THE STATE
versus
WANTMORE MASUKUME
and
TINASHE ZIREBA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 5 NOVEMBER, 2020

Criminal Review

ZISENGWE J. The two accused persons were convicted following their pleas of guilty to two counts of theft contravening (section 113 (1) (a) of the Criminal Law (Codification and Reform) Act, *[Chapter 9:23]*) (the "Criminal code")

1. The facts to which they both candidly admitted were that on two separate occasions, and acting in concert, they proceeded to the Triangle cane reception depot and stole what was referred to as "brass bearings" (20 of them on the first occasion in July 2020, and 88 of them on the second occasion in September 2020) from empty railway wagons belonging to the National Railways of Zimbabwe (NRZ).
2. On the first occasion they managed to get away undetected before they proceeded to South Africa where they sold their ill-gotten loot. However, their luck ran out on the second occasion as they were apprehended with the brass bearings shortly after the commission of the offence.

3. It is the manner in which the brass bearings were removed from the wagons that prompted the query which I directed to the Magistrate.
4. The *modus operandi* employed in both instances was the same. It is described in paragraphs 5 and 4 of the State outlines for counts 1 and 2 respectively and is to the following effect. That the accused persons pursuant to a plan which they had hatched proceeded to the cane reception point where the empty NRZ wagons were parked. Acting in concert, they then used two jacks and shifting spanners to remove the brass bearings from the said wagons.
5. In the query I enquired from the magistrate whether the appropriate charge should not have one of contravening section 38 (2) of the Railways Act *[Chapter 13:09]*.
6. The section reads:

"38 certain offences and punishment therefor

(1) ……

(2) *Any person who wilfully or maliciously*

(a) ***with intent to obstruct, upset, overthrow, injure or destroy any locomotive, rolling stock*** *or to endanger the safety of any person travelling or being upon a railway takes up, removes or displaces any rail, sleeper or any other matter or thing or*

(b) ……

Shall be guilty of an offence and liable to be sentenced to imprisonment for life or any definite period of imprisonment of not less than 10 years, if there are no special circumstances peculiar to the case as provided for in subsection (5d)."

7. The Magistrate (who from her response must have been alive to that provision) insisted that in her view theft was the most appropriate charge given that the form of intent required to sustain a charge under section 38 (2) of the Railways Act was an intent to obstruct, upset, overthrow, injure or destroy any locomotive, rolling stock, etc. Her view was all the accused intended to do was to permanently deprive NRZ of the brass bearings. She stated as follows in her written response to the query:

"It is my considered view that the requisite intent in the section must be to do the listed things. In casu, the accused's intention was to permanently deprive the complainant and not to obstruct, upset, overthrow, injure, destroy or to endanger the safety of any person"

8. What clearly eluded the learned Magistrate was that the legal meaning of "intent" extends beyond its ordinary everyday usage. The meaning that she ascribes thereto is referred to under the common law as direct intent (sometimes referred to as actual intent or *dolus directus*) which connotes the deliberate direction of the will to achieving the proscribed result or circumstance. In other words where it is the perpetrator's object and desire to bring about the prohibited outcome. It was probably lost on the magistrate that in appropriate instances other forms of intent may suffice to found a conviction. These include, firstly, indirect intent (*dolus indirectus*) where although it may not be the offender's aim and object, he nonetheless foresees the unlawful circumstance or result as certain or substantially certain. Thirdly, there is legal intent (sometimes referred to constructive intent or *dolus eventualis*) where the perpetrator does not intend to bring about the prohibited circumstance or to cause the unlawful result which flows from his conduct, but foresees the possibility of the circumstance existing or the consequence ensuing but nonetheless proceeds with such conduct reckless as to whether it eventuates or not (i.e. reconciles himself with that possibility)
9. Needless to say that these basic common law principles have predictably wormed their way into the Criminal Code. Sections 13, 15 and 17 thereof codify these principles as they relate to states of mind in the commission of offences and they find particular relevance in the present matter. Section 17 (2) of the code reads:

