DIRECTOR OF PUBLIC PROSECUTIONS v S. I. LIMBADA AND COMPANY (1964) LIMITED (1980) Z.R. 52 (S.C.)

SUPREME COURT
GARDNER, AG.D.C.J., BRUCE-LYLE, J.S., AND MUWO AG. J.S.
22ND JANUARY AND 18TH MARCH ,1980
S.C.Z. JUDGMENT NO. 5 OF 1980

Flynote
Criminal law and procedure - Forfeiture order - Failure to give party against whom order made right to be heard - Effect of.
Criminal law and procedure - Smuggled goods - Purchaser of - Whether obtains title.
Criminal law and procedure - Review - Power of High Court to review.

Headnote
This was an appeal by the Director of Public Prosecutions against an order to review made by the judge of the High Court whereby an order of the subordinate court for the forfeiture to the State of 446 watches was quashed and declared null and void and the watches were ordered to be returned to the respondent company.

The respondent company had purchased watches which had been smuggled into Zambia. When the order was made, the respondent company applied for a stay of execution on the ground that it had not been given a right to be heard. The appellant put forward three grounds of appeal to the effect that the respondent company should not have been allowed to join as a third party, that the purported application by way of review was an improper procedure and that the respondent was not the owner of the watches within the meaning of s. 169 (2) of the customs and Excise Act.

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Held:
(i) It is entirely within the discretion of the court either to deal with the matter on review or by way of formal appeal.
(ii) If the goods are smuggled, ownership still passes to the purchaser.
(iii) An order for forfeiture should not be made without giving the respondent opportunity to be heard.

Legislation referred to:
Customs and Excise Act, Cap. 662, ss. 149, 155, 162 (3) and 169 (2)
Criminal Procedure Code, Cap. 160, s. 338 (1) (iii) and (b)

For the appellant: A. H. Odora - Obote, State Advocate.
For the respondent: A. J. Nyangulu, Chula & Co.

Judgment

GARDNER, AG.D.C.J.: delivered the judgment of the court.

This is an appeal by the Director of Public Prosecutions against a order on review made by a judge of the High Court on the 20th December, 1979, whereby an order of the Subordinate Court, Lusaka dated the 5th November, 1979, for the forfeiture to the State of 446 watches was quashed and declared to be null and void, and the watches were ordered to be returned to the respondent company.

The history of this case is that on the 5th of November, 1979, Moses Stirling Mulenga and Hassan Ebrahim Patel were jointly charged with smuggling 446 wrist-watches into Zambia from Swaziland contrary to ss. 149 and 155 of the Customs and Excise Act (Cap. 662). When called upon to plead Mulenga pleaded not guilty and Patel pleaded guilty. The Public Prosecutor applied for leave to withdraw the charge against Mulenga; the application was granted and Mulenga was discharged under s. 88 (a) of the Criminal Procedure Code. The Public Prosecutor submitted a statement of facts to the effect that an employee of Limbada & Co. Ltd was selling watches to members of the public, and, when approached, Mr Yousuf Ismail Limbada, a director of the company, produced invoices showing that the watches had been purchased from Mulenga who had obtained them from Swaziland. Mulenga admitted to the Police that he sold the watches on behalf of Patel. The latter said that he had no import permit and that he had imported the watches via Lusaka airport through the VIP gate where he was not searched. Patel was then arrested and under warn and caution admitted the charge. The watches were subject to unpaid customs duty which would have been K1,566.

Patel agreed the facts, whereupon he was convicted on his own confession and fined K4,758, in default two years' imprisonment with hard labour. The magistrate then made the following order:

> "Pursuant to sections 162 (10) and 169 (i) (b) of the Act. Watches forfeited to the State. Senior Clerk of the Court to keep custody of the watches pending instructions from this court as to when to send them to the Customs Department."

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On the 13th of November, 1979, Mr Nyangulu, on behalf of S. I. Limbada & Co. (1964) Ltd. applied for a stay of execution of the forfeiture order on the grounds that he had requested the High Court to review the case under s. 338 of the Criminal Procedure Code, having regard to the fact that his clients had not been given an opportunity of being heard when the forfeiture order was made, in accordance with s. 169 (2) of the Customs and Excise Act. There was no objection by the Public Prosecutor and the magistrate granted a stay of execution.

