THE STATE
versus
JULIET CHIKANDIWA
and
XAVIER MUWALO
and
JOHN KUTSIRA
and
MURANGANWA ZINYANA
and
CALEB RUPERE
and
CHOMBE JANUARY
and
BRODRICK TASUKWA
and
LOVEMORE CHIMHUNGWE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 27 FEBRUARY 2013

Review Judgment

MATHONSI J: In these 3 matters the accused persons were intercepted at roadblocks mounted by the police in Beatrice on 19 and 20 October 2012 while carrying firewood they had fetched at farms in the area. In the first case of Juliet Chikandiwa and 2 others, they had loaded 3 codes of firewood onto a Mazda T35 truck registration number AAP 6474. In the second of Muranganwa Zinyana and 2 others, they had loaded 7 codes onto an unspecified 8 tonne truck registration number ABY 6641 while in the third case of Brodrick Tasukwa and another, they were carrying firewood in an unspecified 2,5 tonne truck registration number ACL 4240.

They were arraigned before a provincial magistrate at Chitungwiza on a charge of contravening section 78(1)(a) of the Forest Act [*Cap 19:05]*. They pleaded guilty to the charge and upon conviction, were each sentenced to 15 months imprisonment of which 5 months imprisonment was suspended for 5 years on condition of future good behaviour. The remaining

10 months imprisonment was suspended on condition they complete 350 hours of community service at Budiriro, Featherstone and Wilkins Police stations.

In addition to those sentences, the firewood and motor vehicles used to ferry it were forfeited to the state.

The matters came before me for automatic review in terms of section 57(1) of the Magistrates Court Act [*Cap 7:01*]. I immediately drew the trial magistrate's attention to the penal provision of section 78(1)(a) of the Forest Act [*Cap 19:05]* under which the accused persons were charged which provision does not provide for forfeiture of the motor vehicles. That section provides:-

> "Any person who, without authority, in or on a state forest or private forest cuts, injures, destroys, collects, takes or removes any tree, timber or other forest produce shall be guilty of an offence and liable;
>
> (i)where damage has been wilfully caused, to a fine not exceeding level 8 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
>
> (ii)in any other case, to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

The magistrate's response only came 3 months after I had queried the forfeiture of the vehicles. It reads in relevant part thus:

> "It is respectfully conceded that section 78(1)(a) which the accused persons stand convicted (sic) does not provide for the forfeiture of the motor vehicles. I was guided by section 62 of the Criminal Procedure and Evidence Act [*Cap 9:07]* to forfeit the said motor vehicle (s). Section 62(1)(a) provides that a court convicting any person of any offence without notice to any other person, declare forfeit to state 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. On all the 3 records it was established that the said motor vehicles were used in the commission of an offence hence the vehicles were forfeited to the state."

On 19 October 2012, Juliet Chikandiwa, Xavier Muwalo and John Kutsira, all of whom are not employed, drove to Mara farm Beatrice in a Mazda T35 truck registration number AAP 6474. Whilst there, they harvested firewood which they loaded onto the vehicle without

authority. They were making their back to Harare at about 0045 hours when they were intercepted at a police road block at the 20km peg along the Harare-Masvingo road leading to their arrest as they had no permit to remove the firewood.

The value of the firewood was not ascertained. When they were brought before the magistrate they pleaded guilty and sentenced aforesaid although the value of the T35 truck was not established. On the same date, Brodrick Tasukwa, Lovemore Chimhungwe and 3 others who pleaded not guilty, drove a 2,5 tonne truck registration number ACL4240 to plot 52 Charter Estate, Featherstone where they loaded firewood. They were on their way back to Harare along the Harare-Masvingo road when they were intercepted at a police road block mounted at the 54km peg. On being found without a permit, they were duly arrested.

Again the value of the firewood was not established neither was the value of the 2,5 tonne truck but they were convicted on their own pleas of guilty and sentence as already stated.

