

**The State
Versus
Anyway Mutariswa
And
Another**

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 12 December 2005

Criminal Review

BHUNU J: Both accused were convicted on their own pleas of guilty on a charge of contravening section 5(1) (a) (i) of the Exchange Control Act [*Chapter 22:05*]. The accused exchanged one hundred rands for two hundred thousand Zimbabwean dollars in contravention of the Act.

They were each sentenced to a fine of \$2 000 000.00 or in default of payment 2 months imprisonment and the one hundred rands were forfeited to the State.

The penalty section requires that before making a forfeiture order the magistrate must make an enquiry into the existence or otherwise of special circumstances. If special circumstances are found then the trial magistrate may not order forfeiture. For instance if the money belongs to an innocent third party such foreign currency may not be forfeited. In this case the trial magistrate ordered forfeiture without first canvassing the existence or otherwise of special circumstances.

His lame excuse is that the case involved a paltry amount as not to warrant any consideration of the existence or otherwise of special circumstances.

It is needless to say that the trial magistrate's attitude exhibits a gross misapprehension of the law. The section is couched in peremptory terms. It admits of no exception. Thus the trial magistrate unlawfully exercised a discretion which he did not have. The relevant portion of the section reads: -

"Forfeitures

- (1) Where a person is convicted of an offence in terms of section *five* which was committed by means of or in respect of any gold, currency, security, goods or other property whatsoever, the court shall, unless the convicted person satisfies it that there are special reasons in the particular case, which shall be recorded by the court, why forfeiture to the State should not take place, declare such property or the rights of the convicted person thereto be forfeited to the State:

Provided that such declaration shall not affect any rights which any person, other than the convicted person, may have to the property in question if it is proved that he was –

- (a) unaware that the offence was being or would be committed; or
- (b) unable to prevent the commission of the offence.”

The trial magistrate’s conduct, in ordering forfeiture without an enquiry into the existence or otherwise of special circumstances, had the potential danger of dispossessing innocent third parties of acquired rights without any justification.

One cannot be denied a right simply because the value involved is insignificant. In any case I do not share the idea that one hundred rands which converted to \$200 000.00 is an insignificant amount.

If it were so, then there was no point in prosecuting the accused. The doctrine of *demini mis non curat lex* ought to have applied. The mere fact that the accused was successfully prosecuted is evidence to the fact that the amount involved was not negligible.

Where an unrepresented accused person is facing a mandatory sentence, it is the duty of the court to explain the nature of the sentence and meaning of special circumstances. See *S v Charera* 1988(2) ZLR 226. This is a matter of common sense and elementary law yet the trial magistrate reneged on that duty.

I also note in passing that the alternative term of imprisonment is grossly disproportionate to the fine. (See *S v Nyirenda* 1988 (1) ZLR 160H and *S v Chirau* 1992 (1) ZLR 24). If the trial magistrate considered that \$200 000.00 was an insignificant amount it is mind boggling how he came to the conclusion that it was equivalent to 2 months imprisonment.

The review cover signed by the trial magistrate shows that accused was convicted of contravening section 4(1)(a) of the Act. That section does not create any offence. Magistrates are again reminded that it is their duty to ascertain the correctness of the record before submitting it for review.

Having said that it is necessary for this court to intervene on review so that the above errors are rectified.

It is accordingly ordered: -

1. That the sentence imposed by the trial court be and is hereby amended to read: -

"Each accused is to pay a fine of \$200 000.00 or in default of payment 5 days imprisonment."

2. That the forfeiture order be and is hereby quashed and set aside.
3. That the matter be and is hereby remitted to the trial court for reconsideration of the question of forfeiture according to law and to amend the review cover to reflect the correct section the accused was convicted of.

CHATUKUTA J, agrees:.....