



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NUMBER 31 OF 2022

BETWEEN

FRACKSON HENOCK BESTER.....1ST APPELLANT

BESTER IWALANI.....2ND APPELLANT

v.

REPUBLIC.....RESPONDENT

CORAM: HONOURABLE JUSTICE MZONDE MVULA - PRESIDING

Ms. P. Mwenelupembe of Counsel for Appellant;

Ms. A. Banda, Senior State Advocate for the State;

Mrs. E. Khonje, Court Clerk and official interpreter.

APPEAL AGAINST FORFEITURE OF TRUCK

Mvula, J.

1.0 Introduction

1.1 The applicants were convicted of trafficking in forest produce without a licence contrary to section 68(12)((3)(a) of the Forestry Act, which was amended in 2020. Both were duly convicted and fined K150,000 each and in default they had a prospect of 9 month custodial sentence over their respective heads. In addition to the sentence, the Court ordered forfeiture of the truck including the charcoal as forest produce which was conveyed on this truck.

2.0 Factual basis for the application

2.1 The first appellant is the driver and the second an assistant driver. They engaged in transfer of forest produce. They pleaded guilty and both were

accordingly convicted as above. In addition to the sentence, the First Grade Magistrate imposed an option of forfeiture. The appellant argues that the court below did not use the option justiciably. This is because forfeiture is provided under section 30 of the Penal Code, which provides specific offences where it can be used.

2.2 The offence at hand however is under the Forestry Act. This statute provides for seizure of trafficked produce and the carrier or vehicle that was used to commit the offence. This lies in section 74(1)(a) and section 74(1)(f). The argument is that the court below did not state reasons why there was forfeiture. What is more, there was no evidence to support the position taken by the Court that the owner of the truck in question is involved in the transaction. The argument is that the option of forfeiture was applied arbitrarily. The same is discretionary, court has to look at circumstances of case.

3.0 **Response by the State to the application**

3.1. That State through State Advocate Ms. A. Banda did not oppose the application. They filled an application but were not on time to serve the response per time lines ordered by the Court. They wished to serve the same during hearing which the court objected for lack of seriousness

4.0 **The Law**

4.1 Section 28 of the Constitution of the Republic of Malawi provides for the right to property. It provides:

“(1) Every person shall be able to acquire property alone or in association with others.

(2) No person shall be arbitrarily deprived of property.

4.2 The Constitution further under section 29 provides for the right to economic activity. It reads:

“Every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi.”

- 4.3 The right to be presumed innocent until proven guilty is part of the laws of Malawi, specifically under Section 42(2)(f)(ii). For the avoidance of doubt we shall reproduce the said provision as follows:

“Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right, as an accused person, **to fair trial which shall include the right to be presumed innocent** and to remain silent during plea proceedings or trial and not to testify during trial.”

[Emphasis supplied].

- 4.4 The right to be presumed innocent hovers over every person even before it is alleged that they have committed an offence. This section recognizes that every person is potentially an accused person. As such should enjoy all rights enshrined in the Constitution, including to be treated differently to the one found guilty, after due process of law. In this case, rights under section 28 and 29 should matter to the one not (yet) found guilty.

- 4.5 In **Republic v Soko Criminal Case No. 359 of 2009**, the court explained further on the right to be presumed innocent, the contrary of which must be proved by the State. The Court stated:

“It is clearly cardinal that in general the legal burden to prove the guilt of the accused rests with and never leaves the prosecution throughout a case like this one.... Further under our Constitution section 42(2)(f)(iii) provides that every person accused of crime is presumed innocent and does not bear any duty in the least to prove such innocence.”

- 4.6 Enjoyment of rights is not absolute. The State by due process can limit enjoyment of, under section 44(2) of the Constitution. The statute recognizes that certain steps must be met, if minded to limit human rights enshrined under the Constitution of Malawi. The section provides:

“Without prejudice to subsection (1) no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.”

