

CHAMU NDAZA
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 24 MARCH 2003

Opposed Court Application

Mr *Tivaone*, for the applicant
Mr *Chidziva*, for the respondent

KAMOCHA J: After hearing argument by both legal practitioners I granted the application in terms of the draft order and indicated that my reasons would follow in due course. These are they.

The applicant sought for an order that the respondent be ordered to release to him a house boat described as Shai Shai House Boat KF 368, engine number 0607088 G. 00550302 D seized by respondent on notice of seizure number 97057 D dated 5 October 2002.

The circumstances giving rise to the application are these. The applicant is a professional tour operator and has been so for some years. He manages a house boat known as Shai Shai house boat registered as KF 368 which belongs to one Jeremiah Nhete who resides in Mandara, Harare. The applicant - "Chamu" resides in Kariba and the house boat is based at Cutty Sark Harbour - Kariba.

Apart from this particular house boat Chamu also manages other boats for various tour operators. His business is mainly to hire out boats for a fee to tour operators. When boats are hired out the hirers also pay for and get the services of the boat captain and the cook. Payments for the hire of the boats are made before the hirers take boats and receipts are issued.

On 4 October 2002 one Robert Matenda hired Shai Shai to spend two nights on it. Matenda is in the business of chartering boats. He paid \$70 000.00 upfront for the two nights.

At about 0700 hours on 5 October 2002 an official of the respondent discovered that Shai Shai was loaded with goods that were to be unlawfully transported to Zambia. The goods were going to be smuggled to Zambia. Among the occupants of the hired boat were some Zambian nationals. All the occupants including Matenda were then arrested and charged with smuggling the goods which were forfeited to the state by the trial court after conviction.

The respondent's official placed the vessel under seizure as it was the means of conveyance of the smuggled goods. The applicant has been trying to secure the release of the boat in vain ever since. He averred that he was not aware that the clients who had hired the vessel were going to use it for smuggling. He believed that they had hired it for a normal house boat cruise. He had no knowledge of the illegal activity of the hirers on the vessel. He said he himself was innocent and had never in anyway participated, aided or gave any blessings to the illegal activities of the hirers. It is infact common cause that he was never arrested for any wrong doing relating to the smuggling of the said goods. He asserted, further, that once a boat has been hired it was not his business to accompany it so as to ensure that the hirers use it for the purpose they have hired it. He therefore had no way of knowing what illegal activities the hirers engaged in.

In this case the culprits appeared in the Kariba Magistrate's Court and were convicted and sentenced to pay fines while their goods were forfeited to the State. But the respondent wanted the applicant's vessel to be forfeited to the State when he is not being accused of any wrong doing. Further respondent wants to forfeit the boat without affording the owner an opportunity to be heard.

The respondent contended that it acted properly in placing the boat under seizure and went on to argue that the vessel should be forfeited to the State. Reliance was placed on section 188 of the Customs and Excise Act [*Chapter 23:02*]. The relevant provision recite as follows:-

"188 Goods and Ships, aircraft, vehicles or other things liable to forfeiture

- 1) Any goods which are the subject matter of an offence under this Act shall be liable to forfeiture.

- 2) Any ship, aircraft, vehicle or other thing used for the removal of goods which -
 - a) are liable to forfeiture; or
 - b) are being exported or have been imported or otherwise dealt with contrary to or not in accordance with -
 - i) the provisions of this Act or any other law relating to Customs and Excise; or
 - ii) any enactment prohibiting, restricting or controlling the importation of such goods; shall itself be liable to forfeiture"

It was respondent's contention that since the above provisions are peremptory the vessel was subject to forfeiture irrespective of whether or not the owner knew or ought to have known that the vessel was going to be used for criminal activities by the hirers. Thus imposing strict liability. I do not agree.

These courts have normally implied strict liability in statutory provisions which create public welfare offences. Professor G Feltoe in A guide to the Criminal Law of Zimbabwe second edition at page 133 discusses the question of strict liability as follows:-

"In Zimbabwe, the imposition of strict liability has not come about as a result of the legislature laying down expressly that certain offences are strict liability offences. Instead the courts, taking into account certain recognised factors, have come to the conclusion that it was the implied intention of the legislature to introduce strict liability in respect of these offences. All of the cases where the courts have decided that strict liability was impliedly imposed have involved statutory provisions which have created so-called public welfare offences. These offences involve prohibitions or duties designed to prevent grave potential danger to the welfare of the State generally and/or to public amenities.

Public welfare offences include such things as public health legislation, safety regulations, legislation aimed at preventing the spread of animal disease, legislation aimed at preventing contamination of drugs and food stuffs which are being processed and manufactured, etc"

As can be seen from the above passage smuggling cannot be classified as one of the public welfare offences and is accordingly not a strict liability

offence. It must, therefore, be established that there was intention or culpa on the part of the owner for liability to attach. *In casu* there is no doubt that the applicant had no knowledge of the commission of the crime which led to the seizure of his vessel. Neither was he negligent in any way.

Finally I wish to emphasize that although the provisions of section 187 and 188 of the Customs and Excise Act are indeed peremptory they do not create a strict liability offence.

In the light of the foregoing I would grant the application in terms of the draft order.

Mangwana Chirairo & Tivaone, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners