

GREATJOY MUNDANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 19 & 22 September 2022

Criminal Appeal

M. Makuwatsine for the appellant
F.I Nyahunzvi for the respondent

ZHOU J: This is an appeal against both conviction and sentence. The appellant pleaded guilty to and was convicted of contravening S 60A (3) (b) of the Electricity Act [*Chapter 13:19*], which penalises cutting, damaging, destruction of or interference with any apparatus for generating, transmitting, distributing or supplying electricity. He was sentenced to the mandatory minimum sentence of ten (10) years imprisonment after the Magistrates Court had found that there were no special circumstances which justified a penalty less than the minimum prescribed by statute.

On 19 September 2022 the respondent filed a notice in terms of s 35 of the High Court Act [*Chapter 7:06*], making the submission that the conviction was not being supported. After considering the reasons advanced for not supporting the conviction this court directed that there be argument on the merits. The reason for that approach was that the concession was predicated upon a misreading of the relevant statutory provision in terms of which the appellant was charged and convicted of contravening. The respondent's counsel cited s 60A (3) (a) of the offended Act which criminalises tempering "with an apparatus for generating, transmitting, distributing or supplying electricity with the result that any supply of electricity is interrupted or cut off.... ". The submission was that the line cut by the appellant was not live as the electricity consumer, the mill, was now in a disused state.

The correct section under which the appellant was charged is s 60 A (3) (b) which provides as follows:

“Any person who without lawful excuse the proof whereof shall lie on him or her

(a).....

(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.”

Subsection (4) provides as follows:

“ If a person referred in subsection (2) (3), (3a) or (3b) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded 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 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.”

Thus paragraph (b) of subsection (3) of s 60A does not require that the conduct of the accused person should result in the interruption or cutting off of electricity supply.

The conduct of the appellant, the facts of which were put to him during the explanation of the essential elements of the offence, falls squarely within the ambit of the penal provision. Any other interpretation of that provision would defeat the clear intention of the legislature which is to protect the infrastructure from being vandalised or cannibalised even where there is no electricity passing through that infrastructure.

The notice of appeal presented three grounds of appeal against conviction. These grounds are presented in the form of arguments rather than as concise and precise grounds of appeal. Be that as it may, the court considered them benevolently especially given the absence of any objection to their validity as grounds of appeal.

In the first ground of appeal the appellant contends that the court *a quo* erred in proceeding to record a plea of guilty and sentencing the appellant on an inappropriate charge. It is argued that the charge preferred deals mainly with acts that interrupt the smooth flow of electricity such that they mainly involve elements of malicious damage to property rather than petty thefts of electricity cables from disused areas which can be dealt with as ordinary theft under s 113(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. These contentions are based upon a misinterpretation of the provision which the appellant contravened. The offence did not just involve stealing; the appellant cut the cable. The act of cutting the cable is what constitutes the first element of the offence. In other words, even if he had cut the cable and left it at the scene he would still be guilty of the offence. The fact that he decided to steal the cable after cutting it does not derogate from the requirements of the offence.

Appellant is confusing himself by ignoring the essentials of the offence which he was charged with and seeking to suggest that his conduct amounted to malicious damage to property or theft. The legislature deliberately enacted specialised legislation to deal with unlawful conduct that is targeted at electricity apparatus, in order to deal with the specific mischief which pertains to that area. For these reasons, the ground of appeal is without substance.

The second ground of appeal is that the court *a quo* erred in not inquiring into the status of the disused mill plant from where the cable was stolen. The status of the mill is not an element of the offence provided for in s 60 A (3) (b). The fact that the mill may not have been operational is therefore irrelevant in the determination of whether the offence has been committed or not. Equally, the fact of whether or not there was interruption of electricity as a result of the appellant's act is irrelevant, as explained earlier on. The length of the cable cut is also irrelevant in determining the guilt of the appellant as is the value of the property. This renders immaterial the discrepancy in the value of the cable cut. Indeed, in canvassing the essential elements the Learned Magistrate did not advert to the value of the cable that was taken away by the appellant. In light of the above reasons, the second ground of appeal is without merit.

The third ground of appeal against conviction is that, the court *a quo* misdirected itself in making a finding that there were no special circumstances. This is a misplaced ground of appeal. Special circumstances are only relevant to the sentence, not to the conviction. Indeed, the issue of the existence or otherwise of special circumstances is only considered after a person has been convicted.

To the extent that this ground was meant to be relied upon in challenging the sentence imposed, this court finds no misdirection in the manner that the court *a quo* proceeded. The learned magistrate tried to explain what special circumstances are even though the example thereof given is clearly inapposite. No such circumstances were tendered. Even before this court the appellant did not provide any special circumstances. In the notice of appeal the appellant makes the incorrect submission that disruption or interference with the flow of the electricity was an essential element of the charge in order to justify the imposition of the minimum sentence. Counsel clearly misled himself in that regard. The explicit wording of the provision which has been cited shows that once there is cutting, damaging or destruction of or interference with the

apparatus concerned then the court is enjoined to pass a sentence not less than the mandatory minimum unless special circumstances are proved.

The first and second grounds of appeal under “sentence “are merely a repetition of the ground discussed as they repeat the same mistaken assertion that the minimum sentence was excluded by the absence of interference with the flow of electricity. The submission that the court ought to have considered a warning, caution and discharge or a wholly suspended term of imprisonment or community service is startling as it ignores the express wording of the statute. Clearly the appellant trivialises an otherwise serious offence.

In all the circumstances, there is no merit in the appeal against conviction or the appeal against sentence.

In the result, the appeal is dismissed in its entirety.

CHIKOWERO J agrees.....

Machaya & Associates, appellant’s legal practitioners.

National Prosecuting Authority, respondent’s legal practitioners