

THE STATE  
versus  
WILLIAM MANGWENDE

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 10 September 2014

### **Criminal Review**

MAWADZE J: This matter brings into focus the dangers of the failure by the presiding judicial officer to familiarise himself or herself with the relevant provisions of the statute under which the accused was being charged. The consequences can be dire and a source of embarrassment. In this particular case the trial magistrate could not properly state the relevant statute under which the accused was being charged. To make matters worse, the facts upon which the conviction is premised do not disclose an offence at all.

On 26 March 2014 I wrote a minute to the trial magistrate in which, I stated as follows:-

“May the trial magistrate comment on the following:

1. What is the correct citation of the Act accused contravened? Is there an Act called Zimbabwe Electricity Supply Authority Act?
2. What is alleged to have been done by the accused which constitutes an offence? The alleged facts should be linked to the provisions of s 60 A(3)(a) of the Electricity Act [*Cap 13:19*].
3. Is the conviction supported by the facts”.

In response the trial magistrate conceded that there is no Act called Zimbabwe Electricity Supply Authority Act but that the correct citation of the charge should be contravening s 60A(3)(a) of the Electricity Act [*Cap 13:19*]. In response to the propriety of the conviction the trial magistrate said:

- “2. Accused touched and tampered with the Zesa meter. The Zesa meter is no longer functional and a new one must be acquired. There is no Zesa at the house in question (*sic*).

3. Accused after seeing that there was a problem he should not have touched the meter or tried to see where the fault was since he is not an electrician. He should have simply called Zesa personal”.

The response by the trial magistrate is not helpful as it does not answer the question on how the accused tampered with the Zesa meter in contravening s 60 A(3)(a) of the Electricity Act [*Cap 13:19*].

Let me refer to the record of proceedings.

The accused was charged and convicted of contravening what is cited as:

“Tempering with Zimbabwe Electricity Supply Authority Property as defined in s 60(3)(1) of the Zimbabwe Electricity Supply Act” (*sic*)

As already stated there is no Act known as Zimbabwe Electricity Supply Authority Act. This explains probably why the relevant Chapter is not even cited. The correct citation of the Act is the Electricity Act [*Cap 13:19*].

The charge upon which accused was convicted is couched as follows:-

“In that on 27<sup>th</sup> day of May 201`3 at 1364 Mabvazuva, Rusape, William Mangwende without lawful excuse tempered with the Zesa Prepaid electricity meter” (*sic*).

The State outline does not explain in clear and specific manner what accused allegedly did which constitutes an offence. The alleged facts are that on 27 May 2013 a report was made that an electric meter at accused’s house had been tampered with. It is alleged that the Zesa Inspector on checking the prepaid meter discovered that it had been tampered with. On how this had happened it is alleged that the accused touched the meter when he suspected that there was an electric fault at his house No. 1364 Mabvazuva Rusape and that the said meter suddenly stopped working. It is not explained how accused “touched” the said meter and how this amounts to tampering with the meter.

The trial magistrate proceeded in terms of s 271 (2)(b) of the Criminal Procedure and Evidence Act [*Cap 9:09*] after the accused had pleaded guilty to the charge. It is again clear that accused did not give an unequivocal admission of the facts and essential elements of the charge. This is so because in putting the essential elements of the alleged offence to the accused, the accused in a bid to explain his innocent conduct gave a lengthy explanation of what he exactly did. The accused was virtually interrogated as the trial magistrate sought an admission of the alleged offence.

The accused’s explanation was very simple. He said that he suddenly realised that the power supply to his house was now weak as the lights were dim. This prompted him to check

on the prepaid meter if he still had sufficient power. The accused said he noticed that the prepaid meter was not well secured on the wall and was shaking. The accused said the Zesa Inspector later explained that the prepaid meter was still intact but that if one touches it or shakes it may cease to function due to its sensitivity. The accused insisted that when he “touched” the prepaid meter it was in a bid to ascertain how secure it was and to check if the fault was due to the expiry of the power purchased or some other fault.

After this lengthy interrogation, purportedly adducing the essential elements of the offence, the accused was found guilty of the charge.

It is clear to my mind that from the answers accused gave he was denying that he “tampered” with the Zesa prepaid meter without lawful excuse or that if he did it was with any criminal intent.

The relevant Electricity Act [*Cap 13:19*] in Part XI is illustrative. It provides as follows:-

“60A offences in relation to electric current and apparatus

(1) ..... (not relevant)

(2) ..... (not relevant)

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

(a) Tamper 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) ..... (not relevant)

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”.

The trial magistrate did find that there are special circumstances in this matter and accused was sentenced as follows:

“To pay a fine of \$400/4 months imprisonment. In addition 4 months imprisonment is suspended for 5 years on condition accused does not during that period commit an offence contravening s 60 of the Zesa Act and for which upon conviction he will be sentenced to imprisonment without the option of a fine” (*sic*).

As already pointed out there is no Act called “Zesa Act”. Further, s 60 of the Electricity Act [*Cap 13:19*] criminalises the making of false statements and declarations and this is not even related to what accused is alleged to have done. This however is besides the point.

Accused's admitted conduct as explained fully by the accused does not constitute an offence as defined in s 60A(3)(a) of the Electricity Act [*Cap 13:19*].

The Encarta Dictionaries – English explains the word tamper as follows:-

“to interfere with and damage something: to interfere with something in a way that damages it or has harmful results”

The accused's conduct does not amount to tampering with the prepaid electricity meter. All what accused did was to touch the prepaid meter which was in his house as he wanted to check the number of units of power supply he still had. This was occasioned by the fact that the power supply was weak and he was not sure of the cause. The prepaid meter was also not well secured against the wall. Such conduct, cannot, by any stretch of imagination amounts to tampering with the prepaid meter without a lawful excuse, which conduct resulted in the disruption of the supply of electricity or cutting off of the power as envisaged in s 60 A(3)(a) of the Electricity Act [*Cap 13:19*]. Neither the requisite *actus reus* nor the *mens rea* are present in this case.

It is unfortunate that the trial magistrate did not bother to check the relevant provisions of the Electricity Act [*Cap 13:19*]. The citation of the said Act was even incorrect. Above all the trial magistrate failed to appreciate that the accused's conduct as alleged and admitted by the accused does not constitute an offence as defined in the relevant provision s 60 A(3)(a) of the Electricity Act [*Cap 13:19*].

The accused's explanation clearly amounts to a defence or denial of the charge. There is therefore a serious misdirection on the part of the trial magistrate.

The conviction of the accused cannot be allowed to stand and should be quashed.

Accordingly it is ordered:-

1. That the conviction of the accused on CRB R568/13 be and is hereby quashed.
2. Accused is found not guilty and acquitted.

The accused should be recalled and advised of the outcome of the review and the consequences thereof.

MATHONSI J: agrees .....