THE STATE
versus
FELIX DZOTIZEI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 6 March 2014

Criminal Review

TSANGA J: The accused was convicted of one count (count 1) of "tampering with electricity apparatus' as defined in s 60A (3) (a) of the Electricity Act, [*Cap13:19*]. He received a mandatory 10 years imprisonment for this count.

He was further convicted on another count (count 2) of "unlawfully abstracting electricity" as defined in s 60A (1) (b) of the same Act. With regard to this count, he received the following sentence:

> "24 months imprisonment wholly suspended for 5 years on condition accused does not, during that period, commit an offence involving the use of electric current which has been unlawfully abstracted, for which he will be sentenced to imprisonment without the option of a fine."

The facts leading to his conviction under these provisions were that on 22 October 2013, an official from the Zimbabwe Electricity Transmission and Distribution Company, (hereinafter referred to as ZETDC) had disconnected power supply at the accused's residence. This was for an unpaid bill of $3635-97. He was warned not to reconnect supply before payment of his bill. A meter reading was taken. Following the disconnection, the accused reported to ZETDC to argue his case. He was advised to pay the bill first or make a payment plan before he could be reconnected. He reconnected himself on 23 October without so doing, and started using the electricity thus described as "unlawfully abstracted". When the ZETDC officially visited his house again a few days later, he was issued a ticket with a penalty of US $282.00. He stated he was not going to pay, preferring instead, his day in court. His decision was particularly motivated by his argument that as far as he knew, the Zimbabwe Electricity Supply Authority (ZESA) had following the elections, expunged these debts which had remained unpaid by many due to economic hardships. He was nonetheless arrested, leading to his trial, conviction, and sentence.

Regarding count 1, "tampering with electricity apparatus" for which the accused received a ten year sentence, the Magistrate admitted in his judgment that the sentence is excessive. However, in his reasons for sentence, he lamented that his hands were tied since the punishment to be meted out under the applicable provision is mandatory. He had found no special circumstances that could exonerate the accused.

Section 60 A (3) (a) & (b) of the Electricity Act reads as follows:

> "3) Any person who, without lawful excuse, the proof whereof shall lie on him or her-
> (a) tampers with any apparatus for generating, transmitting, distributing or supplying electricity **with the result that any supply of electricity is interrupted or cut off:** or
> (b) cuts damages or destroys or interferes with any with any apparatus for generating, transmitting, distributing or supplying electricity;
> shall be guilty of an offence, and if there are no special circumstances peculiar to the case as provided for I subsection (4) shall be liable to imprisonment for a period of not less than ten years."

In my view, the accused's conviction under s 60A (3) (a) of the above Act is problematic as the charge should never have been preferred in light of a studious reading the section. I have deliberately underlined the words in s 60A (3) (a) because by no stretch of even the wildest of imaginations, can it be said that the accused's action resulted in any interruption or cut-off of electricity as envisaged by this section. The charge deliberately omits this relevant aspect of the provision. I cannot see how this charge can stand when improper scaffolding was used to build the case against the accused.

The full import of the severity of punishment that is indeed intended by s 60A (3) lies in appreciating the range of offences involving tampering with electricity that violators are prone to committing. Underhand self-reconnections are merely one of them. More insidious offences include stealing oil from transformers and stealing cable wires which have indeed often resulted in massive black outs and cut offs and serious damage to apparatus. It is common knowledge that in the past some residential areas had to go for months without electricity following theft or interference with transformers. Laws are certainly not formulated in a vacuum. My view is that the reference in s 60A (3) (a) to an act of tampering with an electricity apparatus ultimately resulting in electricity being interrupted or cut off is informed by these kinds of offences. The mandatory sentence must be placed in such contexts.

Furthermore in my opinion the provision is also inapplicable to the facts in question because the situation where ordinary residents illegally abstract and divert electricity by switching themselves back on or self-connecting is adequately canvassed by s 60A (1) 9 (a) and (b).

Section 60A (1) (a) & (b) reads as follows:

> "(1) Any person who, without lawful excuse, the proof whereof shall lie on him or her-
> a)abstracts or diverts any electric current to be abstracted or diverted; or
> b)uses any electric current, knowing it to have been unlawfully abstracted or diverted;
> shall be guilty of an offence and liable to a fine not exceeding level fourteen or imprisonment for a period not exceeding five years or both such fine and imprisonment."

Switching the meter back on again is what enabled the accused to abstract electricity and to thus use it knowing it to have been unlawfully abstracted. Section 60A (1) (a) & (b) clearly stands fully on its own for those who commit the offence of unlawfully abstracting, diverting, and using electricity through self-reconnecting, for example. To then prefer against such an offender a separate and additional count under s 60A (3) (a) of supposedly tampering with electricity, is a punitive, improper and inapplicable case of splitting of charges. The relevant officer who framed the charge against the accused must have been clearly aware that the "glove did not fit" when he omitted the rest of the provision relating to interrupting or cutting off power supply.

On the other hand, the conviction on count 2 in terms of s 60A (1) (b) for which he received a suspended sentence was proper. Applying this provision to the facts, he did use electricity knowing it to have been unlawfully abstracted. He was switched off by the relevant authorities and he duly switched himself back on again. That he did use electricity after he had been switched off is confirmed by the meter reading which had gone up from the time and date that he was switched off. However, the sentence of 24 months that he received for so doing, albeit suspended, was excessive.

In commenting on the excessiveness of the sentence with respect to count 1, the Magistrate observed that the harshness was compounded by the fact that the accused is a first offender aged 71 years. As he emphasised, the accused had led a blemish free life for 70 years. What is unexplained however, is that the charge sheet describes him as 55 years old. Needless to say, it is imperative that the age of the accused is always accurately captured. It is a vital fact which has a material bearing in most situations. Inaccuracy creates unnecessary confusion on review when a judge is faced with contradictory data of this kind. This is more so when the contradictions go without comment in the judgement from the presiding Magistrate. If indeed he is a 71 year old pensioner living in a context where assistance from the State for old people is so limited as to be virtually non-existent, then even a suspended sentence of 24 months on count 2 is manifestly excessive.

I say this for the following reasons. Among those who have fallen foul of the provision are elderly people to whom constitutionally, the State owes some duty of care. This is with regard to s 82 of the Constitution of Zimbabwe Amendment (No.20) Act 2013 which states as follows:

> "People over the age of ***seventy*** have the right-
> ***(a) To receive reasonable care and assistance from their families and the State***
> (b) To receive health care and medical assistance from the State and
> ***(c) To receive financial support by way of social security and welfare***
>
> And the State must take reasonable legislative and other measures, ***within limits of the resources available to it***, to achieve the progressive realisation of this right." (My emphasis)

Granted not all old people fall within the same cohort regarding their inability to meet the costs of social amenities like water and electricity. However, the reality is that there many pensioners especially in the country's urban areas, who are unable to afford these expenses. This is for a variety of reasons such as the economic squeeze and the fact that their pensions were wiped out by inflation.

Nevertheless poverty is not a defence to this crime. Also, it can be validly argued that the role of criminal law is to condemn criminal behaviour as opposed to advancing social welfare goals through active fulfilment, in the manner that is envisaged by the section. However, the State's role in relation to socio economic rights is at three different levels. At one level the State's duty is to *respect* such rights, meaning that the State is obliged refrain from interference with human rights. This could be by way of removing legislative protections or programmes that advance such rights. Secondly the State is expected to *protect* against violation of such rights whether by individuals or by enterprises. Thirdly, the state is expected to *fulfil* its obligations by taking adequate steps towards progressive realisation of the rights within the framework of available resources.

In reality there may be obvious limits to what can be provided by the State in financial terms in light of its limited and severely strained resources but obviously the extent to which this would be held to be so is yet to be fully tested in our context by the Constitutional Court. In terms of s167 of the Constitution, it is the Constitutional Court which determines whether Parliament or the President has failed to *fulfil* a constitutional obligation. Nonetheless, the fact remains that there is also an obligation on the part of the State to *protect* the vulnerable aged. In this instance the criminal court, a vital part of the State machinery, can at least play a protective role by ensuring that the elderly are not unduly harshly penalised for electricity

self-reconnection offences. The court cannot purport to act in complete oblivion of the real circumstances that some of the disadvantaged elderly find themselves or with complete disregard to the different facets of possible interventions by the State in promoting rights of the elderly.

In my view, where needy elderly people are involved in cases of self-reconnections, one role that the criminal courts can play is to ensure that nominal, rather than punitive sentences are imposed, if they must, only by way of discouraging wanton breaking of the law. Such action may not equate to the State honouring its obligation to fulfil the rights of the elderly as envisaged by s 82 but it would at least provide some protective measure. To impose harsh penalties against the elderly who cannot afford would be tantamount to passing the buck for the State's economic failures. Granted, the law and the courts are only a part of the picture. In the in the long run the problem of self-reconnections that results in people falling foul of this provision will only be reduced within the context of a viable economic recovery that impacts on all groups. But where they can, criminal courts too, should play their role towards protecting the elderly.

Having regard to the totality of the above, the conviction and sentence under count 1 is wholly set aside for reasons I have explained.

The conviction under 2 is altered to read.

> Three months imprisonment wholly suspended for 5 years on condition accused does not during that period commit an offence involving the use of electric current which has been unlawfully abstracted, for which he will be sentenced to imprisonment without the option of a fine.

TSANGA J …….....

MUSAKWA J Agrees …….....