- 4.7 Investigations into alleged commission of an offence invariably erode the full enjoyment of these rights. Included, is confiscation of property as proceeds of crime, or connected with an offence. See **Republic v Oswald Lutepo Criminal Case 2 of 2014 (unreported)**. Seizure and forfeiture tools are applied by the State after such due process of law, are prescribed by law, reasonable and recognized by human rights standards.
- 4.8 Rights under Section 42 of the Constitution as well as provisions in the Criminal Procedure and Evidence Code (the Code), and related provisions have to be complied with. This ensures that despite alleged commission of an offence, sanity, law and order and minimum standards of decency are maintained on the part of the ever powerful State machinery over the citizenry. As such forfeiture, as discretionary remedy may be exercised by court, after due process. A party made subject to forfeiture order must be given opportunity to challenge it.
- 5.0 **Exposition of the problem and legal discussion**
- 5.1 Situations may arise where an employee commits an offence under the nose of the employer. They require special skills to get to the bottom of. The employer might or might not be implicated. There is nothing wrong to suspect both of the offence. This calls for ingenious investigation.
- 5.2 State organs ought to be aware that their conduct touches on innocent lives, who enjoy presumption of innocence. This comes on the heels of complaints out there where Police and state agents act with heavy hand over suspects to detain “instruments connected to crime”. They are

oblivious to the presumption of innocence aforesaid. A similar situation was observed in **O’Leary International Limited v The Chief Constable of North Wales and Another [2012] EWHC 1516**. The driver had committed offences in the course of duty and not known to the employer. The Court released the Lorries which were otherwise confiscated during investigations.

5.3 **The Court forfeiture without due process of law**

5.4 The Court below without any iota of evidence found that the owner was part of the load that carried forest products. It ordered forfeiture without hearing him, let alone exercising the right to show cause why it ought not to be forfeited. If lost for direction, the Magistrate should have done was to have pre-sentencing hearing into Section 74 of the Forestry Act under section 260 of the Code. The driver and assistant are employed by owner of truck. He did not authorize the transaction. The driver and assistant in their wisdom found hire for the owner to make business as employed. It was illegal transportation of forestry produce. This is business trip. Unless there is evidence that the owner was the one who found the hire, and told the driver to carry the load, it is the **driver of his own accord** who offends the Forestry Act.

5.5 **Property as instrumentality of crime**

5.6 Property becomes an instrumentality of crime if it plays a reasonably direct role in the commission of an offence. Such property must be instrumental in the commission of the offence, and not merely incidental to. The link between the commission of the crime and the property must be reasonably direct. The employment of the property must be functional to the commission of the crime. See **NDPP v RO Cook Properties (Pty) LTD and Others 2004 (2) SACR 208 (SCA)**. This South African decision was expounded by the Supreme Court of Namibia in **Prosecutor-General v Jaco Marius Kennedy SA 10/2017**. A car which was used to transport a

girl to rape her therein was found to be an instrumentality of a crime because it was functional to the commission of the crime.

- 5.7 There has to be periodic or systematic use of the property. Cogent proof must be adduced that the property has been used as an instrumentality of an offence. In other words, it should not just be an isolated incident of use in criminal conduct. See **NDPP v Engels 2167/2003 (High Court of South Africa Cape of Good Hope Provincial Division)**. Rather, more of such incidents that the instrumentality of crime is cited, allows one to easily draw an inference that the property in question is an instrumentality of an offence. The Court should exercise a balancing act to the requisite standard of balance of probability of the property is worth forfeiture.

6.0 **The Statute providing forfeiture in context**

- 6.1 Section 74(1) of the Forestry Act provides:

“Upon conviction of any person of an offence under this Act, the Court may in addition to any penalty provided by this act order

- (a) That the forest produce which has been used in the commission of the offence shall be forfeited to the Government.

(f) **The seizure of any carrier or vehicle which has been used in committing the offence”**

[Emphasis supplied]

- 6.2 The Act provides the option of forfeiture. Transporters should keep an eye on the affairs of the drivers and those under their care not to carry illicit substances. The offender therefore cannot complain that the punishment is severe when forests are being depleted at an alarming rate than they can be replenished. Unless the driver was the owner of the truck or there is direct evidence that the owner was involved in the transportation, act of forfeiture becomes unjustified.

