

ALBANO ANTONIO MANUEL DA CUNHA  
and  
RJA KELLIE  
**versus**  
RANGARIRAI GAKANJE N.O  
and  
THE STATE

HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 18 DECEMBER 2015 AND 21 JANUARY 2016

### **Urgent Chamber Application for Review**

**MAKONESE J:** The first applicant a 47 year old South African national, arrived at Pandamatenga Border Post on 7 November 2015. He was driving a Nissan UD Truck bearing registration number DR 84LD GP. He was enroute to Botswana. He surrendered his Temporary Import Permit and Passport to the Customs and Immigration officials. The motor vehicle was searched by customs officials and a false compartment containing 4114 bricks of Pacific cigarettes was discovered. The cigarettes were not declared to customs officials and were accordingly seized under Notice of seizure number 016001. The UD Nissan Truck was also seized in terms of section 188 (2) of the Customs and Excise Act, [Chapter 23:02].

The first applicant appeared before a magistrate sitting at Victoria Falls on 27 November 2015 facing a charge of smuggling in contravention of section 182 (1) of the Customs and Excise Act. He pleaded guilty to smuggling 4114 bricks of cigarettes. He was sentenced and convicted on his own plea of guilty and was sentenced to pay a fine of US\$2000 or in default of payment 6 months imprisonment. In addition, the seized goods (cigarettes) were forfeited. The trial magistrate ordered that the motor vehicle used to smuggle the goods be forfeited to the state.

The applicant's legal practitioner has filed an application for review premised on essentially two grounds:

- a) The sentence imposed against the first applicant is incompetent in that the trial magistrate did not have the jurisdiction to impose a sentence exceeding US\$500-00.

- b) the learned magistrate grossly erred in ordering forfeiture of the motor vehicle despite the fact that she had doubts whether the vehicle was designed for smuggling and without establishing whether the owner of the vehicle was aware that the vehicle was being used for such a purpose. It was further argued that in terms of the Customs and Excise Act the court should have heard the owner's explanation before ordering forfeiture.

It is beyond dispute that the trial magistrate, being a junior magistrate did not have Jurisdiction to impose a sentence of a fine exceeding US\$500-00 (Level 8) section 208 of the Customs and Excise Act provides as follows:

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- b) a court of a magistrate, other than a regional, provincial or senior magistrate, shall have special jurisdiction to impose, on summary trial or on remittal by the Prosecutor General of the case for trial or sentence, a fine not exceeding level eight or imprisonment for a period not exceeding two years or both such fine and such imprisonment.”

The sentence ordering first applicant to pay a fine of US\$2000 is therefore incompetent and cannot be allowed to stand.

On the aspect of forfeiture the learned trial magistrate dealt with the issue as follows in her reasons for sentence:

“As mitigatory I have also considered that accused did not benefit from the offence as the 4114 bricks of cigarettes were seized and later forfeited by this court.

I find it appropriate to further forfeit the vehicle which was used in the commission of the offence in accordance with section 188 of the Customs and Excise Act. It is not clear from the vehicle whether the compartment is built in or from the manufacturer in that state. I therefore feel that it is not for the accused person to say that the vehicle is not his but for the owner to clarify certain issues.” (Underlining mine for emphasis)

The learned trial magistrate went on to order forfeiture of the motor vehicle despite the fact that the Public Prosecutor submitted that he did not intend to apply for forfeiture of the vehicle as there was no evidence that the compartment was a false compartment designed for smuggling and crucially, the owner of the vehicle had not been called to defend himself. In her own reasons for sentence, the magistrate expressed doubts whether the compartment where the

cigarettes were concealed was a false compartment or was a design by the manufacturer. It is common cause that the vehicle belongs to RJA KELLIE. There is no evidence on record to suggest that the owner of the vehicle authorized the use of his vehicle for smuggling purposes or for any other unlawful purpose. There is also no evidence to infer that the owner of the vehicle was aware that his vehicle was being used to smuggle cigarettes.

Section 209 (3)(c) provides that no article, ship, aircraft or vehicle shall be forfeited;

“---- until the owner thereof has been given an opportunity of being heard:

Provided that –

(1) This subsection shall not apply to goods which have been imported in contravention of section forty-seven or exported in contravention of section sixty-one ----“

It is clear from a reading of the above section that the trial magistrate was obliged to hear the explanation of the owner of the vehicle to establish whether or not he was aware or must have been aware that his motor vehicle was being used for the purposes of smuggling cigarettes.

Failure on the part of the trial court to give the owner of the vehicle an opportunity to be heard, in clear violation of the provisions of the Customs and Excise Act, amounts to a serious irregularity which renders the order of forfeiture clearly defective and incompetent.

I am satisfied for the reasons stated above that the applicants are entitled to relief sought in the draft order.

I accordingly order as follows:

1. The sentence of US\$2000 imposed on first applicant be and is hereby set aside and substituted with a fine of US\$500.
2. The forfeiture of vehicle number DR 84 LD GP be and is hereby set aside.
3. The said vehicle be released to second applicant or his legal representative within 48 hours of the date of this order.

Makonese J.....

Moyo J.....agrees