

SINDISO SIBANDA

And

NQOBANI MHLANGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU & MAKONESE JJ
BULAWAYO 9 JULY & 2 AUGUST 2012

Ms P. Nkomo for the appellants

T. Hove for the respondent

Criminal Appeal

NDOU J: The appellants were convicted by a Western Commonage Magistrate for illegally reconnecting supply of electricity that had been disconnected by the Zimbabwe Electricity Supply Authority (“ZESA”) employees. The charge was framed as contravention of section 3(b) of the Electricity Amendment Act Number 12 of 2007. The correct charge, the parties now agree should have been cited as either a contravention of section 60 A (1) (b) or section 60A (3) (b) of the Electricity Act [Chapter 13:19]. There is no prejudice to either party and both counsels have submitted that we remedy this aspect of the charge. The issue is whether we should alter to a contravention of section 60 A (1) (b) or section 60A (3) (b). The appellants’ counsel on the one hand submitted that we alter to read a contravention of section 60A (1) (b). The state counsel on the other hand initially submitted that we should alter to read a contravention of section 60A (3) (b). The difference in these provisions is the penalties provided therein.

Section 60A (1) (b) provides:

“(1) any person who, without lawful excuse, the proof whereof shall lie on him or her –

- (a) Abstracts or diverts any electric current or causes 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 such imprisonment.”

Section 60 A (3) (b) provides:

“(3) Any person who, without lawful excuse, the proof whereof shall lie on him or her –

- (a) Tempers with any apparatus for generating, transmitting, distributing or supplying electricity with the result that ay supply of electricity is interrupted or cut off; or
- (b) Cuts, damages, destroys or interferes 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 in subsection (4) be liable to imprisonment for a period of not less than ten years.”

Eventually the state counsel conceded that the appropriate charge should be framed under section 60 A (1)(b) of the Act. From the facts of this matter we are in agreement that the concession was properly made. Section 60 A (3) (b) is intended for serious conduct like theft of copper cables and transmitters. We do take judicial notice of the fact that the Act was

amended by Act 12 of 2007, *supra*, because of the rampant theft of copper wire from ZESA. The mandatory sentence was enacted on account of these copper thefts and not reconnection of power supply.

In the circumstances the appellants' are convicted of contravening section 60 A (1) (b) of the Electricity Act [Chapter 13:19]. As alluded to above, this offence has the option of a fine.

Looking at the personal circumstances of the appellants and the gravity of their conduct a fine coupled with a suspended sentence will meet the justice of the case. The appellants are first offenders. They "stole" the power supply for domestic use. They served one month of the sentence before they were granted bail pending this appeal. Their act resulted in momentary blackout in their suburb.

Accordingly, the appeal against sentence is upheld and sentence imposed by the court *quo* is set aside and substituted by the following:

Each: US\$300 or in default of payment 3 months imprisonment. In addition 10 months imprisonment wholly suspended for 3 years on conditions the accused in that period does not commit any offence defined under section 60 A of the Electricity Act [Chapter 13:19] and for which he is convicted and sentenced to imprisonment without the option of a fine.

Makonese J I agree

Kenneth Lubimbi & Partners, appellants' legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners