

THE STATE

Versus

PARDON SIBANDA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO5 FEBRUARY & 11 MARCH 2021

Review Judgment

TAKUVA J: This matter was placed before me on automatic review in terms of section 57 of the Magistrates' Court Act (Chapter 7:10)

The accused was arraigned before a Regional Magistrate at Bulawayo on seven (7) counts of contravening section 89 (1) (a) as read with Statutory Instrument 4/2000 of the Postal and Telecommunications Act Chapter 12:05 "destroys, injures or removes any telecommunication line belonging to or used by telecommunication licence".

On different dates and times as indicated in the respective counts, the accused person tampered with telecommunication apparatus constructed and adapted for use in transmitting and receiving telecommunication service which resulted in the interruption and cut off of such services. The accused's modus operandi on all the seven (7) counts was to force open a Tel-One main hole. Once inside, the accused would proceed to act and remove underground copper cables and went away unnoticed.

The accused's luck ran out on 2 May 2020 when he was arrested at the scene of yet another court. He had in his possession a pliers, hacksaw and a hammer. Upon being interviewed by the police he confessed to all seven (7) counts and made indications at all of them. The total value of the stolen copper wire is \$27414,25 and nothing was recovered.

When the charges were put to him he pleaded guilty to all seven counts no special circumstances was convicted and sentenced as follows:

- "Count 1 - 10 years imprisonment
- Count 2 - 10 years imprisonment
- Count 3 - 10 years imprisonment
- Count 4 - 10 years imprisonment
- Count 5 - 10 years imprisonment
- Count 6 - 10 years imprisonment
- Count 7 - 10 years imprisonment

Of the total of 70 years imprisonment 20 years imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving a contravention of section 89 (1) (a) removing destroys or injures telecommunications for which accused is sentenced to a term of imprisonment without the option of a fine.”

It is the suspended portion of the sentence that disturbed me and I raised the following query with the trial magistrate; “is 70 years imprisonment not the minimum sentence for the 7 counts? Is it competent to suspend any portion of the 70 years prison term?”

The response was as follows;

“... In my view I had thought that since the sentence I had passed that is, 70 years imprisonment was in excess of 10 years imprisonment, could suspend a portion of it as long as it is above 10 years imprisonment.

I could have been wrong in that opinion. I therefore stand corrected”.

It is trite law that where the court decides that the mandatory minimum term of imprisonment or fine prescribed by the legislature has to be imposed, it may not suspend all or a portion of the mandatory minimum prison sentence or fine – see section 337 (1) as read with paragraph 3 of the Sixth Schedule of the Criminal procedure and Evidence Act. See also *De Montille* 1979 RLR 105 and *S v Kudavaranda* 1988 (2) ZLR 367 (H).

In casu, it was not competent for the court *a quo* to suspend 20 years imprisonment leaving an effective sentence of 50 years. The mandatory 10 year term is per count. Therefore the total mandatory minimum sentence is 70 years imprisonment. It is impermissible to suspend any portion of the 70 year term of imprisonment. The scenario postulated by the learned Regional magistrate occurs where for example if he had sentenced the accused to 12 years imprisonment per count culminating in a total sentence of 84 years. It would have been competent for the court to suspend 14 years imprisonment leaving a balance of 70 years imprisonment. Once you impose the minimum sentence, it remains the minimum.

If the court *a quo* felt that an effective sentence of 70 years would be too harsh, it should have ordered sentences for certain counts to run concurrently. Here one looks at counts which were committed on the same day or same place and group them together. *In casu*, counts 1 and 3 were committed during the same month while count 2 and 4 were committed on the same day and counts 6 and 7 were committed during one month.

Since the sentence imposed by the court *a quo* has been tainted by an irregularity it cannot be permitted to stand. It is hereby set aside and in its place it substituted with the following:

Count 1 – 10 years imprisonment

Counts 3 – 10 years imprisonment

Count 2 – 10 years imprisonment

Count 4 – 10 years imprisonment

Count 5 – 10 years imprisonment

Count 6 – 10 years imprisonment

Count 7 – 10 years imprisonment

The sentence in count 3 is to run concurrently with the sentence in count 1.

The sentence in count 4 will run concurrently with the sentence in count 2.

The sentence in count 7 is to run concurrently with the sentences in count 5 and 6.

Total effective sentence = 30 years imprisonment.

Moyo J I agree