THE STATE
versus
JONASI CHANDAFIRA

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 21st August, 2002

Criminal Review

SMITH J: The accused was charged with contravening s 9(1)(b) of the Control of Goods Act [Chapter 14:05], as read with Statutory Instruments 153B of 1989 and 336 of 2001. It was alleged that he was selling l kg packets of brown sugar for $150, when the controlled price is $35. Three people confirmed that they had in fact paid him $150 for the sugar. It seems clear that the policy of prescribing maximum prices to ensure that basic foodstuffs and other commodities are available to all at affordable prices is not working. The accused pleaded guilty and was duly convicted on 12 July 2002. He was sentenced to a fine of $3 000 or, in default of payment, 40 days imprisonment.

The conviction is in order and the sentence is appropriate. The only question is whether the trial magistrate, who is a provincial magistrate, had the jurisdiction to impose such a sentence. There is no doubt that prior to 20 May 2002 the magistrate had the necessary jurisdiction, but the position on and after that date has changed.

The Criminal Penalties Amendment Act, 2001 (hereinafter referred to as "the Act") was promulgated on 1 February, 2002 (Statutory Instrument 55 of 2002). The long title of the Act says that it is an Act to make provision for increases in the general level of fines in statutes through statutory instrument and to amend a number of other Acts. The Act inserts a new section 346A in the Criminal Procedure and Evidence Act [Chapter 9:07] which empowers the Minister of Justice, Legal and Parliamentary Affairs (hereinafter referred to as "the Minister") to publish a statutory instrument setting forth a standard scale of fines which

must specify different levels of fines, each level being designated by a number, and in respect of each level of fine, the monetary amount of the fine. The Act then amends some 266 Acts by deleting references to specific amounts of money and substituting a reference to a specific level. Thus, for example, s 6(1)(a)(i) and s 6(1)(b) of the Control of Goods Act [Chapter 14:05] provided that the maximum amount of the fine that could be prescribed was $10 000. The Act amended those sections by deleting the reference to $10 000 and substituting the words "level eight".

The reason for introducing the new system is a very sensible one. It is a system which operates in the United Kingdom and possibly in other countries. Hitherto, when an Act which creates any offence is drafted and passed by Parliament, it specifies the maximum penalty that may be imposed in the case of a person who is convicted of committing the offence. If it is considered that a fine is appropriate, which is the case in the vast majority of offences, the maximum fine that can be imposed is stated. With the passage of time and the effects of inflation, penalties that were considered appropriate when the Act was passed by Parliament become more and more unrealistic. For example, in the Miscellaneous Offences Act [Chapter 9:15] for some offences the maximum penalty was a fine not exceeding $50 or imprisonment for a period not exceeding 6 months and for others it was a fine not exceeding $200 or imprisonment for a period not exceeding 12 months. If the maximum fine that may be imposed is expressed as level one or level two, and the Minister is able to quantify each level by way of a statutory instrument, the maximum monetary penalties can be increased as the value of the dollar decreases without having to amend every reference to the amount of maximum fine in every Act of Parliament by way of another Act of Parliament. Moreover, the increase can be effected by one statutory instrument, instead of having separate amendments for every one of the sections that need amending.

Section 1(2) of the Act provides that the Act shall come into operation on a date to be fixed by the President by statutory instrument. By Statutory Instrument 111 of 2002 the date of commencement was fixed as 20 May 2002. With effect from that date, all the amendments to the various statutes specified in the Act came into effect. One of the statutes that were

amended is the Magistrates Court Act [Chapter 7:10]. Section 50 of that Act prescribes the ordinary jurisdiction for magistrates as to punishment. It specifies the maximum fines and the maximum period of imprisonment that a magistrate may impose for offences. Thus, in the case of a magistrate, other than a senior, provincial or regional magistrate, the maximum fine he could impose on summary trial is $2 000 and on remittal it was $3 000. A senior magistrate could impose a fine not exceeding $3 000 and a provincial or a regional magistrate could impose fines not exceeding $5 000 and $12 000 respectively. The Act amended the relevant provisions of s 50 of the Magistrates Court Act by deleting the references to $2 000, $3 000, $5 000 and $12 000 and substituting references to level six, level seven, level eight and level eleven respectively.

The statutory instrument fixing the date of commencement of the Act was published in the Gazette of 20 May 2002. In the same Gazette the statutory instrument made by the Minister setting forth the monetary amount of each level of fine was published (Statutory Instrument 112 of 2002). According to the provisions of that statutory instrument, level six is $40 000, level seven is $80 000, level eight is $120 000 and level eleven is $250 000. Those amounts equate to the maximum fines that can be imposed by the various classes of magistrates in the ordinary run of cases. It seems incredible that the ordinary jurisdiction of magistrates is being increased so greatly. Whereas previously a junior magistrate would impose a fine of $2 000 on summary trial and $3 000 on remittal, it is now proposed that he will be able to impose fines of up to $40 000 on summary trial and $80 000 on remittal. In the case of a regional magistrate, he will be able to impose a fine of up to $250 000, instead of the previous $12 000.

