THE STATE

Versus

MARK FREDERICK ROBINSON

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 15 MAY 2008

T Mkhwananzi, for the state
R M Smithwick, for the accused

Criminal Review

NDOU J: The accused was properly convicted of contravening section 8(1) of the Gold Trade Act [chapter 21:03] [the Act] by a Bulawayo Magistrate and nothing turns on the conviction.

The accused was sentenced on 8 October 2003 to a fine of $10 000 or in default of payment 1 month imprisonment. Once more, nothing turns on this part of the sentence. This review is solely about the forfeiture of the gold. The salient facts of the case are the following. Members of Zimbabwe Republic Police Gold Squad regularly visit the accused's entity trading under the style of Kings Jewellers to check compliance with the Act. On 3 October 2003 at about 1600 hours one such routine check resulted in the detection of the offence for which the accused stands convicted. The check showed that the accused had 8,59 grammes of gold not entered in the register as required by the Act. The accused was in the circumstances, correctly charged for the above-mentioned provision of the Act. The trial magistrate conducted the summary trial in terms of section 271(2)(a) of Criminal Procedure and Evidence Act [chapter 9:07]. Even before going into the written submissions made on behalf of the accused and the state, I believe that it was wrong for the trial magistrate to adopt this procedure. The facts do not seem to establish a trivial offence, especially when one considers that forfeiture of the gold was a possibility. I

do not have to decide this

point in view of the concession made by the state counsel on another point raised by the accused. The accused, in a founding affidavit, accompanying this application for review, avers that the sentence imposed by the trial magistrate is a fine of $10 000 or in default 1 month imprisonment. He categorically states that there was no order for forfeiture of the gold. He states that, in any event he specifically asked the fate of the gold. This he did when he was still in the dock soon after the sentence. The trial magistrate "assured" him that the gold was to be returned to him as it was not part of the sentence. On 10 November 2003 he obtained an extract from the Criminal Record Book from the Clerk of Court [This extract was filed of record in this application]. This extract supports the accused's version as no forfeiture was reflected. Thereafter, the accused made several attempts personally to secure the return of the gold. Eventually, he got an answer that the gold had been forfeited to the state. This response came from the Gold Squad who all along had custody of the gold. To the accused's surprise, the record now reflected that the trial magistrate ordered forfeiture of the gold. This contradicted the extract of the record supplied by the Clerk of Court, *supra*. The only explanation of the contradiction is that the trial magistrate entered the forfeiture clause well after the sentence had been imposed and the accused started claiming the gold i.e. some time after pronouncing the sentence. The reasons advanced on behalf of the Attorney-General in conceding that the forfeiture was added later are stated as follows by state counsel:

> "The writer [state counsel] is persuaded to follow applicant's [accused's] argument that the forfeiture order was added a few days later for the following reasons:
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> (i) the way the forfeiture order was written clearly shows that it was squizzed so that it does not interfere with the signature;
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> (ii) an extract from the Criminal Record Book (CRB) obtained from the Clerk of Criminal Court on the 10th November 2003 states that applicant was sentenced to $10 000/1 month imprisonment;
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> Another extract from the CRB dated 23rd December 2003 also shows $10 000/month imprisonment;
> The writer [state counsel] physically checked the CRB and it still reflects the sentence as $10 000/1 month imprisonment
> The writer submits that the procedure followed in recording the sentences in the CRB shows that it is highly unlikely that the Clerk of Court may have erroneously copied an "incomplete sentence" from the record."

I agree with both counsel. In any event the trial magistrate chose not to

depose to an opposing affidavit. His answer [not in affidavit form] is in any event unhelpful and incoherent. He did not respond to the detailed allegations made under oath by the accused. All he could say was –

> "The record shows that so does the copy of the charge sheet given to the accused. There was no communication between the court and accused about forfeiture except to say the order was pronounced in open court".

It is not surprising that the state counsel found the trial magistrate's version indefensible. Magistrates should realise that to err is human, there is no need to embark on some dishonest explanation for the error. The law has built in procedures to remedy genuine errors. As alluded to, there is an irregularity in these proceedings. I am empowered by section 29(4) of the High Court Act [chapter 7:06] to exercise powers exercisable on automatic review. Further, I have review powers [as the accused is attacking the sentence only] under section 57(3) of the Magistrates' Court Act [chapter 7:10] – *S* v *Ferguson* 1942 SR 168; *R* v *Pria & Anor* 1967 RLR 106 (G); *S* v *Stockie* 1980 ZLR 280 (G); *S* v *Runganga* 1995 (2) ZLR 303 (H) at 306G-307E; *S* v *Nyathi* HB-90-03; *S* v *Fikizolo* HB-131-04 and *S* v *Nkata & Ors* HB-11-06.

The accused on one hand prays that I order the trial magistrate to respond to the founding affidavit. The state, on the other hand prays that I order forfeiture notwithstanding the irregularity. I am not persuaded by either prayer. I feel that the conviction and the fine imposed should stand. However, I feel that the parties should be given an opportunity to make submissions on question of forfeiture before a magistrate. In exercise of the wide powers I enjoy on review, this is a case which requires that I confirm the conviction entered by the trial magistrate but send the case back for sentence to be passed afresh – *Criminal Procedure in Zimbabwe* by J R Rowland at 26-9 to 26-10.

Accordingly, I confirm the conviction and the sentence of $10 000 or 1 month imprisonment and set aside the forfeiture in the sentence and order that the accused be sentenced afresh by a different magistrate after hearing further submissions by both parties on the question of forfeiture.

Cheda J …….. I agree

Criminal Division, Attorney-General's Office, state's legal practitioners
Coghlan & Welsh, accused's legal practitioners