

THE STATE
vs
TADIOUS MUKUSA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE 4 September 2002

HUNGWE J: The accused was found selling maize to the public at Chikafa Business Centre, Guruve. He had two tonnes in his lorry at the time, valued at \$30 000,00.

He was charged for contravening section 3 of the Grain Marketing (Controlled Products Declaration) (Maize and Wheat) Notice S.I. 235A of 2001 as read with section 33(1) of the Grain Marketing Board Act, [*Chapter 18:14*].

He pleaded guilty and was convicted and sentenced to \$10 000 or 12 months imprisonment. His lorry was said to be held at the Police Station.

Three issues arise. Firstly, S.I. 235A of 2001 does not create an offence. It merely declares maize and wheat to be controlled products.

The offence of trading in maize is created by section 40(2)(c) of the Grain Marketing Act [*Chapter 18:14*]. That section makes it an offence for any person to sell, remove or otherwise dispose of a controlled product and liable to a fine of not less than three times the value of such a product or to imprisonment of up to two years.

The correct citation of the offence therefore is -

"Contravening section 40(2)(c) of the Grain Marketing Act, [*Chapter 18:14*] in that....."

The charge is accordingly amended.

Secondly, as for the penalty, the Act lays down the formula for arriving at the maximum penalty. It also provides for an order of forfeiture which a court convicting a person may make on application by the prosecutor.

The record does not reflect that the prosecutor made such an application. It is incompetent for a Court to make an order *meru motu*. I say this because in terms of section 40(3) it lays down different consequences that follow from different findings of fact relating to the controlled product.

If the product was in the possession of the accused or was seized the court may order that it be forfeited to the use of the GMB. If there is no proof that it is still in the accused's possession, the Court may give summary judgment.

In both instances, forfeiture is not to the State but for the use by GMB.

The difference between forfeiture to the State and that for the use by GMB is that in the latter events the accused is paid the value of his product. This is important because accused does not lose out completely.

Thirdly the agreed facts reveal that police impounded the accused's motor vehicle and kept it at the station. The police have no power in terms of the Act to impound the accused's motor vehicle. The trial court did not give any directive regarding the impounded motor vehicle. If it be that the accused's motor vehicle is still impounded, then the police are directed to release it to the accused.

As the fine imposed is less than three times the maize found in accused's possession, there is no need to consider how the formula is to be applied but I am of the view that 12 months imprisonment alternative to the \$10 000 fine is harsh. Five months would have been sufficient. The sentence imposed by the Court *a quo* is set aside and the following imposed -

“\$10 000 or idp 5 months imprisonment. The 2 tonnes of maize found in the accused's possession is forfeited to the use by GMB in terms of section 40(3)(a) of the Act”.

Chinhengo J, I agrees.