

TAWANDA MADZITIRE
and
NICHOLAS MUNGAYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 25 March 2014

Criminal appeal

S.Ganya, for the appellants
E.Mavuto, for the respondent

HUNGWE J: The two appellants were convicted of contravening s 60A (3) (a) of the Electricity Act, [*Cap13:19*] as amended. They were each sentenced to 10 years imprisonment after the court found that there were no special circumstances in the case. The appeal is against both conviction and sentence. The notice of appeal was poorly drawn but taking a robust approach which seeks to deal with the merits, or lack thereof, of the appeal, one can read that the basis of the appeal is that there was no direct evidence linking the appellants to the commission of the crime. Secondly, the appellants aver that there was no proof beyond a reasonable doubt that the appellants committed the crime for which they stand convicted.

Counsel for the State filed a concession in terms of s35 of the High Court Act, [*Cap 7:06*] indicating that the State did not support the conviction. I am however unable to support the position adopted on behalf of the State in this matter for the following reasons.

Act No 12 of 2007 amended Part XI of the Electricity Act, (“the Act”), by inserting s60A which reads:

“60A Offences in Relation to Electric Current or Apparatus”

There are six subsections to that section. The first three sections create the offences in connection with an electric current and apparatus. A person convicted of contravening subsections(1) or (2) is liable to a fine not exceeding level 14 or to imprisonment not

exceeding five years or to both such fine and imprisonment. For a contravention of subsection (3) there is a minimum mandatory sentence of ten years imprisonment. However, in s60A there is a provision for a reverse onus regarding whether or not an offence has been committed. Each subsection begins:

“(1) Any person who, without lawful excuse, the of proof of which shall lie upon him or her..... shall be guilty of an offence.....”

In their heads of argument, the appellants argue that since there is no direct evidence that they had cut-off the copper conductors which were found in their motor vehicle, then the reverse onus cast upon them by the relevant section did not apply. Put differently, the appellant’s argument is that the Act did not criminalize mere possession of copper conductors. As such there was no evidence they had cut, damaged or interfered with an electric current or apparatus.

The evidence upon which the appellants were convicted is as follows. At around 03h00 hours there was a power black-out around the Blackfordby/Nyabira farming area. The farmers there established that this was not a scheduled load-shedding. They went out to investigate. They saw a motor vehicle, a commuter omnibus, and gave chase to it. The motor vehicle was cornered after a considerable distance. This motor vehicle’s tyres were shot to immobilize it. Some people then fled from the motor vehicle. The first appellant, who was its driver, was apprehended. Evidence was that there may have been between five and nine people who escaped. First appellant led to the arrest of the second appellant. Inside the motor vehicle was a role of copper conductors which exhibited signs that it had been freshly cut. First appellant led his captors to the portion of the transmission grid from which copper conductors had been cut. There were signs at the site that the cables had been recently vandalised. This had led to the black-out. First appellant explained to his captors that he had been hired to transport goods from a broken down motor vehicle which also needed to be towed away. To the police officer who questioned him soon after his capture, first appellant had explained that he had been hired by one Hardlife to carry maize from a certain farm in the area. Police failed to locate Hardlife but apprehended second appellant at his residence in Harare.

The learned trial magistrate had no hesitation in rejecting the explanation of innocent possession of copper conductors offered to him by the appellants. He disbelieved the appellants’ story by pointing out that it did not accord with the probabilities of the case. The

claims which he found to be improbable include the claim that a commercial passenger minibus could be hired to carry maize when a lorry or a pick-up truck would have been more suitable for the job. Secondly, the learned trial magistrate pointed out to the less likelihood of such a task been undertaken soon after midnight. Thirdly, he did not believe the story about how the appellants' "clients" suddenly, and without explanation, turned hostile and virtually hijacked the "kombi". There are other inconsistencies in the appellant's case which justified an adverse finding regarding their credibility. One such aspect is whether a knife or a gun was used to "hijack" the appellants.

