

SHEPHARD MATUTE
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MUSAKWA JJ
HARARE, 27 February 2015 & 30 August 2017

Criminal Appeal

Mr *Dzvetero*, for the appellant
Mrs *F Kachidza*, for the respondent

BERE J: After a fully contested trial the appellant was convicted of one count of fraud in contravention of section 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], and the second count for contravening s 60 (A) (3) (b) of the ZESA Act.

The appellant was sentenced as follows;

Count 1: 12 months imprisonment of which 6 months imprisonment were suspended for 5 years on usual conditions of future good conduct. The remaining 6 months imprisonment were suspended on condition of restitution.

Count 2: 10 years imprisonment.

The learned magistrate then ordered both counts to run concurrently.

Aggrieved by both conviction and sentence the appellant filed this appeal.

As against conviction in respect of count one it was contended that the court *a quo* misdirected itself by convicting the appellant on evidence which had been sufficiently discredited in the court *a quo* to the extent of failing to reach the expected threshold in criminal matters.

The court *a quo* was heavily criticized for having misdirected itself by making a specific finding that the appellant had generated the receipts which led to the conviction of the appellant and the evidence in this regard was said to have been inadequate.

The appeal against conviction on count two was premised on the fact that the court *a quo* misdirected itself by allowing the prosecution to charge the appellant with violating a non-existent piece of legislation, the ZESA Act.

Secondly, the court *a quo* was said to have misdirected itself by relying on the flawed evidence of the complainant in identifying the appellant.

The appeal against sentence was restricted to the attack on the 10 year prison term imposed against the appellant, and that sentence was said to be excessive as to induce a sense of shock.

The respondent conceded that indeed the sentence imposed on count two was improper and did not wish to support it, opting for a sentence of either a fine or community service. I agree with the stance taken for the reasons that will be given later in this judgment.

Appeal against conviction for count one

I do not believe that there is justification in attacking the judgment of the court *a quo* in count 1.

As correctly argued by Mrs *Kachidza*, for the respondent, the court *a quo* made a correct assessment of the evidence as I will endeavour to show hereunder.

When an employee of the Zimbabwe Electricity Supply Authority (ZESA) visited the complainant and demanded to see the receipts, he was shown fake documents. The complainant revealed the source of the fake receipts which were easily traced to the appellant who had presented to the complainant as an employee of ZESA. The appellant was accepted and identified by the complainant using the cell number that he had been using on a number of occasions when communicating with the complainant. The appellant did not deny that he used to attend to and fix the complainant's electricity and that their mode of communication was via cellphone using the same line that was used to arrest him.

The complainant had no difficulty in identifying the appellant because the appellant had a history of coming to the aid of the complainant upon request via the same cellphone. The evidence for count one was simply overwhelming.

As regards count two, the appellant's main thrust was that since he had been charged and convicted on a non-existent piece of legislation, he should be acquitted. The respondent, whilst conceding the defect in the charge sheet sought to have the charge substituted by a more appropriate one since the facts admitted to by the appellant constituted an offence, and the respondent therefore argued that there would be no prejudice to the appellant. I agree with such submissions.

There does not seem to be any provision in our law that if an accused admits to certain facts which constitute the commission of a crime, but is then charged with a defective indictment, such person must then enjoy the benefits of an outright acquittal as what the appellant's counsel seemed to suggest both in his heads of argument and in oral submissions in court.

It seems to me that the situation that confronted us in this appeal is the one envisaged by s 274 of the Code which reads as follows:

“274. Conviction of crime other than that charged.

Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged.”¹

In the case of *S v Chideme*² the accused was charged with the offence of contravening s 408 of the Mines and Minerals Act which section did not create an offence, but allowed the offender to be charged with the offence of theft. The charge was accordingly altered to one of theft.

In the instant case, it is common cause that the appellant does not dispute that his conduct amounted to some criminal offence. There will therefore be no prejudice if the proper indictment is preferred against him since there will be no prejudice to the appellant. All what the

¹. Criminal Law (Codification and Reform) Act [Chapter 9:23]

². 1990 (1) 267 (H)

facts establish in this matter is that the appellant abstracted or diverted electricity in contravention of section 60A (1) (a) of the Electricity Act³ and the indictment is accordingly amended to read that. To this extent the appeal succeeds.

The sentence provided for under section 60 (*supra*) is a fine not exceeding level fourteen or imprisonment of a period not exceeding 5 years or both.

The respondent has suggested either community service or a fine given the strong mitigatory factors of this case. I agree and to this extent the appeal succeeds.

The sentence of the court *a quo* in respect of count two is set aside and in its place the following sentence is imposed:

“The appellant is ordered to pay a fine of \$1000 or in default of payment to undergo 3 months imprisonment.”

MUSAKWA J agrees.....

Antonio & Dzvetero, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners

³. Chapter 13:19