- 6.3 In this case, driver was on fluorid of his own. See **Masika v ADMARC 10 MLR 244**. So long as the driver proceeded and with assistant as would

ordinarily have, unless expressly authorized by the owner, the employer is not vicariously liable, when he was found with conveyance of forest produce. The penalty is the fine to the driver and assistant. In any event evidence suggests this is one isolated incident. The State did not lead evidence that the same is systematically used to ferry forest produce to make it liable for forfeiture. See **NDPP v Engels (supra)**.

- 6.4 The owner has a business interest to let out his truck. Forfeiture without direct link to proprietor, when allegations heavily pin on the driver and his assistant who plead guilty, is abuse of process. Such confiscation of the truck not supported by law. Section 44(2) of the Constitution makes the conduct by court below to order forfeiture arbitrary deprivation of property. This is not prescribed by law, unreasonable, not recognized by international human rights standards, and unnecessary in an open and democratic society.
- 6.5 So far there is no offence committed by the owner. He enjoys the right to own property in the KU 6710 Fuso Fighter truck in point under section 28 of the Constitution. The State under 260 of the Code, in antecedents during trial did not have evidence to connect owner to the transportation of Forestry products. They did not discharge the legal burden of proof under section 187 of the Code. This burden does not rest on the appellants for an offence of this nature to prove that the truck should not be forfeited. Laboring how the same is instrumentality of crime does. Otherwise the owner enjoys right to economic activity with his truck. He engages in business to haul goods under section 29 of the Republican Constitution.
- 6.6 Driver Frankson Henock and his assistant Bester Walani were on a frolic of their own. In this regard, the truck owner cannot be vicariously liable for the offence illegal conveyance of forest produce by the driver. There has to be evidence linking the same. See **Masika v ADMARC (supra)**. In any event, the owner had to be called to show cause why the confiscated truck should not be forfeited to the Malawi Government under section 74(1)(f) of the

Forestry Act. Without such due process, and without any evidence that truck owner was linked to the illegal hire, truck owners will lose property due to employees despite living an honest life as transporter.

6.7 The forfeiture under appeal is not supported by law. Accordingly, the property so impounded should be released. See **Raymod Lyons and Co. v Metropolitan Police Commissioner [1975] QBD 321**. In this case, Judge said that property should be released in simple cases where there is no difficulty in law and the matter was clear.

6.8 It follows *a fortiori* that forfeiture of the truck is unlawful and violates section 28(2) of the Constitution. It will make Government vicariously liable in future for losses the appellant may post if the confiscation were to stand. This does not keep in line with section 42(2)(f)(iii) of the Constitution. Forfeiture before due process is illegal. The truck owner, should have been availed to section 42(1) (a) and section 42(2) (b) over the truck. With owner not connected to offence, confiscation of the truck remains arbitrary and illegal in all circumstances of the case.

6.9 The appellant has a remedy under section 41(3) of the Constitution. In any event, should there be application to forfeiture at end of trial, an enforcement officer will apply to the court for an order. The obvious rationale is to allow the proprietor of the asset to be heard on it, keeping in line with natural justice principles. The sanction of forfeiture is discretionary which courts exercise sympathetically. The courts consider circumstances of the case with reasons thereof. See **Lumbe v Republic 9 MLR 52**. It is not automatic remedy at all.

7.0 **Conclusion and direction**

7.1 Against the foregoing, Court holds that Order of forfeiture by the First Grade Magistrate is unlawful. It violates natural justice principles, and Sections 28(2), and 29 of the Constitution in particular. The order made

as part of the sentence on 14th January 2022 is hereby set aside under section 353 (1)(b) of the Code.

- 7.2 The Court orders that Fuso Fighter Truck Registration number KU 6710 should be released to the owner without conditions
- 7.3 Magistrates should uphold the rule of law by following simple procedure as laid down above, next time when faces with such situations in court.

Made in court this 23rd August 2022



JUDGE