SMART KOSAMU
versus
THE STATE

HIGH COURT OF ZIMBABWE
OMERJEE and UCHENA JJ
HARARE, 17, 19 February and 10 March 2004

No appearance for appellant
Mr *Shava,* for the respondent

UCHENA J: The appellant a Zambian national was arrested by Zimbabwe Revenue Authority officials at Zimbabwe's Kariba boarder post. He had travelled from Zambia to Zimbabwe and was on his way back to Zambia. He was driving his Toyota Hilux. He went through returning immigration procedures without declaring that he had any money to be declared.

After he had finished the necessary procedures for persons leaving Zimbabwe his motor vehicle was searched by Zimbabwe Revenue Authority officials who found $3 690 000-00 hidden in the door panels of his Toyota Hilux. He was arrested and taken to Kariba Magistrates' Court. He was charged with the statutory offence of unlawfully exporting Z$3 690 000-00 out of Zimbabwe.

The appellant pleaded guilty. He was convicted and sentenced to 3 months imprisonment. The Z$3 690 000-00 was forfeited to the State.

He appealed to this court against sentence only.

In response to the appellant's appeal Mr *Shava* for the respondent in his heads of argument conceded that the sentence imposed by the magistrate was severe and that this court was at large to interfere with thAT sentence. Mr *Shava* also pointed out that the appellant's conviction on a charge of exporting Zimbabwean currency is not proper as the appellant was arrested within the borders of Zimbabwe. He correctly indicated that the appellant should have been charged and convicted of attempting to export the z$3 690 000-00 out of Zimbabwe.

The appeal was set down for the 17th February 2004. There was no appearance for the appellant. Mr *Shava* for the respondent was in attendance. An examination of the record revealed there was no proof of service on appellant's legal practitioners to be served. We postponed the case to the 19th February 2004 for appellant's legal practitioners. They were duly served but did not attend on the 19th. If the respondent had not made a concession in terms of section 35 of the High Court Act [*Chapter 7:06*] we would have struck the

appeal off the roll. In view of the short notice given to the appellant's legal practitioners it would not have been appropriate to dismiss the appeal for want of prosecution.

In view of the provisions of section 35 of the High Court Act we decided to review the case as in a review the attendance of the parties or their legal practitioners is not required.

Section 35 of the High Court Act provides as follows:

> "35. When an appeal in a criminal case, other than an appeal against sentence only, has been noted to the High Court, the Attorney general may, at any time before the hearing of the appeal give notice to the registrar of the High Court that he does not for the reasons stated by him support the conviction whereupon a judge of the High Court in chambers may allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and without their appearing before him."

In the present case the appeal was against sentence only. The case would ordinarily have to proceed as an appeal. However the Attorney General noticed the impropriety of the conviction and brought it to the attention of the court. In terms of section 29(4) of the High Court Act this court can exercise review powers when it is brought to its attention "that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court. ….".

The Attorney General has brought it to this court's attention that the proceedings are not in accordance with real and substantial justice. The provisions of sections 29(4) and 35 of the High Court Act brings this case within the review procedure.

I agree with Mr *Shava* that the conviction on a charge of exporting Zimbabwean currency from Zimbabwe to Zambia should be set aside. The conviction is set aside and substituted by one of attempting to export Zimbabwean currency from Zimbabwe to Zambia.

In terms of section 5(3)(a) of the Exchange Control Act [*Chapter 22:05*] a conviction for the substantive offence calls for a mandatory sentence of a fine of not less than the value of the exported currency or imprisonment. The mandatory sentence is not applicable in cases of an attempt. In the case of *S v Tawanda Dzikiti & Anor* HH 18/93 MUTAMBANENGWE J at pp 1-2 said:

> "But in *S v Nyati* 1981 ZLR 108 Gubbay J (as he then was) reasoned that a person convicted of attempting to export currency in contravention of

> section 16(1) of the Exchange Control Act is not liable to the mandatory minimum fine in terms of section 5(3)(a) (see *S v Molly Pananayi* HH 267/92). Forfeiture is part of the sentence. The usual fine imposed in cases of attempt is something less than the value of the currency involved particularly where forfeiture of the currency involved is also decreed, which must be taken into account in determining the appropriate fine (see *S v Nyati* at 110D)."

In the present case the statute provides for a fine and forfeiture. The magistrate imposed a sentence of imprisonment and forfeiture. There is no justification for imposing imprisonment where the legislature provided for a fine. In the case of *William Rutsvara v S* SC 2/90 referred to by Mr *Shava,* McNALLY JA said:

> "It is trite that where the statute lays down a monetary penalty as well as a period of imprisonment, the court must give consideration first to the imposition of a fine, it will normally reserve imprisonment for bad cases."

In this case imprisonment was not justified even for the substantive offence. It should be out of consideration for an attempt. A fine below the value of the currency is appropriate.

The currency should be forfeited to the State as the appellant is a Zambian. He should not be allowed to take the currency out of this country. As the forfeiture is part of the sentence the fine to be imposed must be substantially reduced. We were advised by Mr *Shava* that the appellant was granted bail pending appeal soon after being sentenced. There is therefore no need to consider the effect of any portion of the sentence served in assessing the appropriate fine.

The appellant's conviction is therefore set aside and is substituted by that of attempting to export Z$3 690 000-00 out of Zimbabwe.

The sentence imposed by the trial magistrate is set aside and substituted by the following:

"$1 000 000-00 in default of 50 days imprisonment.

The Z$3 690 000-00 is forfeited to the State."

Omerjee J, I agree.

*Attorney-General's Office, l*egal practitioners for the respondent.