On 20 October 2012 Muranganwa Zinyana, Caleb Rupere and Chombe January, who had earlier driven in an 8 tonne truck registration number ABY6641 to Featherstone and loaded firewood onto the truck, were also intercepted at 0130 hours at a police road block mounted at the 20km peg along Harare – Masvingo road. When they failed to produce a permit to remove firewood, they were arrested. Although the values of both the firewood and vehicle were not ascertained, they were convicted on their pleas of guilty and sentenced as stated above.

Now the penalty for contravening section 78(1)(a) is set out in the Act. That penalty does not include the forfeiture of the instruments used in the commission of the offence be it the machete used to cut the firewood, a wheelbarrow, scotchcart or indeed motor vehicle used to carry the firewood. If the legislature intended to provide for the forfeiture of those items, it would have certainly said so in the penal section. It did not.

In my view, it was not the business of the sentencing court to go beyond the penal provision and import further penalty provisions from another law when the law giver had specifically provided for the punishment to be imposed against the offender. In doing so, the trial court fell into grave error.

The offence committed is a statutory one provided for in the Forest Act. It is undesirable to go further than the statute criminalising the conduct of the accused persons in search of further

sentencing power when such power is specifically given in the Act. Doing so leads to imposition of a penalty not envisaged by the law giver and certainly leads to undue punishment.

The magistrate says he had to go to section 62(1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] in order to find jurisdiction and authority to forfeit the vehicle. He does not explain why he found it necessary to do so. This was as unnecessary as it was a misdirection.

In any event, care must always be taken in deciding whether to order forfeiture or not, that such order does not result in the imposition of a penalty which is disproportionate to the gravity of the offence committed. Factors to be taken into account in deciding whether to order forfeiture were set out in *S v Ndhlovu* (1) 1980 ZLR 90 (GD) and they are;

1) The nature of the article.
2) Its role in the commission of the offence.
3) Whether there is a possibility of the article being used again in the commission of similar offences.
4) The effect of the forfeiture on the accused person.
5) In view of the value of the article, whether its forfeiture will give rise to the imposition of a penalty disproportionate to the gravity of the offence.
6) Where the article is of considerable value like a motor vehicle, whether it has been used previously to commit a similar offence.

The point is made in *S v Kurimwi* 1985 (2) ZLR 63 at 65 D and 67 F that the value of the motor vehicle must be considered *viz a viz* the value of the goods smuggled. By parity of reasoning, the value of the vehicle must be weighed against the value of the firewood in the present case. Indeed as stated by PITTMAN J in *S v Mahomed* 1977 (2) ZLR 207 at 211E the decision on a forfeiture order requires first an inquiry whether the forfeiture would be equitable. See also *R v Poswell & anor* 1969 (4) SA 194 (RAD) and *R v Barclay* 1969 (4) SA 195 (RAD).

In *casu,* the trial court proceeded, virtually headlong without inquiring into the value of the firewood forming the subject of the offence or the value of the vehicles ordered forfeit and clearly was not alive to the importance of the value of the forfeited vehicles as against the offence. Indeed none of the guidelines set out in Ndhlovu supra was ever taken into consideration in deciding the forfeiture.

It occurs to me that firewood is generally of negligible value. This, measured against the considerable value of motor vehicles, means that the unsolicited order for forfeiture was not only inequitable but clearly led to the imposition of a disproportionate penalty not matched by the gravity of the offence.

Accordingly, while the conviction of the accused persons was proper and the sentence imposed fell within the sentencing discretion of the magistrate, the orders for forfeiture of the 3 motor vehicles cannot stand.

In the result it is ordered that:-

1. The convictions of the accused persons in CRB B377-9/2012, CRB B 380-2/2012 and CRB B383-7/2012 are hereby confirmed.

2. The sentences imposed on the accused persons in CRB B377-9/2012, CRB B380-2/2012 and CRB B383-7/2012, excluding the forfeiture orders, are hereby confirmed.

3. The order for the forfeiture of the Mazda T35 registration number AAP6474, the 8 tonne truck registration number ABY6641 and the 2,5 tonne truck registration number ACL 4240 are hereby set aside with the result that the said motor vehicles should forthwith be returned to the accused persons.

4. The order for the forfeiture of the firewood in all the 3 cases is hereby confirmed.

MATHONSI J:…….

MAWADZE J: agrees……..