

STATE
versus
INNOCENT MARUTA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 1 MARCH 2022

Criminal Review

TSANGA J: The accused was convicted on his own plea of guilty to two counts of contravening s 89 (4) (b) and (5) of the Postal and Telecommunications Act, Chapter 12:05 and one count of contravening s10 of the Copper Control Act [Chapter14:06]. The facts in count one were that on the 2nd of November 2021, in Masasa Park, Harare, he had been found by a resident cutting Telone communication drop wires. A citizen's arrest had been effected and when he was searched he was found with Telone cables weighing 1 kg and valued at US\$150.00, which he indicated he cut and stolen from a Telone line in Masasa Park. In count two, he had been searched and found in possession of cables weighing 1kg and valued at US\$50.00.

The basis for count 3 was that also upon being searched, he had been found with a green plastic bag with 2kgs of some scrap copper rewinds valued at US\$200.00 for which he had no permit. For this count, he was charged under s10 of the Copper Control Act [Chapter 14:06].

Section 89 4(b) the basis for count one, provides as follows provides as follows:

- (4) Any person who—
 - (a).....
 - (b) without lawful cause, the proof whereof shall lie on him or her, destroys, injures or removes any telecommunication line belonging to or used by a telecommunication licensee; or
 - (c)
 - (I) knowing that it has been stolen; or
 - (ii) realising that there is a real risk or possibility that it has been stolen;
- shall be guilty of an offence, and **if there are no special circumstances peculiar to the case as provided for in subsection (10), be liable to imprisonment for a period of not less than ten years.** (My emphasis).

Section 89 (5) the basis for count 2 which he provides as follows:

- “(5) Any person, other than a cellular telecommunication licensee, a radio station licensee, a telecommunication licensee or a private telecommunication licensee, who, otherwise than for lawful cause (the proof whereof shall lie on him or her), has on his or her person, or in

his or her possession, or under his or her immediate control, or upon any land or upon or in any premises, any telecommunication infrastructure material that is not being used in connection with any telecommunication service lawfully provided to him or her, shall be guilty of an offence and, if there are no special circumstances peculiar to the case as provided for in subsection (10), be liable to imprisonment for a period of not less than five years or more than ten years.”

Lastly s10 of the Copper Act Chapter 14:06 which was the basis for count 3 provides as follows:

“10 Failure to give satisfactory account of possession of copper

Any person who is found in possession of copper in regard to which there is a reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable to a fine not exceeding level eight or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”

He was sentenced as follows:

Count 1: 10 years imprisonment

Count 2: 5 years imprisonment

Count 3: 12 months imprisonment.

In count 1, under s 89 (4) (b) which attracts a mandatory minimum sentence, the accused stated that he did not know that the cables were still working and that he thought they were old non-working cables. The Magistrate rightly found that this was not a special circumstance and thus imposed the mandatory minimum sentence of 10 years. In total, he received an effective sentence of **16 years** for the three counts.

I raised a query with the Magistrate as to why the court had not ordered the sentences for counts 2 and 3 to run concurrently with the main sentence of 10 years. The magistrate’s response was that this was because of the rampant nature of the offence presently and hence the focus had been on deterrence and sending a message to like-minded criminals to stay away from Telone apparatus.

The Criminal Procedure and Evidence Act [Chapter: 9:07] provides in s 343 as follows on cumulative or concurrent sentences:

“343 Cumulative or concurrent sentences

(1) When a person is convicted at one trial of two or more different offences or when a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence, as the case may be, as the court is competent to impose.

(2) When sentencing any person to punishments in terms of subsection (1), the court may direct the order in which the sentences shall be served or that such sentences shall run concurrently.”

In essence, it is indeed competent to sentence for each count but it is also equally competent for a sentencing court to direct that sentences run concurrently. Where a court desires to impose an exemplary sentence, indeed one way of doing so is by making sentences run consecutively particularly where the offence is grave and prevalent, even if similar. However, where a lengthy mandatory sentence has already been imposed on one of the counts, it is proper that the sentences in the other similar offences, be made to run concurrently to the mandatory sentence. This is because a mandatory sentence is in itself an exemplary sentence to other would be offenders.

In this instance, counts 1 and 2 ought in fact to have been treated as one for sentencing in that the offence was one or similar in nature; the offences were closely linked in time and arose out of the same transaction of going around stealing telephone wires. See *S v Chayiswa* 2004 (1) 80 (H) for these factors that are taken into account for multiple counts and globular sentencing. The sentence in count 3, a separate offence, ought to have been made concurrent with the sentence for counts 1 and 2. This is for the reason that there being no special circumstances to avoid the imposition of a mandatory sentence of ten years, that punishment, as stated, was already exemplary. Furthermore, the accused being a first offender this ought to have been a serious consideration in how the sentence would run for the remaining offence.

Accordingly, the sentence is altered to read as follows:

Counts 1 and 2 are treated together for sentencing: Ten (10) years imprisonment.

Count 3: One (1) year imprisonment

The sentence in count 3 to run concurrently with the sentence for counts 1 & 2.

The Magistrate must bring the altered sentence to the attention of the prison authorities.

Chilimbe J.....Agrees