

THE STATE
versus
EDMORE ZENDERA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 22 September 2004

Criminal Review

UCHENA J: The accused was on the 14th May 2004 at Gokwe Magistrate's Court charged with the contravention of section 5 of the Control of Goods Petroleum Products Prices (Amendment Order 2003 (No 3)) as read with section 6(3) of the Control of Goods Act [*Chapter 14:05*]. He pleaded guilty and was convicted on his own plea. The conviction is proper but issues have been raised on the forfeiture of 29 000 litres of diesel found at the premises the accused was operating from.

The facts of the case are, that the accused operates a petroleum products agency known as Preview Investments (Pvt) Ltd. His agency had a contract with Dunleth Enterprises (Pvt) Ltd. The agreement between the accused's agency and Dunleth Enterprises is that the accused mobilizes or obtains bulk petroleum products consumers for Dunleth. Thereafter Dunleth would deliver supplies for the bulk consumers and pay the accused's agency a commission.

Contrary to the agency agreement the accused obtained deliveries of diesel which he kept at Dzinemhuru garage. The accused then sold some of the diesel to members of the public not covered by the contract between him and Dunleth Enterprises.

He was at the time of his arrest found in possession of 29 000 litres of diesel stored in drums.

On being charged he pleaded guilty and was convicted on his own plea. He was sentenced to a fine of \$200 000/in default of payment 6 months imprisonment. In addition the 29 000 litres of

diesel was forfeited to the State.

In terms of section 59 of the Magistrates' Court Act [*Chapter 7:10*] the accused's legal practitioners submitted a statement on review. In it they alleged that -

- "1) The learned magistrate acted *ultra vires* the provisions of section 5 of Statutory Instrument 189 of 2003 which does not provide for forfeiture of the goods except where the forfeiture was being done by a Regional Magistrate. The said magistrate did not have the powers to forfeit the said product to the State as she had no capacity to do so.
- 2) The forfeiture was made by way of alteration after the court had adjourned in the absence of the accused and the prosecutor.
- 3) The alteration of the sentence by the magistrate has seriously prejudiced Dunleth Enterprises (Pvt) Ltd the owner of the diesel that was confiscated, who has since been granted an order interdicting the police from disposing the diesel pending the application for review."

The dispute concerning the forfeiture of the diesel first appeared before me on 26 May 2004 as an urgent chamber application under HC 6008/04. At the hearing of the urgent chamber application the parties consented to the granting of an interdict preventing the police from disposing of the diesel pending the review of the criminal proceedings which had resulted in the forfeiture of the diesel to the State.

The record of the criminal proceeding was placed before me in early July 2004. On the 5th of July 2004 my clerk wrote to the Provincial Magistrate Midlands asking the trial magistrate to comment on the allegations made against her decision in the application for review. In particular she was to comment on (1) whether she made the forfeiture order after the court had adjourned and (2) the allegation that her forfeiture order was *ultra vires* the provisions of section 5 of SI 189 of 2003.

No response was received. When my clerk made telephonic

inquiries with Gokwe Magistrates' Court he was advised that the record had not been received. He on 2 September 2004 sent another letter and a photocopy of the record made from HC 2008/04. By letter dated 6 September 2004 the trial magistrate responded commenting as follows on the issues raised in the accused's legal practitioners' statement on review.

- 1) She agrees that SI. 189/2003 does not make provision for forfeiture. She however used the power conferred on her by section 62(1) of the Criminal Procedure and Evidence Act.
- 2) She denies making alterations to the sentence after the court had adjourned but says she made the forfeiture order at the time she passed sentence.

The accused's legal practitioner made a bald allegation in her statement on review that the forfeiture order was made after the adjournment. She was herself not present at that hearing. She did not attach any affidavit by the accused or some other person present at the hearing to the statement on review to substantiate the allegation. It must be stressed that legal practitioners should not lightly make allegations alleging impropriety on the part of a judicial officer without first establishing and verifying the basis for the allegation.

In this case the magistrate denies forfeiting the diesel to the State after the court had adjourned. She says she forfeited the diesel to the State at the time she passed sentence. I cannot resolve this issue in the accused's favour on the basis of a bald allegation not substantiated by any evidence.

However an examination of the magistrate's reasons for sentence does not reveal any mention of the forfeiture. The magistrate should have dealt with the forfeiture in her reasons for sentence. Her failure to do so seems to indicate that she did not properly direct her mind to the forfeiture.

The second issue raised was that of the forfeiture being *ultra*

vires the provisions of section 5 of SI 189 of 2003. In her response the magistrate does not dispute that SI 189 of 2003 does not provide for forfeiture. She however said she acted in terms of section 62(1) of the Criminal Procedure and Evidence Act (hereunder referred to as the "CP & E Act").

