ADOLF NDUDZO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA& MANGOTA JJ
HARARE, 28 January, 2015

Criminal Appeal

P Kumbawa, for the appellant
F Kachidza, for the respondent

MANGOTA J: The appellant was charged with contravening s 60A (3) of the Electricity Act [*Chapter 13:19*]. He was, in the alternative, charged with contravening s 173 (1) (a) (i) and (ii) of the Criminal Law (Codification And Reform) Act [*Chapter 9:23*].

The allegations which the state preferred against him in respect of the main charge were that, on a date to the prosecutor unknown but in June, 2013 and at 165 Smuts Road, Prospect, Waterfalls, Harare, the appellant and two others removed a conventional meter with serial number 573625 and replaced it with a pre-paid meter with serial number 07087936378. It was the contention of the state that, when the appellant and his accomplices acted as they did, they interfered with an apparatus which is used for transmitting or supplying of electricity to house number 165 Smuts Road, Prospect, Waterfalls, Harare. (emphasis added).

The state's allegations in respect of the alternative charge were that, on a date to the prosecutor unknown but in June, 2013 and at Smuts Road, Prospect, Waterfalls, Harare the appellant and his two accomplices unlawfully and intentionally corruptly concealed from their principal, Zimbabwe Electricity Transmission And Distribution Company, a personal transaction intending to obtain a consideration in the sum of $500 after the installation by them of a pre-paid meter. The consideration, the state claimed, was not due to them in terms of the agreement which existed between their principal and them.

The appellant pleaded not guilty to both the main, and the alternative, charges. He was, however, convicted after a fully-fledged trial and was sentenced to 10 years imprisonment.

He appealed against conviction. He stated in his four grounds of appeal that the trial court erred:

(a) in convicting him without indicating the charge which he had been convicted of – i.e. between the main and the alternative charge(s);

(b) in convicting him when the evidence which had been adduced did not support the offence of contravening s 60A (3) of the Electricity Act [*Chapter 13:19*]

(c) in relying on the evidence of a single witness whose eyesight and other faculties were failing – and

(d) in not allowing him a fair trial.

The respondent remained of the view that the appellant was erroneously convicted of the main charge. It stated that he should have been convicted of the alternative charge. It gave very convincing reasons for the position which it took. It insisted that the sentence which the court *a quo* imposed on the appellant induced a sense of shock.

The concluding remarks of the trial magistrate's judgment read:

> "The state has managed to prove its case against the second accused, who is accordingly found guilty as charge" (emphasis added).

The second accused is the appellant. Two charges had been preferred against him in the alternative. The remarks of the learned trial magistrate, with respect, do not show the actual charge which the appellant was convicted of. That is a serious misdirection on the part of the trial court.

The fact that the court *a quo* proceeded to make an inquiry into the existence or otherwise of special circumstances which surrounded the commission of the offence supports the view that the court convicted the appellant of contravening section 60A (3) of the Electricity Act. That view finds further support from the 10 year sentence of imprisonment which the court *a quo* imposed on the appellant. The trial court must have been persuaded to pursue that route in terms of s 60A (3) of the Electricity Act. The section enjoins a court which convicts a person in terms of it to impose a mandatory minimum sentence of 10 years imprisonment. The only occasion when the court is allowed to depart from that mandatory sentence is where the court is satisfied that special circumstances exist in the case of an accused person who is before it. Section 60A (4) reads:

> "If a person referred to in subsection (2) or (3) satisfies the court that there are special circumstances perculiar to the case, which circumstances shall be record by the court, why the penalty provided under subsection (2) or (3) should not be imposed, the convicted person shall

be liable to a fine of up to or not exceeding level fourteen or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment".

The trial court did not find special circumstances to have been existent in the case of the appellant. It, accordingly, imposed upon him the sentence of 10 years imprisonment.

There is no doubt that the trial court misdirected itself in a very serious way when it failed to pronounce the charge which the appellant had been convicted of. The appellant was, as it were, left in the dark as regards the fact of what he had been convicted of.

It is trite that where a court is trying a person of more than one charge or of charges which are preferred in the alternative, the court must assess the evidence of the prosecution as a whole and make a definite pronouncement of what the person is convicted of. The pronouncement must also show what the person is acquitted of. Leaving matters hanging in the air as the court *a quo* did in the present case creates a serious uncertainty. It opens the work of the judicial officer to criticism which can easily be avoided.

The appellant and the respondent were *ad idem* on the point that the evidence of the state did not support the conviction of the appellant on the main charge. The court agrees with the parties' position on the matter. The section which pertains to that charge prohibits persons from cutting, damaging or interfering with an apparatus which generates, transmits, distributes or supplies electricity. The only occasion where a person is allowed to interfere with such an apparatus is where the law allows him to do so for one reason or the other. The apparatus which is contemplated *in casu* is the conventional meter. The appellant and another or others removed, and replaced, it with a pre-paid meter. The question which begs the answer is whether or not, in acting as they did, the appellant and his accomplice(s) interfered with the apparatus.

