

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

1051/2020
APPEAL 1051/2020

BETWEEN:

LEAH TEKUMWENZO MPONDELA

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Chishimba, Sichinga, JJA

On 17th February 2021 and 25th February 2021

For the appellant: C. Chibawe, Ferd Jere and Company

For the respondent: C. Bako, Deputy Chief State Advocate, National
Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Legislation referred to:

1. Narcotic Drugs and Psychotropic Substances Act,
Chapter 96 of the Laws of Zambia
2. The Forfeiture of Proceeds of Crime Act, No. 19 of
2010

1.0. INTRODUCTION

1.1. The appellant's boyfriend was convicted of an offence under the **Narcotic Drugs and Psychotropic Substances Act**, in the Subordinate Court (Hon. N. Chabala). Following the conviction, the public prosecutor applied, pursuant to **sections 4 (a) and 10 of the Forfeiture of Proceeds of Crime Act**, to have a motor vehicle that was used to commit the offence forfeited to the state.

1.2. The trial magistrate declined to hear the application, taking the view that since the conviction had been appealed, the High Court was better placed to hear the application.

1.3. After the High Court (Wanjelani, J.), heard and dismissed the appeal, the state advocate was allowed to apply for forfeiture of the motor vehicle. The application was made pursuant to **section 34 of The Narcotic Drugs and Psychotropic Substances Act** and was granted.

1.4. Dissatisfied with the grant of that order, the appellant launched this appeal.

1.5. In this judgment, we consider whether it was correct for the Subordinate Court to decline to hear the application for forfeiture, on account of the conviction being appealed. We will also consider whether an appellate court can order forfeiture, where a trial court has not done so.

2.0. BACKGROUND

2.1. On 4th December 2017, officers from the Drug Enforcement Commission, who were conducting a sting operation, apprehended the appellant's boyfriend. He was driving a motor vehicle in which 20.2 grams of cocaine was found. The appellant claims that the motor vehicle belongs to her.

2.2. Subsequently, the appellant's boyfriend was arrested and charged with the offence of trafficking in narcotic drugs contrary to **section 6 Narcotic Drugs and Psychotropic Substances Act**. He was tried for the offence in the Subordinate Court and convicted on 23rd July 2018.

- 2.3. On the same day, the public prosecutor, pursuant to **sections 4 (a) and 10 of the Forfeiture of Proceeds of Crime Act**, applied for the appellant's motor vehicle to be forfeited to the State. The application was not heard on the same day, but adjourned to a later day.
- 2.4. In the meantime, the appellant filed in a 'third-party claim' on the motor vehicle. In addition, the appellant's boyfriend appealed his conviction to the High Court.
- 2.5. When the case came up for hearing of the application for a forfeiture order, the trial magistrate ruled that she could not hear the application because the appellant's boyfriend had appealed his conviction. She also indicated that the High Court was better placed to hear the application, after hearing the appeal.
- 2.6. On 6th December 2018, the High Court heard the appeal and on the 15th of February 2019, the appeal was dismissed.
- 2.7. After the dismissal of the appeal, an application was made for the forfeiture of the

motor vehicle. This time it was made pursuant to **section 34 of the Narcotic Drugs and Psychotropic Substances Act** and not under **The Forfeiture of Proceeds of Crime Act**. The application was heard *ex-parte* and on 14th June 2019, the High Court issued an order forfeiting the appellant's motor vehicle to the state.

2.8. Following the forfeiture order, this appeal was launched. In addition, the appellant applied to stay the forfeiture order but the High Court declined to stay the order. The judge set out reasons for declining to stay the order.

3.0. GROUNDS OF APPEAL

3.1. Three grounds have been advanced in support of this appeal; heads of arguments were also filed in their support. The grounds of appeal and heads of argument, are, in the main, concerned with whether it was just for the forfeiture to be ordered without hearing the appellant's third-party claim.

3.2. However, as indicated earlier on, the two issues that this appeal raises are; whether an

application for forfeiture can be launched where the conviction has been appealed and whether an appellate court can order forfeiture.

