STATE

Versus

PRINCE NDLOVU

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 23 MAY 2022

Criminal Review

TAKUVA J: This matter was referred to the Registrar by the learned Regional Magistrate at Plumtree.

The accused was convicted on his own plea of guilty of contravening section 10 (1) (A) as read with section 10 (3) of the Environmental Management Act (Control of Hazardous Substances) (General) Regulations 2018 (S.I 268/2018) "Store or sell Hazardous Substance without a licence" by a Magistrate at Plumtree on 27 September 2020. He was sentenced to pay a fine of "ZWL $1 200-00 in default of payment 90 days imprisonment. The 66 x 30 litres petrol and 200 l x 2 petrol be and are hereby forfeited to the state. The exhibit to be disposed by public auction." (my emphasis).

The facts are that on the 25th day of August 2020 at approximately 2100 hours at Syringer turn off along Bulawayo-Plumtree road, the police intercepted a Toyota Hiace registration No. ABQ 6011 driven by the accused. Upon searching the vehicle they found the items mentioned in the charge sheet leading to accused's arrest and prosecution.

The learned Scrutinising Regional Magistrate raised the following queries;

(1) Does section 10 (3) of the said legislation create an offence?

(2) Does the discretion to order forfeiture to the State extend to prescribing to the State how it should dispose the items?

In dealing with the 1st point the trial court said the following;

"Section 10 (3) of the said legislation does not create an offence, it is only a penal provision. The correct citation is section 10 (1) (a). I must at this stage admit that it was an oversight on the part of the trial court not to check on the correctness of the charge. When I dealt with this matter the statute in question was not readily available. I only looked for it through prosecution after the learned Regional Magistrate raised the issues in question. Be that as it may, when I dealt with the matter I genuinely believed that I was dealing with contravention of section 10 (1) (a). This explains why canvassed elements are in line with the said section." (my emphasis)

I must confess I also struggled to locate the relevant statute leading to some delay in preparing this judgment. It is trite that a mere miscitation of a section or chapter number in circumstances where a court complies with the provisions in question is not necessarily fatal to the proceedings. See section 202 (3) of the Criminal Procedure and Evidence Act, Chapter 9:07, *S* v *Mutizwa* 2006 (1) 78 H.

In casu the court *a quo* canvassed the correct essential elements of the offence. The accused was not in any way prejudiced by this obviously harmless error.

While dealing with the 2nd query, the learned Magistrate said;

"Section 17 (3) (iii) of the Environmental Management (Control of hazardous substances) (General) Regulations S.I 268/2018 does not specifically empower the trial court to prescribe to the state how it should dispose the forfeited items. The trial court made that prescription as a way to discourage the police from seizing items with the aim to benefit themselves. To that end, I do not see it prejudicial to the state or the interest of justice. Be that as it may, I stand guided." (my emphasis)

I am of the view that the court *a quo* fell into error when it arrogated to itself the power to prescribe the method of disposal. If this is permitted, floodgates will be opened for Magistrates all over the country to choose whatever mode of disposing exhibits. This will be chaotic.

Disposal of forfeited hazardous substances is provided for in section 17 (3) (a) (b) (iii) of the Environmental Management (Control of Hazardous Substances) (General) Regulations 2018 (S.I. 268 OF 2018). The section states;

"17 (3) (a) All items which have been seized under subsection (1) shall –

(a) be taken forthwith and delivered to a place of security under the control of an "Agency" or police officer, and

(b) be held in custody at the owner's risk until –

(i) …….

(ii) ……

(iii) The criminal proceedings have resulted in the conviction of the accused person, in which event the convicting court may order any such items to

be forfeited to the State or returned to the accused person, as it deems fit in the circumstances." (my emphasis)

The role of the "Agency" is spelt out in subsection (4) which states;

"4. The Agency shall establish and maintain a register of items seized under this section to be known as the seized items register, in which the agency shall record the following –

(a) description of seized items, including, where necessary, their quantity; and
(b) the name of the person from whom they were seized and the place at which they were seized and the reason for seizure; and
(c) the date of seizure; and
(d) the manner of eventual disposal (whether returned to the person referred to in paragraph (b) or forfeited to the State)."

Subsection 5 creates an offence against any person who conceals or disposes of any items deemed seized by the Agency or a police officer in terms of subsection (1).

In my view it is the Agency that has the jurisdiction to deal with seized items. The court's role ends after issuing a forfeiture order. There is no room for a court to prescribe the mode of disposal in the absence of a law permitting such a role. I also find it improper for a Magistrate to take judicial notice of the fact that police officers abuse their offices. It is an abstruse argument based on extra-judicial information.

In the result, I take the view that the court *a quo* misdirected itself when it prescribed the manner of disposal of the exhibits in the circumstances of this case.

Accordingly, the court *a quo's* sentence is amended by the deletion of the last sentence to the effect that "The exhibit to be disposed by public auction." The accused's sentence should read as follows;

The accused is sentenced to $1 200-00 in default of payment 90 days imprisonment. The 66 x 30 litres petrol and 200 litres petrol x 2 be and are hereby forfeited to the State.

Takuva J……..

Makonese J agrees……