to in paragraph (*a*) of subsection (2) and unable to prevent such use; or
> (ii) the ship, aircraft, vehicle or other thing was adapted for the purpose of concealing or smuggling goods as described in subparagraph (ii) of paragraph (*b*) of subsection (2);
> (*c*) any articles unless or until the owner thereof has been given an opportunity of being heard: Provided that—
> (i) this subsection shall not apply to goods which have been imported in contravention of section *forty-seven* or *forty-eight* or exported or attempted to be exported in contravention of section *sixty-one*;
> (ii) paragraph (*c*) shall not apply where the court is satisfied that there are good reasons why the owner concerned cannot be given an opportunity of being heard."

Subsection 3 of s 209 applies where the forfeiture is made in terms of subsection (1) (b) (i) thereof. Since the trial court forfeited the vehicles in terms of s 188(2 (b) of the Act the provisions of s 209(3) would not apply since they are specific.Either way it would seem the Magistrate fell into error. We are cognizant that this is not part of the grounds of appeal but it remains a salient issue for guidance.

Having disposed of the said issues l turn to the grounds of appeal.

The right to be heard

The first ground of appeal is really a ground for review. The complaint is a procedural irregularity. The court will consider the ground of appeal in the exercise of its review powers. It was submitted for the appellant that forfeiture in terms of s 188(2)(b) as read with s 209(3) (b) and (c) is incompetent where the owner of the vehicle is not heard or was unaware that the vehicle was used in contravention of the Act or it is proved that the convicted person is not the owner of the vehicle. This court has interpreted the provisions in such a way that they do not impose strict liability[4] . It is therefore mandatory for the trial court to hear the owner of the vehicle before making the order for forfeiture. There were no meaningful submissions from the second respondent except that the appellants cannot be heard on appeal for the first time as they were not before the trial court.

The submission made for the second respondent was the basis of the preliminary point that was disposed of in HH 335/20. The court's finding was that s 209 gives an owner of the

[4] Chama Ndaza v Zimbabwe Revenue Authority HH79/04

vehicle the right to appeal against a forfeiture order. We did not appreciate the persistence with this line of submissions by the second respondent's counsel in light of our decision. The only recourse for the second respondent would be an appeal instead of regurgitating a point already disposed of.

The difficulty that arises in this appeal is that the appeal court and the appellants have been forced to rely on information outside the record of proceedings. We agree with the submission that the appellants were supposed to be heard first before an order detrimental to their interests was made. It would seem the Magistrate was aware that the accused person before her was not the owner of the vehicles. The reasons given in response to the reviewing Judge is clear proof of that fact. What baffles this court is that the Magistrate went on to give details of how the appellants were aware of this illicit transaction. The record of proceedings does not bear testimony to the explanation given. In our view it was incompetent for the trial court to conclude that it was unnecessary to hear the owners of the vehicles without clear evidence before it that they knew about the commission of the offence. We might as well add that it may be useful for a trial court which considers forfeiture to enquire from the accused person whether the mode of transport used belonged to them or not.

The right to be heard is one of the cornerstones of any democratic society. Although s209 (3) (c) (ii) gives the court a discretion to forfeit goods without hearing the owner of the property , the court must exercise the discretion with utmost care bearing in mind that it is about to limit a right and give a prejudicial order. In *casu* the court should have satisfied itself that there were good reasons not to hear the owners. There was no information before the court to help it come to the decision of satisfaction or dissatisfaction on the issue. We may as well conclude that the decision was a thumb suck, the court just decided not to hear the owners based on nothing. Clearly the court fell into error and this was the first error.

The second error is that the trial court did not give the reasons for the forfeiture. It is trite that failure to give reasons is a misdirection. The failure to give reasons in this case has forced the appellants to make submissions based on issues extrinsic to the record of proceedings. In the exercise of our review powers we are entitled to set aside the order of forfeiture.

The finding on the first ground of appeal invariably informs the decision in respect of the remaining two grounds. Since the appellants were not heard the trial court did not make a finding on their intention as regards the commission of the offence.

From the foregoing whether we restrict ourselves to our appellate jurisdiction or fall back on our review powers the appeal must succeed.

In considering the appropriate order, we considered remitting the matter for the Magistrate to hear the appellants on the issue of forfeiture. However, in view of the lapse of time we believe it is in the interest of justice that the order be set aside without further ado. The order ought not to have been made in the circumstances in which it was granted.

The sentence by the court a quo must be altered by the setting aside of the paragraph on forfeiture.

Accordingly, the appeal is hereby upheld.

The sentence imposed by the court a quo is set aside and substituted as follows,

1. $2000 in default of payment 10 months imprisonment. The 228 boxes of cigarettes are forfeited to the State
2. The Nissan Vanette registration number ADK 0694 and the Mitsubishi Delica registration number ABU 6387 shall be released to the appellants forthwith.

CHIKOWERO J agrees……..