4.0. CAN AN APPLICATION FOR FORFEITURE BE LAUNCHED WHERE A CONVICTION HAS BEEN APPEALED?

4.1. The application for forfeiture, in the Subordinate Court, was made pursuant **section 4 of The Forfeiture of Proceeds of Crime Act**. The relevant portions of that provision read as follows:

- (1) Subject to subsection (2), where a person is convicted of a serious offence after the coming into force of this Act, a public prosecutor may apply to the court for one or both of the following orders:
 - (a) a forfeiture order against property which is tainted property in respect of the offence;
 - (b)

4.2. We have examined **The Forfeiture of Proceeds of Crime Act** and have not come across any provision that stops a trial magistrate from hearing an application for forfeiture on the ground that the conviction has been appealed.

4.3. It would appear that the trial magistrate was concerned with the prejudice that would be

suffered by the owner of the motor vehicle if she ordered forfeiture and the conviction was set aside on appeal. However, that should not have been the case because of the safeguard in **Section 11 (4) of the Forfeiture of Proceeds of Crimes Act.**

4.4. It reads as follows:

'where the court makes a forfeiture against property -

- (a) The property shall not, except with the leave of the court and in accordance with any direction of the Court, be disposed of, or otherwise dealt with, by or on behalf of the state before the relevant appeal date; and
- (b) If after the relevant date, the order has not been discharged, the property may be disposed of and the proceeds applied or otherwise dealt with, in accordance with the direction of the Attorney General'.

4.5. The forgoing provision makes it clear that where an appeal has been launched, forfeited property cannot be disposed of or used until the appeal is dismissed or permission has been obtained from the court.

4.6. In the circumstances, we find that the trial magistrate erred when she declined to hear the application for forfeiture on the ground that the conviction had been appealed. Since the

appellant, a person who claimed to have an interest in the motor vehicle, had given notice, she should have heard both the public prosecutor and the appellant.

5.0. CAN AN APPELLATE COURT ORDER FORFEITURE?

5.1. As indicated earlier on, the forfeiture order in this case was issued pursuant to **section 34 of the Narcotic Drugs and Psychotropic Substances Act**. It provides as follows:

- (1) A court which convicts for an offence under this Act shall, in addition to any penalty, order the narcotic drug or psychotropic substance, and any movable or immovable property used to commit the offence to be forfeited to the State.

5.2. It is clear that under **the Narcotic Drugs and Psychotropic Substances Act**, it is a convicting court that orders forfeiture and not an appellate court. An appellate court can only order forfeiture where an application was made in the trial court, but declined and there is an appeal against that refusal.

5.3. The position is the same under **The Forfeiture of Proceeds of Crime Act**. It is the convicting court

that orders forfeiture. The High Court can only make a forfeiture order if it is the convicting court or where there is an appeal against the Subordinate Court declining to make such order after a trial before it.

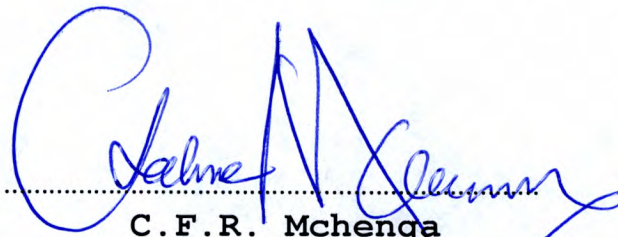
- 5.4. Under **The Narcotic Drugs and Psychotropic Substances Act** and **The Forfeiture of Proceeds of Crime Act**, where trial takes place in the Subordinate Court and no application for forfeiture is made in that court, an application cannot be launched in the High Court which is sitting as an appellate court.

6.0. DECISION

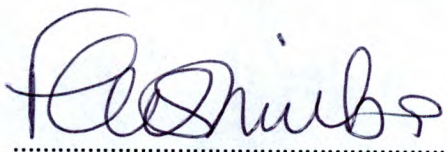
- 6.1. We set aside the forfeiture order issued by the High Court on account of that court not having the jurisdiction to make it.
- 6.2. Mr. Bako has submitted that there was sufficient material before the High Court to determine the appellants claim over the motor vehicle. We agree with him. However, in view of the fact that it is before trial court that such

an application should be made, we find it inappropriate for us to consider the claim.


- 6.3. Having set aside the order made by the High Court, we direct that the trial magistrate or a magistrate of equal jurisdiction, hear the public prosecutor's application for forfeiture that was filed pursuant to **sections 4(a) and 10 The Forfeiture of Proceeds of Crime Act**. The appellant, must, during that hearing, be allowed to present her third-party claim.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



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F.M. Chishimba
COURT OF APPEAL JUDGE



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D.L.Y. Sichinga
COURT OF APPEAL JUDGE