Section 62(1) of the CP & E Act provides as follows:

"62(1) A court convicting any person of any offence may, without notice to any other person declare forfeited to the State -

- (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
- (b) if the conviction is in respect of an offence specified in the Second Schedule, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or, in the case of a conviction relating to the theft of any goods, for the conveyance or removal of the stolen property and which was seized in terms of this part." (emphasis added)

My understanding of section 62(1) is that the court has a discretion on whether or not to forfeit to the State any article involved in the commission of any offence. That discretion should be exercised reasonably and judiciously in circumstances where the article is one mentioned in section 62(1)(a) or (b).

A court must therefore start by considering whether or not the article is one by means whereof the offence was committed or the offence falls under the Second Schedule of the CP & E Act. If it is, the court must then consider whether the article should be forfeited in terms of section 62(1)(a) or (b). In terms of section 62(1)(a) the article must be one "by means whereof the offence was committed" or "one which was used to commit the offence".

In the present case the magistrate should have asked herself whether the diesel she was forfeiting to the State was an article by means whereof the offence was committed or one used to commit

the offence.

The offence the accused person was convicted of is that of selling petroleum products to the public while not being a holder of a licence. The agreed facts reveal that the accused was an agent of Dunleth for purposes of finding bulk consumers to whom Dunleth would sell diesel and the accused would be paid commission. In paragraph 4 of the State's outline it is alleged as follows.

"4. Between the period extending from 5th April 2004 to 4th May 2004 the accused obtained deliveries of diesel fuel which he kept at Dzinemhuru Garage. The accused proceeded to sell diesel fuel to members of the public who are not catered for in the contractual agreement with Dunleth Enterprises."

In paragraph 5 of the State's outline it is alleged -

"5 The State may produce receipts in respect of small quantity sales made direct to the public from Dzinemhuru Garage."

The offence was the sale to members of the public. The question the magistrate should have asked herself is whether the diesel which was found at the garage had been sold to members of the public or a means by which diesel had been sold to members of the public or was used to commit the offence.

In my view an article "by means whereof" the offence is committed is one which enables the offender to commit the offence or assists or aids the offender in committing the offence. For example a motor vehicle used to transport goods with which the offence is committed can be described as a means whereof the offence is committed. In my view this does not extend to diesel which remains after other diesel has been sold in contravention of the law. This should be so if regard is had to the State's own outline which clearly states that the accused had a contract which allowed him to sell to bulk consumers on behalf of Dunleth. Should diesel meant for bulk consumers be forfeited just because some diesel has been sold to public consumers. I am of the view that the

diesel which was forfeited did not play any part nor was it used in the commission of the offence. The diesel should therefore not have been forfeited to the State in terms of section 62(1)(a) of the CP & E Act.

In terms of section 62(1)(b) the offence for which the accused has been convicted must be one falling under the Second Schedule. If the offence falls under the Second Schedule of the CP & E Act then the article can be forfeited and the court can proceed to consider whether the article qualifies for forfeiture in terms of section 62(1)(b). If the offence does not fall under the Second Schedule the article cannot be forfeited to the State and the inquiry should end there.

The Second Schedule of the CP & E Act provides for four groups of offences in connection with which articles may be seized and be confiscated in terms of section 62. The offences are:

- (1) Any offence under any enactment relating to the unlawful possession, conveyance or supply of habit-forming drugs or harmful liquids.

The offence for which the accused was charged is not in any way connected to habit forming drugs or harmful liquids so the offence does not fall under this group.

- (2) Any offence under any enactment relating to the unlawful possession of or dealing in precious metals or precious stones.

The offence for which the accused in this case was convicted does not fall under this group.

- (3) Theft, either at common law or as defined by any enactment.

Again the offence for which the accused was convicted does not fall under this group.

- (4) Breaking and entering any premises with intent to commit any offence either at common law or in contravention of any enactment.

Again the offence for which the accused was convicted does not

fall under this group.

The fact that the offence for which the accused was convicted does not fall under any of the four groups of offences under the Second Schedule means the diesel should not have been seized and confiscated in terms of section 62(1)(b) of the C P & E Act.

It must be noted that while section 62(1) of the CP & E Act can be used to forfeit goods or articles used in committing any offence care must first be taken to ensure that the article is one by means whereof an offence was committed or was used to commit the offence or the offence falls within the second schedule as it is only articles which fall under section 62(1)(a) and (b) which can be forfeited even if the act under which the offence was created does not provide for forfeiture.

If the magistrate in this case had properly applied her mind to the provisions of section 62(1)(a) and (b) she would not have forfeited the diesel to the State.

In the circumstances the magistrate's order forfeiting the 29 000 litres of diesel to the State is set aside. The Officer-in-charge Gokwe Police Station is ordered to immediately release the 29 000 litres of diesel to Dunleth Enterprises.

Mavangira J agrees:.....

Gula Ndebele and Partners, applicant's legal practitioners.
Attorney-General's Office, Criminal Division, respondent's legal Practitioners.