

S V ZENDERE

High Court, Bulawayo

Judgment No. HB-19-04

Ndou J

Criminal review

25 February 2004

*Court – jurisdiction – extra-territorial – whether Zimbabwe court has jurisdiction over an offence committed in no-man’s land between Zimbabwe and Botswana
Criminal law – statutory offences – Immigration Act [Chapter 4:02]- s36 (1) (a1)-
passport offences- provides for extra-territorial jurisdiction*

The accused altered a passport to effect a forgery in the no-man’s land between Zimbabwe and Botswana, for the purpose of entering Botswana. He was convicted in the Zimbabwean magistrates court but on review the issue of jurisdiction arose, since the prejudice would apparently be to the Botswana government.

Held, that: where a substantial element of a crime or its harmful effect occurred in Zimbabwe, and there is no conflict with the right of another state, there is no breach of international law when a Zimbabwean court assumes jurisdiction over an offence committed by its national outside its territory. Since the accused was a Zimbabwe national, the forgery occurred in an area patrolled by the ZRP, the passport is the property of the Zimbabwe government and there was no danger of interfering with another country’s jurisdiction, the jurisdiction of a Zimbabwe magistrates court was confirmed.

Held, further that: the Immigration Act s 36(1)(a1) provides for extra-territorial criminal jurisdiction for forgery of passports.

Cases cited:

DPP v Stonehouse [1977] 2 All ER909 (HL)
S v A 1979 RLR 69 (GD)
R v Baxter [1971] 2 All ER359 (CA)
S v Kanyamula 1983 (2) ZLR 222 (S)
S v Mharapara 1985 (1) ZLR 350 (H)
R v Vickers [1975] 2 All ER945 (CA)
Treacy v DPP [1971] 1 All ER110 (HL)

Legislation considered:

Immigration Act [*Chapter 4:02*] s 36 (1) (a1)

NDOU J: The accused was charged for contravening two sections of the Immigration Act [*Chapter 4:02*]. He pleaded guilty to both and was convicted.

In count 1 he was convicted of departing from Zimbabwe at a place other than the gazetted point of exit (border jumping) in contravening of section 11(1) of the Act. He was sentenced to a fine of \$1 000 or in default of payment 10 days imprisonment. Nothing turns on this conviction and sentence it is therefore confirmed as being in accordance with true and substantial justice.

In count 2 the accused was charged with forging entries in a Zimbabwean passport, whilst in the so-called “no-man’s land” intending “to prejudice the Botswana Immigration Department”. I queried whether in light of the fact that the charge sheet alleges that the prejudice would be suffered by the Botswana authorities the Plumtree Magistrates’ Court had the requisite territorial jurisdiction. The facts of this case are the following:

- “1. After crossing the border into Botswana, the accused got to the Ramakgwebane Border Post where he teamed up with his other friend who could not be arrested by the police.
2. The accused saw the complainant Colleta Chasi, a 48 years old woman who had been denied entry into Botswana at the Ramakgwebane Immigration Offices.
3. The accused took to complainant’s Zimbabwean passport and lured her to follow them to the place commonly known as the “no-man’s land”.
4. The accused then stopped at the bushy area where they forged the complainant’s passport by altering the letters and figures on a previous print of a date-stamp using a coloured pencil.
5. On seeing police officers who were patrolling at the area the accused ran away and the accused was caught being in possession of the complainant’s passport and three coloured pencils used in the altering of the date-stamp prints.”

With the benefit of hindsight the trial magistrate opines that he did not have the requisite territorial jurisdiction to entertain the charge in count 2. He bases his view on the decision of *S v Mharapara* 1985 (1) ZLR 350 (HC). In this case Mfalila J held that under the principle of nationality or active personality in International Law, a state has jurisdiction with respect to any crime committed outside its territory by a person or persons who is or are its national at the time when the offence was committed or when he is or they are prosecuted and punished. So long as there is no

conflict with the territorial principle and the right of other states there can be no breach of International Law in a state assuming jurisdiction. It is however, a principle which should not lightly be applied in view of the possible conflict with the legitimate rights of other states – see also *S v A* 1979 RLR 69 (GD); *Treacy v Director of Public Prosecutions* [1971] 1 All ER 110 (HL); *R v Baxter* [1971] 2 All ER 359 (CA) and *Director of Public Prosecutions v Stonehouse* [1977] 2 All ER 909 (HC).

In general, Zimbabwe adheres to the Anglo-American principle of territoriality and as such assumes criminal jurisdiction where offences have been committed by its own subjects or within the geographical ambit of its land. It does not by its legislation invade the jurisdictional province of other sovereign states. This principle seems to be losing ground in the face of a trend indicating that where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements, or their harmful effect occurred – *R v Treacy, supra*, at page 558.

In my view, there may be circumstances where, in a case reflecting foreign and domestic elements, it becomes irrelevant to ask where the crime was committed or whether the last essential act occurred within the territory of Zimbabwe. The court is not compelled to disclaim jurisdiction if satisfied that either a substantial element of the offence or the harmful effect thereof occurred within Zimbabwe. But where the foreign elements in an offence predominate the connection between the physical acts of the offender or these harmful effects, on the one hand and Zimbabwe on the other, may indeed be so tenuous that our courts will hesitate to exercise criminal jurisdiction – *South African Criminal Law and Procedure Vol V* by A V Lansdown and J Campbell at pages 7-11.

In casu, the accused was arrested at what is termed “no-man’s land” between Zimbabwe and Botswana. The forged passport is property of the Zimbabwe Government. The accused person and his accomplice (who is erroneously referred to as the complainant) are nationals of Zimbabwe. The area where the forgery occurred is under patrol of the Zimbabwe Republic Police. In fact the accomplice had been prevented from entering Botswana by its authorities. I hold the view that the laws of Zimbabwe are as applicable there as they are in any other part of the country. I draw strength in this view in *S v Kanyaula* 1983 (2) ZLR 222 (SC) and *R v Vickers* 1975]All ER945.

If I am wrong in this regard the conviction will still stand because the wording of the Immigration Act gives our courts extra-territorial criminal jurisdiction for this type of contravention. There are many statutes that do so. Section 36 (1) (a1) of the Immigration Act provides –

“Any person who *outside Zimbabwe*

- (i) forges any Zimbabwean permit or travel document; or
- (ii) is in unlawful possession of or uses any forged Zimbabwean permit or travel document, knowing it to be forged; or
- (iii) is in unlawful possession of or uses any Zimbabwean permit or travel document which he is not entitled to possess or use shall be guilty of an offence and liable to a fine not exceeding ...”

From the foregoing I am satisfied that the Plumtree Magistrates’ Court was correct in exercising criminal jurisdiction in count 2. In the circumstances I certify the proceedings in both charges as being in accordance with true and substantial justice on both counts.

Ndou J concurred