

THE STATE

VERSUS

CHARLES NONGERAI

AND

OTHERS

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 28 FEBRUARY 2013

Review Judgment

CHEDA J: This is a review where in my brother NDOU J raised a query with regards to sentence.

The accused were charged with one count of assault with intent to cause bodily harm and also of kidnapping.

The background of this matter is that all the three accused live in Gweru while the complainant lives in Shurugwi. On the 27th August 2012 at around 1340 hours, all the three accused proceeded by car to Wallcose A2 mine at Tongogara Farm, Shurugwi which is owned by complainant's mother. Upon arrival they found the complainant's brother, one Norest Javangwe who was in a shaft underground. They enquired about the whereabouts of her mother and she advised them that she was not around.

The accused then called her into their car whereupon they started assaulting her with an assortment of weapons demanding money, which they alleged was owed to them by her mother. She suffered injuries in the process and was medically attended to.

During that process the accused grabbed her and forcibly took her into their car and drove to a place called Ascot Shopping Centre, Mambo shopping centre and later to Irvine shops all these places are in Gweru. Throughout this period, they continued assaulting her.

They further proceeded to Mkoba 9 and 6 in Gweru, where they locked her in their car as they began drinking beer.

A report was made to the police and accused were subsequently arrested. During complainant's ordeal, they were using one of the accused's vehicle being a green Isuzu Ballet Registration Number AAT 1637.

They were convicted on both counts and were sentenced as follows:

"5 years imprisonment. In addition the vehicle Isuzu Bellet AAT 1637 is hereby forfeited to the state."

The conviction on both counts is proper, but, it is the sentence which needs a thorough examination. The motor vehicle which they were using was forfeited to the State.

When the learned trial magistrate was asked by my brother NDOU J, why the motor vehicle was forfeited to the State, his response was:

"Ad para 2

The vehicle was forfeited because it was used for the commission of the crime. It was driven to the mine where they kidnapped the complainant and drove it to all places where they assaulted the complainant. They kept the complainant in the vehicle for 8 hours until she was rescued by the police. She messed up herself in the vehicle. It Facilitated the commission of the crime.

If they had no vehicle the commission of the crime was going to be difficult or impossible.

I acknowledge the observations and have since rectified the anomaly. I sincerely apologise for the errors noted by the judge and undertake not in future to make the same errors.

(signed)

MATURA E (MRS)

PROVINCIAL MAGISTRATE- SHURUGWI"

The question of forfeiture is dealt with under Part VI of the Criminal Procedure and Evidence Act [Chapter 9:07] in particular section 62 which reads thus:

"Forfeiture of article to State

- (1) A court convicting any person of any offence may, without notice to any other person, declare forfeited to the State-

- (a) 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;
or
- (b) if the conviction is in respect of an offence specified in the Second Schedule, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or, in the case of a conviction relating to the theft of any goods, for the conveyance or removal of the stolen property;

And which was seized in terms of this Part:

Provided that such forfeiture shall not affect any right referred to in paragraph (a) or (b) of subsection (4) if it is proved that the person who claims such right did not know that the weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he could not prevent such use, and that he may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.

- (2) A court convicting any person or which finds an accused not guilty of any offence shall declare forfeited to the State any article seized under this Part which is forged or counterfeit or which cannot lawfully be possessed by any person."

The order of forfeiture is purely discretionary, which discretion, of course should be judicially exercised. In that determination the courts should be guided by the following factors:

- "(1) the nature of the article
- (2) the role played by it in the commission of the offence and whether there is a necessary connection between it and the offence;
- (3) the possibility that it will be used again in the commission of the offence;
- (4) the effect of forfeiture on the person(s) affected thereby;
- (5) whether by virtue of the value the forfeiture of the article would be disproportionate to the gravity of the offence,
- (6) in the case of an article of considerable value, such as a motor vehicle, whether or not it has been used on other occasions for a similar criminal purpose, see Criminal Procedure in Zimbabwe John Reid Rowland, Legal Resources Foundation 1997 and also *R v Ndlovu* 1980 ZLR 96 at 103-104"

The provisions of Part VI of the Criminal Procedure and Evidence Act, in my view, do not cover the vehicle used in the commission of this offence. I hold this view in light of the factors listed *supra*, that is whether the article, that is, the motor vehicle may be used again in the commission of the offence and whether it has been used in the commission of other offences.

The motor vehicle was indeed used in the commission of the offence and it was a necessary connection between it and the offence. However, in my opinion, that factor must be taken together with other factors such as the effect of the forfeiture on the owner of the motor vehicle. The vehicle is in my opinion of great considerable value especially when heed is taken that accused is already serving a 5 year imprisonment term.

The guidelines with regards to the factors to be taken into account were also clearly stated in *S v Mohamed* 1977(2) RLR 207 (GD) at 211E-G where PITMAN J said:

“It is therefore clear that decision of a forfeiture order requires first an inquiry whether a forfeiture order would be equitable. Relevant matters would include:

- (1) the real value of the goods to the accused (*S v elms* (GS-66-76) and *S v Smith*, 1974 (1) SA 607 (R));
- (2) the purpose for which they were being imported (*S v Lennon* 1972 (2) RLR 259 (AD));
- (3) the importance to the accused of being allowed to retain them;
- (4) whether it would be difficult for him to replace them;
- (5) whether it will benefit or harm the community if he is allowed to retain them (*Coetzee v S* AD-185-76); and
- (6) whether the accused will be able to pay an adequate monetary penalty for his offence, if imprisonment is not regarded as a suitable punishment.”

It is trite law, therefore, that judicial officers should at all times approach the question of forfeiture with a serious view in light of the serious consequences which may flow from the said order.

In light of that, the value of the motor vehicle is inappropriate to the gravity of the offence to an extent that forfeiture of the motor vehicle will be against public policy and an acceptable sense of justice.

The learned magistrate had a discretion to order forfeiture , but however as the courts have always stated such a discretion should be exercised judicially see *R v Ndlovu (supra)*. The learned magistrate's reason that she ordered forfeiture because without the vehicle the offence would not have been committed, is indeed in order, but, however it is a factor to be taken into account but not the only determining factor as shown above.

I am therefore not favourably persuaded that forfeiture was justified.

In conclusion, I confirm the conviction and sentence, but, the forfeiture order is set aside.

Cheda J.....

Makonese J agrees.....