In support of the application for a stay of execution there was an affidavit sworn by Yousuf Limbada who averred that he was a director of S. I. Limbada & Co. (1964) Ltd, that his company purchased 446 watches from Mulenga for a total of K16,807.50, and that his company was the

owner of the watches having purchased them in good faith in circumstances under which it was unaware that the watches were improperly brought into the country and therefore liable to forfeiture or seizure.

The advocates for the respondent company requested the High Court to review the order for forfeiture, and in support of their request submitted a further affidavit by Yousuf Ismail Limbada exhibiting invoices which indicted that the company had purchased 941 assorted watches from Zwazam International Ltd at the price of K32.50 each in respect of 631 of the watches and K30 each in respect of the remaining 310. The deponent also exhibited to his affidavit an itemized list of the watches seized by the Police on the 19th of October, 1979.

On the 21st of November, 1979, the application for review was heard in open court by a judge of the High Court, and Mr Odora - Obote, on behalf of the Director of Public Prosecutions, raised a preliminary objection that, as the respondent was not a party to the original trial, it could not have recourse to s. 338 of the Criminal Procedure Code which provides for review. Mr Nyangulu, on behalf of the respondent, requested that the respondent be joined in the application before the High Court.

In his preliminary ruling the learned judge, on review, held that, as there was evidence before the trial court that the watches were sold to the respondent, it had an interest in the matter and it was only few that it should be heard by the court. The preliminary objection was therefore over-ruled and the application to join the respondent in the proceedings was granted.

The application was then heard and in reply to the claim Mr Odora - Obote submitted that the goods had been seized under s. 162 of the Customs and Excise Act and the procedure under sub.-s. (9) of that section was available to the respondents for recovery of the watches, that is to say, being a person from whom the articles had been seized or the owner thereof the respondent Company could institute proceedings for their recovery from the Controller of Customs within three months of notice of seizure being given or published. It was also argued that the respondent could not be the owner of the goods even if it had purchased them in good faith because the smuggler of the goods could not pass a good title.

In his judgment on review the learned judge held that the seizure by the police was not a seizure under s. 162 of the Act, and such a seizure could not be equal to the court order of the 5th November, 1979, so as to make the latter superfluous. The learned judge commented as follows:

> "The evidence before this court in the form of affidavit is that the watches were bought by the applicants at their true value and that they were not aware that the goods were liable to seizure. There is no other evidence to the contrary and I can see no basis on which I cannot accept the applicants' evidence of their innocent acquisition of the watches for their true value."

In view of the fact that s. 169 (2) of the Act provides that no forfeiture shall be ordered upon

conviction of an offender unless and until the owner of the goods has been given an opportunity of being heard, the learned judge held that the making of the forfeiture order without giving such an opportunity to the respondent was null and void, and for that reason an order was made for the forfeiture order to be quashed and for the watches to be returned to the respondent.

The appellant put forward three grounds of appeal to the effect that the respondent company should not have been allowed to join a third party, that the purported application by way of review was as improper procedure, and that the respondent was not the owner of the watches within the meaning of s. 169 (2) of the Act.

The first and second grounds were taken together and Mr Odora- Obote argued that the provisions of s. 338 of the Criminal Procedure Code provided for the review of a case only as between the State as one party and the convicted person as another. He maintained that the respondent's claim was a civil claim and he suggested that proper course was for the respondent to apply for a writ of mandamus. In considering this argument we have noted that under s. 338 (1) (iii) of the Criminal Procedure Code a reviewing judge has power to call additional evidence, and in this respect we consider that a reviewing judge has a discretion to accept such additional evidence by way of affidavit if such evidence is tendered to the court, and the judge's power is not limited to evidence which he calls for of his own motion. In our view the provisions of s. 338 which provide for review in cases where the record has been called for or which otherwise comes to the knowledge of the High Court allow for the making of an application to the court to exercise its powers of review, and it is entirely within the discretion of the court whether to deal with the matter on review or whether to indicate that the matter must be dealt with by way of formal appeal. The purpose of the powers of revision is to enable the High Court to put right an error by a subordinate court without-delay, and subject to there being such an error we consider that it is proper for a judge to deal with the matter by way of review rather than by wary of appeal. The reasons given by the learned review judge for allowing the respondent to make representations were that as the respondent clearly had an interest in the matter it was only fair that the court should allow the respondent to make representations. This is a case in

which a court had made an order which adversely affected the respondent, and we entirely agree with the learned review judge that natural justice requires that the respondent be entitled to make representations against such an order. Mr Odora - Obote concedes this but argues that the proper procedure should be by way of mandamus. In this particular case there is no specific remedy available to the respondent and an application for mandamus would presumably lie. However, as we have pointed out the provisions for review are available for the remedy of errors and the procedure is expeditious. The fact that a civil or quasi-civil remedy may be available to the respondent does not alter the fact that the order was an ancillary order made in criminal proceedings and, as such, under s. 338 (1) (b) of the Criminal Procedure Code, the High Court had power to alter or reverse the order.