> **"17. References or absence of references to states of mind in statutory crimes**
>
> *(1) ……*
>
> *(2) Where in any enactment creating a crime -*
>
> *(a) the word "corruptly", "deliberately", "fraudulently", "indecently", "intend" "intentionally" ,"maliciously", "purposely ", "wantonly" or "unlawfully ",* ***or phrase "with intent to" or "for the purpose of " or expression any related or derivative is used with respect to*** *the commission by any person of the crime, Section thirteen or (subject to subsection (3) of this section)* ***section fifteen shall apply to the determination of the state of mind of the person of committing that crime."*** (Emphasis added)

10. In terms of section 15 (4) the concept of "realisation of real risk or possibility" supersedes the common law test for legal intention (*dolus eventualis)*. Section 15(1) provides as follows:

15 Realisation of real risk or possibility

(1) Where realisation of a real risk or possibility is an element of any crime, the test is subjective and consists of the following two components:

(a) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility, that

(i) his or her conduct might give rise to the relevant consequence; or

(ii) the relevant fact or circumstance existed when he or she engaged in the conduct; and

(b) a component of recklessness, that is, whether, despite realising the risk or possibility referred to in paragraph (a), the person whose conduct is in issue continued to engage in that conduct.

11. In applying the test above, it is unrealistic and absurd to suggest, as the magistrate appears to do, that the accused in hoi0sting the NRZ wagons on some jacks and thereafter removing the brass bearings by means of shifting spanners did not subjectively realise the risk or possibility of causing any of the consequences listed in Section 38(2) of the Railways Act. Had the accused persons been charged under the said section and the facts as set out in the state outline been admitted or proved the court would not have been so blinkered as to conclude that there was no intention at the very least to "injure" those wagons. The accused undoubtedly have been charged with a contravention of the said section under the Railways Act.
12. The clear intention of the legislature in enacting those provisions under part VI of the Railways Act was to combat vandalism of railway equipment and infrastructure by prescribing severe mandatory minimum sentences for the interference, damage or destruction of the same.
13. The failure to do so resulted in the intention of the legislature being circumvented (albeit unwittingly) and that the accused probably unjustifiably escaped the mandatory minimum sentences prescribed therefore.

I say the above alive to the principle that the state being *dominus litis* is at liberty to prefer whatever charges it may deem fit from a given set of facts. All that is being pointed out here is that at the very least the Magistrate should have queried the appropriateness of the charges

in view of the clear provisions of the Railways Act and given the possibility that the prosecutor may have missed the same.

14. Parallels may be drawn with provisions under Section 60A the electricity Act, *[chapter 13:19]* which equally provide for harsh penalties for the vandalism of electricity generation and transmission infrastructure.
15. Surely the Magistrate must have appreciated that it is hardly an excuse when charged with a contravention of section 38(2) of the Railways Act or a contravention of section 60 (A)of the Electricity Act, that the act of vandalism was done solely with the intention of pilfering parts of the infrastructure so damaged, destroyed vandalised. The act of cutting off or removal of parts of such infrastructure comes with a concomitant appreciation of the accompanying damage thereto.

    In any event seldom do perpetrators vandalise state infrastructure solely for sabotage or malicious purposes. Almost invariably, the motive is to gain some financial benefit such as from the sale of components pilfered in the course of such vandalism. This was clearly the mischief that the legislature sought to address. A perusal of Act 1 of 2011 which ushered in extensive changes to several pieces of legislation for the protection of stateowned infrastructure undoubtedly reveals as much. Different considerations would, of course, have applied had the accused persons not removed the brass bearings from the wagons i.e. if they had merely appropriated the same from (say) a store room whence they were kept.
16. Ultimately, however in view of the sentences imposed on the accused persons in the wake of their convictions on the theft charges, I find it unnecessary to quash the proceedings and remit the matter for a trial *de novo*.
17. I am however unable to confirm the proceedings as being in accordance with justice as there was a clear negation of the intention of the legislature under the provisions of the Railways Act and accordingly I withhold my certificate.

ZISENGWE J……..

MAWADZE J agrees……