The learned trial magistrate observed that the case against the appellants was based on circumstantial evidence. In cases depending largely upon circumstantial evidence there is always the danger that the conjecture or suspicion may take the place of legal proof. Such suspicion, however so strong cannot be allowed to take the place of proof. The court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof for sometimes it may happen to be a short step between moral certainty and legal proof. At times it can be a case of 'may be true.' But there is a long distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. The court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the complete chain must be such as to rule out a reasonable doubt in the mind of the court as to the guilt of the accused. The contention by the appellants in the present case is that the circumstantial evidence adduced by the State was wholly insufficient to bring home the guilt of the accused.

In the matter of *Wilson Muyanga v The State* HH-79-13, I had the occasion to comment on a case which turned on circumstantial evidence in the following words;

"Where a case rests upon circumstantial evidence such evidence must satisfy the following tests:

- (1) These circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (2) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else; and
- (4) The circumstantial evidence, in order to sustain a conviction must be complete and incapable of explanation by any other hypotheses than that of guilt of the accused and in such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

See also: *S v Blom* 1939 AD 188; *S v Shoniwa* 1987 (1) ZLR 215 (SC); *S v Masawi* 1996 (2) 472 (SC).

The various pieces of strands in the chain of evidence which, taken cumulatively, amount to the circumstantial evidence upon which the conviction of the appellants was based are the following:

- (a) There was an unscheduled power black-out in the Blackfordby/Nyabira farming area around 03h00 on 16 December 2012.
- (b) Alert farmers in that area went out to investigate and spotted a minibus driven by the first appellant in which second appellant was present.
- (c) A chase of the minibus ensued. The minibus was cornered as one of the farmers was approaching from the opposite direction. First appellant stopped. Second appellant and others fled.
- (d) Stashed underneath the bus seats were rolls of copper conductors which indicated these had been freshly cut-off.
- (e) First appellant led his captors to the section of the transmission grid which also showed signs that the cables had been freshly vandalised. First appellant gave different explanations regarding his presence in the area.
- (f) Second appellant was arrested in Harare much later. One Hardlife was mentioned as being part of the gang.
- (g) At 06h45 the rolls of copper conductors were positively identified as part of the copper conductors used in the area where there was vandalism of the electricity transmission grid earlier on that night.

In my respectful view the learned trial magistrate drew the only reasonable inference which, on the above facts, he could have drawn. These factors point to the guilt of the appellants. The appellants' conduct is inconsistent with their innocence. First appellant attempted to evade arrest by racing away from the scene for close to 30 kilometres before he was apprehended. They gave a false explanation for their presence in the area. Second appellant was arrested at his Harare residence after fleeing from the commuter omnibus which had been cornered. Appellants' defence that they had been hired then hijacked was rejected as not being reasonably possibly true. I am unable to find fault in that finding by the learned trial magistrate. In light of the reverse onus cast upon the appellants by s60A, the evidential burden on the appellants was higher than usually cast upon an accused person in the ordinary course of events. Generally, there is no onus on an accused to prove his innocence. As long as he can put forward an explanation which is reasonably possibly true,

he is entitled to his acquittal. However, where there is a reverse onus, as is present in s60A of the Act, the accused would have to discharge the evidential onus set out in the statute regarding lawful excuse for his conduct. Having been found in an area where there had been a black-out, and in possession of freshly cut copper conductors around 03h00 I am unable to hold that the appellants have discharged the onus upon them to show that they had lawful excuse for possession of cables which had just been cut from the transmission grid. Therefore, in my view, the conviction is proper.

It is for these reasons that I did not agree with the concession by the State and for which reasons I also dismissed the appeal against conviction by both appellants. As for sentence, no submissions were made regarding the appeal against sentence in the heads of argument filed on behalf of the appellants. As such the learned trial magistrate was enjoined to impose the minimum mandatory sentence which he did. I therefore assume that the appeal against sentence, by implication, has been abandoned.

In the result, the appeal against both conviction and sentence is dismissed in its entirety.

BERE J agrees. _____

Kajokoto & Company, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners