

INNOCENT MANJORO

versus

THE STATE

HIGH COURT OF ZIMBABWE

MWAYERA & MUZENDA JJ

MUTARE, 19 and 27 May 2021

### **Criminal Appeal**

*C. Chibaya* for the Appellant.

*Mrs J. Matsikidze* for the Respondent.

MUZENDA J: This is an appeal against both conviction and sentence imposed by the Magistrate Court sitting at Mutasa on 17 December 2020 where the appellant was convicted of abstracting or diverting electricity current as defined in s 60A (1)(a) of the Electricity Act [*Chapter 13:19*] and was sentenced to 2 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual conditions of future good behaviour.

#### Background.

Appellant and one Stanley Ndongwe were jointly charged for contravening s 60(1)(a) of the Electricity Act, the allegations in the main charge were that on an unknown date to the public prosecutor during the month of July 2020 and at Muparutsa Business Centre, Honde Valley, one or both of them unlawfully abstracted or diverted electric current or caused electricity current to be abstracted or diverted to the appellant's grinding mill. Alternatively appellant unlawfully used electricity current at his grinding mill knowing it to have been unlawfully abstracted or diverted.

The facts of the state reflects, that appellant is not employed. His co-accused Stanley Ndongwe is employed at Hauna Growth Point by Zesa. On 28 August 2020 a ZESA employee

inspected a grinding mill managed by the appellant and detected that electricity power was not going through the meter as it had been by passed. Appellant blamed an electrician who had attended to the electric fault when ZESA advised him to rectify a power cut at the grinding mill.

The appellant on the date of his trial pleaded not guilty and in his defence outline stated that in August 2020 he experienced an electrical fault he informed ZESA and spoke to his co-accused. His co-accused later visited the site and noted a certain joint which had a fault. The co-accused advised appellant then to look for an electrician. Appellant then called one Spider who attended to the fault and repaired it. He was only later advised by ZESA Loss Control Office and informed that electricity had been abstracted or diverted. Appellant's co-accused in his defence denied the allegations and also denied that he diverted electricity, he only recommended that the fault be attended to. The co-accused denied using electricity unlawfully.

Two state witnesses testified on behalf of the state, Denny Nechiora and Lax Bungu. Denny Nechiora is the one who discovered that electricity had been abstracted at ZESA substation and he told the court *a quo* that appellant implicated his co-accused. The substation was not locked and according to this witness someone did the connection for the appellant. He also confirmed that when a consumer experiences a fault he consults ZESA, Denny Nechiora did not implicate the appellant's co-accused. Mr Lax Bungu's evidence was identical to Denny's Nechiora's. When Lax Bungu confronted the appellant about the abstraction, appellant told the witness that he did not know what the electrician did at the substation, however the terminals of the breaker had been removed and connected directly to the grinding mill, the breaker is at the transformer of the grinding mill. He told the court that appellant's meter is situated at the substation. He did not implicate appellant's co-accused.

After the testimony of the state witness, the state closed its case and the state withdrew charges against appellant's co-accused for lack of evidence. The appellant was put to his defence and maintained what he had stated in his defence outline. Under cross examination by the state he told the court that he does not know how electricity operates and on the day he was arrested he had purchased a token and that he was buying tokens and punch them into the metre. Appellant told the court he had evidence about the tokens but had not brought such evidence to court. However he would use eco-cash to purchase tokens, he totally denied by passing the electricity.

The court *a quo*'s decision.

From the foregoing the court a quo concluded that there was overwhelming evidence that appellant committed the offence. It also concluded that appellant hired one Spider to divert current or electricity straight to his grinding mill thereby by-passing the meter. The court further concluded that appellant knew very well that power or electricity was diverted at the meter which explains why he was not buying ZESA tokens. The manner in which power electricity was diverted using jumpers, the court went on, appellant definitely knew that electricity was not passing through the meter, the court *a quo* went on to remark that even a person not cognisant with how electricity operates could easily see that current was diverted. It went on to add that appellant is the one who looked for the jumpers possibly used or offered his car jumpers to divert the current. In addition the learned magistrate was satisfied that appellant paid for the services rendered in by passing electricity he could not be heard saying he did not appreciate what happened, appellant also benefited through the use of electricity at the grinding mill without paying. Appellant was convicted and sentenced as already pointed in the above introduction. Appellant not happy about this finding decided to note an appeal against both conviction and sentence.

#### Grounds of Appeal

##### **Ad Conviction**

1. The court a quo grossly misdirected itself both on facts and at law by convicting the appellant on the basis that he had failed to prove that he was buying Zesa tokens thereby placing an onus upon the appellant to prove his innocence. Appellant's guilt was not proved beyond reasonable doubt.

##### **Ad Sentence**

2. The court a quo grossly misdirected itself at law by imposing a sentence that induces a sense of shock despite the existence of several mitigatory facts which included the following.
  - a. Appellant was a first offender
  - b. Appellant used the electricity without paying for a period of a month
  - c. Appellant was running a family business
  - d. The section under which appellant stood convicted provided the imposition of a fine and the court a quo over-emphasized deterrence.
3. The court a quo grossly misdirected it self in terms of the law by failing to consider other non-custodial sentences.

Relief sought

Where appellant prays that:

- (a) His appeal against conviction succeeds
- (b) His conviction be quashed, set aside and substituted with the following..  
“Accused be and is hereby found not guilty and acquitted”

Alternatively

Where appellant prays that:

- (a) His appeal against sentence succeeds.
- (b) The sentence that was imposed against appellant be and is hereby quashed , set aside and substituted with the following:  
“Accused be and is hereby sentenced to 12 months imprisonment of which 6 month imprisonment is suspended on the usual conditions of good behaviour and the remaining 6 months imprisonment is suspended on condition accused pays \$10 000 fine”

The appeal against conviction is opposed by the state. The appeal against sentence is not opposed by the state.

Submission by Counsel

Mr *Chibaya* for the appellant submitted that the guilt of the appellant was not proved beyond reasonable doubt. He further argued that the appellant was buying electricity tokens, the state did not manage to lead evidence to show that appellant was not buying tokens. The court a quo also erred in convicting the appellant on the basis that he did not prove that he was buying Zesa tokens taking into account that the state has the onus to prove the guilty of an accused person beyond reasonable doubt.

As regards sentence, appellant submitted that the sentence induces a sense of shock given several mitigatory factors. He further submitted that although an appeal court will not interfere with the sentencing discretion of the lower court, the appeal court can do so where the sentence is disturbingly severe. In this case the sentence of 2 years imprisonment with half of it suspended is disturbingly severe it was submitted. I such a case a superior court can interfere where the discretion was not judiciously exercised. It was further submitted on behalf of the appellant that the court a quo misdirected itself by failing to consider other non-custodial sentences.

Mrs *Matsikidze* for the respondent submitted in her heads of arguments that although the state witnesses could not specifically clarify the point of by passing the result benefitted the appellant. She added further that the appellant had no onus to prove his innocence but was required at law to do so if a statute places such onus on him as required in s 60 A (1)(a) of the Act to show that he is not criminally liable for the act attributed to him by the state. The respondent contended further that the appellant hired and paid Spider to effect repairs which culminated in the bypass, hence, it was submitted, appellant was part of the abstracting arrangement. In addition he did not buy electricity tokens to feed into his metre. The state argued in its concluding remarks that appellant was at all material times aware of the by-pass and actually benefitted from it.

On the issue of sentence the respondent's counsel as already indicated hereinabove is not opposed to the appeal against sentence. However the respondent is of the view that appellant's moral blameworthiness is very high and still should be sentenced to a custodial term of at least six months imprisonment.