Before dealing with the question of whether or not there was an error by the subordinate court, in that when purporting to make an order under s. 169 (2) of the Customs and Excise Act the owner of

the goods was not given an opportunity of being heard, we will deal briefly with Mr Odora - Obote's argument that the respondent is not the owner of the goods because they were smuggled goods and, as such, no purchaser could acquire a title to them.It is trite law that no purchaser may acquire a better title to goods than that of the person from whom he receives the goods, so that, in the case of stolen goods, the ownership cannot pass to the purchaser because it still vests in the original owner. In the case of goods of which the vendor is the opener the ownership will pass to the purchaser.

If the goods are smuggled the ownership still passes although the goods would continue to be subject to seizure were it not for the fact that under s. 162 (3) of the Customs and Excise Act it is specifically provided that no seizure shall be made where goods have been acquired for their true value by a person who was unaware at the time of their acquisition that they were liable to seizure. With regard therefore to the third ground of appeal to the effect that the respondent is not the owner of the goods within the terms of s. 169 (2) we have no hesitation in finding on the statement of facts that the respondent was the owner of the goods at the time when the forfeiture order was made.

Having come to this conclusion we have to consider whether there was an error on the part of the magistrate when he made the order for forfeiture without giving an opportunity to the respondent to be heard. As we have said, the statement of facts clearly indicate that the respondent was the owner of the goods, and it is clear on the face of the record that the respondent was given no opportunity to be heard; in consequence the order could not be made. In the light of this the learned review judge, being properly seized of the case, was entitled, and, in fact, had a duty, to declare the order to be a nullity.

We now have to consider the order made by the learned review judge that the goods be returned to the respondent. Mr Odora - Obote has argued that the evidence before the learned renew judge an to the bona fides of the purchase of the watches was inadequate and that the

matter should be sent back to the magistrate's court for a proper investigation to be made. Mr Nyangulu, on behalf of the respondent, maintains that it was within the power of the learned review judge to make such an order, that there was no error in law or in fact by the learned judge, and therefore the order for the return of the watches should stand. He pointed out that evidence had been called, in the form of affidavits, to which there was no reply by the appellant, that these affidavits indicated the bona fide purchase of the watches by the respondent without knowledge that they were smuggled, such evidence was accepted by the learned review judge as being the truth and there is therefore no reason for this court to interfere with that order.

It is true that the appellant put in no affidavit in opposition to those of the respondent claiming that there had been a bona fide purchase of the watches. In his arguments before the learned review judge counsel for the appellant at all times maintained that the whole of the procedure by way of review was wrong, and at no time argued that the ownership of the watches should be investigated. Even before this court Mr Odora-Obote has relied principally on his arguments that the procedure was improper and that for legal reasons the respondent is not the owner of the snatches, and it was

only when this court raised the possibility of sending the case back to the magistrate that even have been urged on behalf of the appellant that this is the proper course to take.

We are bound to say that we feel it would have been better had the argument about the bona fides of the sale been put to the learned review judge in order to draw to his attention the desirability of sending the case back to the magistrate for a full investigation. However, the fact that this course was not taken by the appellant does not prevent the question being raised now. We have considered the evidence set out in the affidavits put in by the respondent and we note that some of the watches were sold to the respondent for K30 and some for K32.50 each. There was no evidence as to the original cost of the watches in Swaziland nor was there evidence to show whether the price paid by the respondent was a realistic one for watches on which it could be presumed that duty had been paid.

In our view the order for the return of the watches to the respondent should not have been made without more detailed information being available, and for this reason are propose to make an order which will enable such an investigation to be carried out.

So far as this appeal relates to the quashing of the magistrate's forfeiture order, it is dismissed. So far as the appeal relates to the order that the watches should be returned to the respondent, it is allowed. The case is sent back to the trial magistrate or to a court of competent jurisdiction to consider the making of an order under s. 169 (2) of the Customs and Excise Act.

Appeal allowed in part