Had the statutory instrument made by the Minister came into operation on 20 May 2002, which is the date the Act came into effect making all the amendments to 268 Acts of Parliament, all would be well. However that is not the case. The new s 346 A that has been inserted in the Criminal Procedure and Evidence Act provides, in subs (2), that the Minister shall publish a statutory instrument setting forth the standard scale of fines and, in subs (3), that he may at any time thereafter amend or replace the standard scale. However, subs (4) of

that section provides that the Minister shall within the next fourteen days on which Parliament sits after he makes a statutory instrument in terms of sub (2) or (3), lay it before Parliament and the statutory instrument shall not come into force unless approved by resolution of Parliament. Therefore, although all the various statutes have been amended by the deletion of specified amounts for the maximum fines that may be imposed and a standard scale of fines has been fixed, the standard scale is not in force because it has not been approved by resolution of Parliament.

One wonders at the competence and level of intelligence of those responsible for this state of affairs. Any reasonably intelligent person would have published the standard scale of fines and then fixed the date of commencement of the Act as being the date the scale is approved by resolution of Parliament. That would have avoided any *lacuna* in the law. However, that was not done. The *lacuna* was created on 20 May 2002 and has yet to be filled. Parliament has met on two occasions since 20 May and on neither occasion did the Minister seek to move the necessary resolution in Parliament. One wonders what he is waiting for.

The jurisdiction of the various classes of magistrate has been fixed at various levels but there is no statutory instrument in force specifying the monetary amount of the different levels. Likewise, there are some 266 Acts of Parliament which create offences and specify the maximum level of fine that can be imposed on a person convicted of any particular offence so created, but there is no standard scale of fines in force specifying the monetary amount of any of the levels. Subsection (4) of the new s 346 A is very specific. The standard scale of fines prescribed by the Minister shall not come into force unless and until it is approved by resolution of Parliament. In Statutory Instrument 112 of 2002 there is an explanatory note at the foot of the notice. It explains the provisions of the new section 346 A, including subs (4) thereof, and concludes by stating "Accordingly, the notice is not effective until and unless Parliament resolves to approve it". The Courts cannot ignore the specific requirements of an Act of Parliament. Parliament has specifically provided that any scale of fines must be approved by Parliament and that must be respected.

The Attorney-General is aware of the predicament caused by the bringing into operation of the Act without there being a Standard Scale of Fines in force. His office issued a circular in which it is stated that the Act came into operation on 20 May 2002 and that the Standard Scale of Fines fixed by the Minister in S I 112/2002 will not come into effect unless and until approved by resolution of Parliament. The circular then goes on the state -

> "3. The net effect of the foregoing is that although the 2001 Act is now in force the new regime of monetary penalties will not come into operation until it is approved by Parliament. It follows that all existing statutory penalties as prescribed before the entry into force of the 2001 Act remain intact and will continue to apply until S.I. 112/2002 is approved by Parliament. Moreover, the present level of monetary penalties will also apply after Parliament has granted its approval to S.I. 112/2002 in respect of all offences committed prior to the date of approval of Parliament.
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> 4. Similarly, the existing sentencing jurisdiction of magistrates courts and the existing ceiling for deposit fines will continue to apply until S.I. 112.2002 is approved by Parliament".

I fail to see how it can be said that all existing statutory penalties will remain intact and continue to apply and that the existing sentencing jurisdiction of magistrates courts will continue to apply. Those penalties have been amended by an Act of Parliament, as has the sentencing jurisdiction of magistrates. The provisions of an Act of Parliament cannot be ignored when they cause problems. The problem must be dealt with, not just put under a carpet and forgotten. One cannot remedy the situation by issuing a circular which does not have the force of law and cannot amend, suspend or obliterate the provisions of an Act of Parliament.

The effect of bringing the Criminal Penalties Amendment Act, 2001 into force before there is a Standard Scale of Fines in effect means that magistrates have no jurisdiction to impose a fine. In addition, in the case of any offence created by one of the 266 statutes specified in the Schedule to the Act, a person convicted of any such offence may be sentenced to imprisonment but cannot be sentenced to a fine.

In this case the conviction is confirmed but the sentence is set aside. The matter is referred back to the trial magistrate so that he can impose a competent sentence. He may impose a short custodial sentence and suspend the entire sentence or impose a very short

period of community service. He may not however impose a fine unless there is some legislation empowering him to do so.

MAKARAU J, agrees.