#### Analysis of the matter

It is discerned from the record of proceedings that appellant was only but a manager of the grinding mill. The mill belonged to the mother of the appellant. The appellant is not an electrician but a consumer who when confronted with an electric fault would contact the service provider, ZETDC through its personnel. The appellant telephoned Zesa, its agent or employee attended the scene and advised appellant to contact an electricity expert, appellant did and gave work to Spider. To the appellant the problem was solved and he was reconnected to electricity. How Spider did so is not privy to the appellant. At a later stage it was discovered that there was an abstraction of power or diversion at the substation of Zesa, 100m away from the grinding mill, appellant was contacted and he pleaded ignorance of that abstraction. He blamed a Zesa employee and Spider and told the police and the court that he was but a novice in how electricity appliances work. Appellant was charged and convicted for abstraction and the court *a quo* concluded that appellant at all material times was aware of the abstraction since he failed to prove that he was paying for electricity tokens.

In its judgment the court *a quo* concluded that appellant hired Spider to divert current or electricity straight to his grinding mill thereby bypassing the meter. The court *a quo* further alluded that the jumpers used by Spider to divert current belonged to the appellant and those jumpers belong to appellant's car. I have critically and repeatedly scanned the record of proceedings and failed to locate the possible source of all these facts or basis for this inference.

No one from the state witnesses testified to these facts. What is apparent from the record is that appellant experienced an electric fault and he contacted Zesa. He was advised to hire an electrician to rectify the problem and not to abstract or divert electricity. The court *a quo* misdirected itself on the facts when it concluded that appellant hired Spider to abstract electricity. The court *a quo* further erred in alluding that appellant provided jumpers to spider to divert electricity. This finding is not supported by evidence and it amounts to a misdirection. Spider was not called to testify that appellant instructed him to abstract electricity, the state had the onus to locate Spider and explain the instructions he got from the appellant. Where such a key witness is not called by the state, the benefit of doubt should be accorded to the accused.

The court *a quo* weighed in favour of the state case on the basis that appellant did not prove that he had been purchasing electricity tokens, as such he benefitted. Appellant throughout the proceedings strongly maintained that he was buying tokens and actually told the court *a quo* in his evidence in chief that on the very day he was in court, he had bought a token. He had left the proof of such evidence at his home, no further questions were put to the appellant as to what form of evidence was at his disposal nor was the court postponed to enable appellant to avail such evidence. The court *a quo* could not accept appellant's version and concluded that he was not buying tokens. On that note the court *a quo* erred. No onus lies on the accused to prove his innocence, the onus always lies on the state to prove beyond reasonable doubt that an accused is guilty of an offence. Appellant did not have knowledge of the abstraction and he never buckled in court on that aspect. The state witnesses did not specifically implicate appellant, just because the appellant was the manager of the grinding mill, he ought to have known about the abstraction. That inference is not the only one to be deduced from the facts adduced in court below. Spider could have abstracted electricity and did not inform the appellant. In any case appellant did not wholly benefit from the abstraction since he is but an employee, his mother owns the mill. Spider was not prosecuted nor called to confirm the conclusions reached by the court *a quo* in its judgment. I am satisfied that the state failed to prove both *mens rea*, *actus reus* and unlawfulness in this matter.

The court *a quo* did not pronounce its verdict vis-à-vis the alternative charge for unlawful use of electricity by the appellant. The amount of prejudice was not established by the state and facts on that aspect are scanty. A triar of facts must make conclusions or inferences from tangible evidence clearly established from facts not to import or make its own facts and make adverse conclusions against an accused, that will be misdirection. The court did not do

an inspection in loco and I fail to see the basis of stating that one can easily see that current was diverted, how apparent was it if the employee operating the mill could not see it?

The appeal against conviction is laid on a strong foundation and it succeeds. The conviction is set aside, appellant is found not guilty. The appeal against sentence automatically falls away.

Disposition

The following order attains:

- (a) The appeal against conviction be and is hereby upheld.
- (b) The conviction of the accused be and is hereby quashed and substituted by the following:

*“Accused is found not guilty and acquitted, both on the main and alternative charges.”*

MUZENDA J \_\_\_\_\_

MWAYERA J agrees \_\_\_\_\_

*Chibaya & Partners, Appellant’s Legal Practitioners  
National Prosecuting Authority, for the State*