



**CASE NO.: CA 59/2010**

**IN THE HIGH COURT OF NAMIBIA**

**MAIN DIVISION, HELD AT WINDHOEK**

In the matter between:

**THE STATE**

**APPLICANT**

And

**JIAN GUO CHEN**

**RESPONDENT**

**CORAM: NDAUENDAPO, J**

Heard on: 07 February 2011

Delivered on: 21 May 2012

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**APPLICATION FOR LEAVE TO APPEAL**

**JUDGMENT:**

**NDAUENDAPO J**

## **JUDGMENT**

- [1] This is rather an unusual application for leave to appeal by the state against a decision or ruling of the Regional Court not to order forfeiture of foreign currency seized from the accused.
- [2] The respondent, to whom I shall refer to as the accused, was charged in the Regional Court at Windhoek with various counts of contravening provisions of the Exchange Control Regulation of 1961 (reg 3.5 as read with reg 22 thereof) pertaining to seizure and forfeiture. He was also charged with contravening section 35 (2) of the Anti-Corruption Act No. 8 of 2003. The accused pleaded guilty and handed in a written statement in terms of section 172 (2) of the Criminal Procedure Act 51 of 1977, setting out the facts which he admitted and on which he pleaded guilty. He was found guilty as charged.
- [3] The facts of this case can be summarized as follows:

The accused, a Chinese national, was arrested on 14 November 2007 at Hosea Kutako International Airport in possession of U\$451 492.00 with the aim of taking the currency out of Namibia without declaring it and without treasury authority. When he got arrested, he offered three Police officers amounts of N\$700.00 and N\$870.00, N\$10 000.00

respectively as an inducement not to arrest him for unlawfully possessing the currency.

The foreign currency was seized from him and booked in as exhibits at the Katutura magistrate's court. On 3 September 2010 when the accused pleaded guilty, the court was informed by the clerk of the court that the foreign currency was stolen and could not be traced.

The Prosecutor, Ms Husselman, who appeared for the State nevertheless applied to court for the forfeiture of the missing currency in terms of section 35 (1) of the Criminal Procedure Act 1977 (Act 51 of 1977) or regulation 3. (5) of the Exchange Control Regulations 112 of 1961. The presiding officer declined the application on the basis that he could not do so because the foreign currency was stolen.

Dissatisfied with that, the state filed an application for leave to appeal against that decision. It is trite that in an application of this kind the applicant must satisfy the court that the applicant has a reasonable prospect of success on appeal. (see: R v Nxu Malo 1939 AD 580

The grounds on which the state applies for leave to appeal are *inter alia* stated as follows:

[4] 4.1 "The learned magistrate misdirected himself and or erred in law or fact by declining to make an order for forfeiture of the foreign currency

involved or its equivalent value in Namibia currency regardless of the fact that the foreign currency was missing from the office of the clerk of court. The learned Magistrate misdirected himself and or erred

**Alternatively**, in law or fact when he failed to make any order in terms of section 35(1) of the Criminal Procedure Act and or failed to forfeit to the state foreign currency involved, its equivalent value or the respondent's right to such foreign currency or its equivalent value thereof"

[5] Section 35 provides that:

*"35 Forfeiture of article to State*

*(1) A court which convicts an accused of any offence may, without notice to any person, declare-*

*(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 referred to in Part 1 of Schedule 2, 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 for the conveyance or removal of the stolen property,*

*And which was seized under the provisions of this Act, forfeited to the State:*

*Provided that such forfeiture shall not affect any right referred to in subparagraph (i) or (ii) of subsection (4) (a) if it is proved that the person who claims such right did not know that such 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 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”.*

It is clear from the section that the court has a discretion to order forfeiture or not and that the discretion must be exercised judicially. In **S v MARAIS 1982 (3) 988 (A) AD: 1001 the court held that: “ section 35 (1) is clearly an enabling and not a compulsory provision since it provides that the court which convicts the accused may, if it thinks fit, decree forfeiture. It is a matter which lies within the discretion of the court and in the exercise of that discretion the court will take into account all relevant circumstances”**

In *casu*, the state does not allege that the discretion was not exercised judicially. In my respectful view the court a quo correctly exercised its

discretion based on the fact that there was nothing to forfeit as the currency was stolen.

[6] The **alternative** ground is equally bad in law. Section 35 (1) clearly states that it is the article or object used in the commission of the crime that must be declared forfeited. An equivalent currency can never be the same as the missing currency used in the commission of the crime. That alternative ground is therefore without merit.

[7] “ The next ground is stated as follows:

4.2 “the learned Magistrate misdirected himself and or erred in law or fact by omitting to enquire and establish whether the respondent was the rightful owner of the seized foreign currency, as this was relevant to the issue of his entitlement to compensation in lieu of the seized foreign currency.’ In terms of section 35 (1) the inquiry about ownership of the seized currency becomes relevant only if there is a forfeiture order, but in the absence of such an order that inquiry does not arise. That ground is without merit.

The next ground is:

[8]“4.3 the learned magistrate misdirected himself and or erred in law or fact in his conclusion that only the seized item was liable to forfeiture to the state as the Criminal Procedure Act 51 of 1977 permits

compensation in lieu thereof to the owner if the article has been disposed of thus allowing for forfeiture of the right to compensation of the respondent, if he was the rightful owner". Section 35 clear states that only the currency used in the commission of the crime is liable to forfeiture.

The last ground is stated as follows:

[9] "4.4 The learned magistrate misdirected himself and or erred in law or in fact by declining to make an order for forfeiture or making an order of referring the matter to treasury on the basis that there would be no benefit accruing to the national revenue fund, leaving the way open for the respondent to possibly fully benefit from his crime if he was to claim compensation". The learned magistrate could not have made an order of referring the matter to treasury in the absence of the stolen currency and there would be no benefit accruing to treasury if such an order is made.

Having regard to what I said, there are no prospects of the success on appeal.

In the circumstances, I come to the conclusion that the learned magistrate exercised his discretion not to order forfeiture judicially.

[10] In the result, the application for leave to appeal is refused.

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**NDAUENDAPO, J**

**ON BEHALF OF PLAINTIFF:**

**S. NDUNA**

**INSTRUCTED BY:**

**PROSECUTOR-GENERAL OFFICE**

**ON BEHALF OF THE STATE:**

**MR SISA NAMANDJE**

**INSTRUCTED BY:**

**NAMANDJE & CO**