

Ref No LL/SR/145/11/92

IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CRIMINAL APPEAL NO. 04 OF 1993  
RUTH MLENGA AND PATRICIA BANDA

VS  
THE REPUBLIC

From the First Grade Magistrate's Court sitting at Lilongwe  
Criminal Case No. 143 of 1992

CORAM: NTAMBO, J.

For the state Chatsika Principal State Advocate  
Accused persons absent represented by Kumango  
Law Clerk Chilongo  
Machine Operator Mtunduwaitha

J U D G M E N T

The appellants were convicted by a First Grade Magistrate at Lilongwe, on their own pleas of guilty and acceptance of the facts which were before the Magistrate as correct, of the offence of failing to declare goods at the frontier contrary to s.55(1) (b) and punishable under s.143 of the Customs and Excise Act. They were each sentenced to a fine of K1,000 and to six months' imprisonment with hard labour in default, with a further order of forfeiture of the goods (fertilizer) under s.145 (1) of that Act. They have appealed to this Court against the forfeiture order only on two grounds as follows:

1. Although the accused persons did plead guilty in the lower Court but the sentence should not have included an order forfeiting the fertilizer to government.
2. Consequently the accused pray that the order under (1) above be reviewed and the fertilizer returned to the appellants".

Section 145 (1) provides for the forfeiture of any goods in respect of which an offence has been committed under the Customs Laws. And under S.159(1) when goods have been seized by reason of the commission of an offence against the Customs Laws, then, on the conviction of the accused of such offence, such goods are, without further order, forfeited.

The Magistrate appears to have looked upon these sections as making the forfeiture order automatic and as an end in themselves. He, therefore, proceeded as if the appellants were not entitled to oppose the making of the order. That is wrong because apart from

being a violation of the fundamental principle that a person may not be condemned to any penalty unheard, it contravenes the spirit of S.161 of that Act which aims at protecting the interests of innocent owners of goods. The relevant part to the case at hand is Sub. S. 2 which provides that notwithstanding the provisions of S.159 (1) the goods (other than prohibited goods) shall not be forfeited if the owner thereof satisfies the Court that the offence in respect of which they were rendered liable to forfeiture was committed without his knowledge or consent and that he was unable to prevent it. This means that the owner of the goods has to be given an opportunity of being heard before the order can be made, for howelse would he satisfy the Court as allowed under that Section.

When the appellants were asked by the trial Magistrate whether the facts were correct as presented by the prosecutor, they each said, and I quote:

**"First Accused:** On the facts there is only one mistake, where he says he found us at the border of Malawi at Mchinji. That is not correct. We found a driver at Chipata, the driver we do not know. We gave him MK20,000 to take the fertilizer to Mchinji. We were not found at Mchinji. We crossed the border. We were arrested at Biwi in Lilongwe.

**"Second Accused:** There is one mistake, where he says this motor vehicle I paid K3 - per bag, it was K20,000 from Chipata to Mchinji Bond. That is where we found this motor vehicle to carry the fertilizer to Biwi ....."

These statements in my view, tend to suggest quite clearly that the appellants did not accompany the fertilizer to Mchinji. They paid K20,000 at Chipata in Zambia for its transportation to Mchinji in Malawi. This shows that the appellants may not have had knowledge of, or, may not have consented to, and may have been unable to prevent, the commission of the offence.

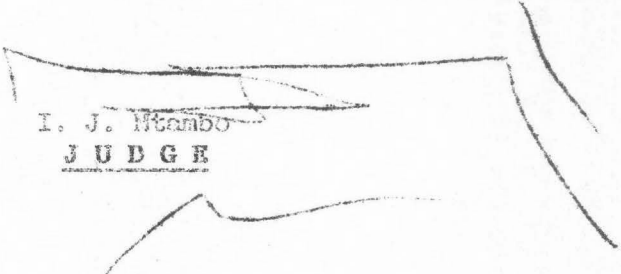
In the circumstances, it seems to me that the Magistrate was in error when he imposed the forfeiture order without first giving the appellants the opportunity of being heard on the defences which

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were available to them under S.16(2). Accordingly, the forfeiture order cannot be allowed to stand, it is quashed. I order that the fertilizer be released to the appellants forthwith subject, of course, to the payment of any lawful charges.

The appeal, therefore, succeeds.

PRONOUNCED in open Court this 03th day of February, 1994  
at Lilongwe.



I. J. Ntumbo  
J U D G E