The interpretation section of the Electricity Act does not define the word "interfere". However, a correct interpretation of the word can easily be gleaned from a reading of the section which creates the offence. The section reads, in part, as follows:

"(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 any 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" (emphasis added).

It does not require the knowledge and ingenuity of a rocket scientist to ascertain that the appellant and his accomplices did not contravene para (a) or (b) of s 60A (3) of the Electricity Act. The conduct of the appellant and his accomplice(s) did not result in the supply of electricity being interrupted or cut off as is contemplated in para (a) of the section. Equally, their conduct did not constitute an act of vandalism which para (b) of the section contemplates. The evidence which the state led did not support the appellant's conviction on the main charge. The court *a quo*, accordingly, erred when it convicted the appellant, as it did, on the main charge.

It has already been stated that the appellant and his accomplice(s) removed the conventional meter and replaced it with a pre-paid meter. They did not perform the work as an act of charity. They charged the owner of house number 165 Smuts Road, Prospect, Waterfalls, Harare the sum of $500 for their work. The owner of the house one Aerkanos Mutema was adamant that he paid the stated sum to the appellant and others. He said he paid them an initial sum of $400 and later, at the instance of the appellant, a further sum of $100. He said he paid the amount through his son.

There is no doubt that the appellant and his accomplice(s) concealed from their principal a personal interest in the transaction which they concluded with Mr Mutema. They obtained a consideration of $500 when they installed the pre-paid meter on to the house of Mr Mutema. They knew at the time that they received the amount that the consideration was not due to them. They also knew that the agreement which existed between their principal and them did not allow them to act in the manner which they did.

There is, therefore, no doubt that the appellant and his accomplice(s) contravened s 173 (1) (a) (i) and (ii) of the Criminal Law (Codification And Reform) Act. The evidence of the prosecution supports the appellant's commission of the mentioned offence in an irrefutable way. The respondent was, accordingly, correct when it stated that the appellant should have been properly convicted of the alternative, and not the main, charge.

The appellant, on his part, made a confession in the course of the court *a quo*'s proceedings. The trial court explained to him the meaning and exigencies of special circumstances after which it invited him to state whether or not such circumstances existed in respect of the case which it had convicted him of. His submissions were as follows:

> "I committed the offence after the Human Resources Department at ZETD had held several meetings with meter readers and announced that the department of meter readers was going to be closed down due to the introduction of pre-paid meters. The same department further

> advised us that we should look for employment elsewhere. I was led into the commission of the offence by a colleague who is currently on the run without realising the gravity of the offence…. (emphasis added).

The appellant, therefore, stands convicted of the alternative charge.

Counsel for the appellant did not make any submissions in respect of the sentence which the court must impose upon him. He, in fact, did not appeal against sentence. He left that matter to the court to determine.

The respondent, on the other hand, remained of the view that the appellant's aggravatory matters outweighed what favoured him by a very wide margin. It stated, correctly so, that the appellant breached the trust which his employers bestowed upon him. It stated, further, that he committed the offence out of greed and not need as he was gainfully employed. It insisted that a sentence of 4 years imprisonment with one year being suspended for deterrent reasons would meet the justice of the present case.

The offence which the appellant committed attracts the penalty of a fine of up to or not exceeding level fourteen or imprisonment for a period which does not exceed twenty years or both. It follows from the foregoing that the legislature did not want persons who act in a corrupt manner to be treated with kid gloves. The appellant acted corruptly when he stole his employer's valuable item and installed it at Mr Mutema's house for a consideration. The respondent spelt out in a very lucid way all the factors which militate against the appellant. The court remains alive to those matters in its effort to assess the sentence which is commensurate with the crime which he committed. The appellant is, on the other hand, a middle –aged first offender. He maintained an unblemished record for some 42 years running. He is a family man who lost his employment as a result of this offence.

The court remains of the view that a short but sharp term of imprisonment is warranted in the circumstances of this case. It, however, does not agree with the respondent's proposal which is to the effect that the appellant be sentenced to four years imprisonment with a three year term being effective. The appellant, in the court's view, should be sentenced to a term of imprisonment which is less than the effective three years which the state suggested. A portion of that sentence will be suspended for a period of time and for deterrent reasons.

The court has considered all the merits and demerits of this appeal. It is satisfied that the appellant proved, on a balance of probabilities, his innocence in respect of the main charge. He, however, stands properly convicted of the alternative charge. The appeal,

therefore, succeeds in part.

It is, in the result, ordered as follows:

1. The conviction of the appellant in respect of the main charge be and is hereby quashed and the sentence of 10 years imprisonment set aside.
2. The appellant be and is hereby convicted of contravening s 173 (1) of the Criminal Law (Codification And Reform) Act [*Chapter 9:23*].
3. The appellant is sentenced to 24 months imprisonment; 6 months of which are suspended for 5 years on condition he does not, within that period, commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

   Effective sentence: 18 months imprisonment.

CHATUKUTAJ: agrees ……..