Judgment No. HB 13/09
Case No. HC 1667/08
CRB REG 64/08

THE STATE

Versus

PETER MAKONO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 FEBRUARY 2009

W Mabhaudi for the state
M T Jumo for the accused

Criminal Review

NDOU J: This matter was submitted for review of the sentence by the accused's legal practitioner. On my invitation, the Attorney General's Office also filed written submissions. The salient facts of the case are the following. The accused was convicted of two counts of theft of copper wire, the property of Zimbabwe Electricity Supply Authority (ZESA) i.e. two counts of contravening section 113(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The accused pleaded guilty and was duly convicted and sentenced to 5 years imprisonment in respect of each count. Of the total sentence, 3 years was suspended on condition of good behaviour. In the review statement, it is submitted that the effective sentence be reduced to one of two(2) years imprisonment. In count 1, the accused teamed up with three(3) others and went to B Halum place in Mvuma with the sole intention to cut and steal ZESA copper wires. They cut 320 kilograms of copper wire from ZESA, loaded it into a vehicle and took it to Harare. The accused was paid ZAR700,00 for his participation in the crime. The copper wire was recovered from one of the team members. In count 2, the accused person were searched and he was found in possession of 180 kilograms of copper wire. His explanation for selling this copper wire was that he found it in a bush at Central Estate Farm. Instead of surrendering it to its owners, ZESA, he decided to sell it. In count 1, the accused was fortunate in that he was not charged with the ideal charge of contravening section 60A of the Electricity Act [Chapter 13:14] (as amended by the Electricity Amendment Act 12 of 2007). Section 60A(3) provides:

> "Any person who, without lawful excuse, the proof whereof shall lie on him or her –
>
> (a) …
>
> 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."

If the prosecutor had done his/her research, this would have been the most appropriate charge in count 1. Be that as it may, the accused stands convicted as outlined above. The learned Regional Magistrate took into account in accused's favour that he is a first offender who pleaded guilty showing some measure of contrition. He also took into account that all the stolen copper was recovered and further, that the accused shoulders family responsibilities.

He, however, rightly observed that theft of copper wire from ZESA is prevalent in the country. The accused was phoned by illegal copper dealers from Harare and informed in advance, of their intended mission to come to Mvuma to steal copper wire from ZESA. After this call, accused assembled a team made up of himself, Thomas, Peter and Rodwell to go and cut ZESA copper wire. After they accomplished this mission, they waited for the illegal copper dealers from Harare. This team of four illegal copper dealers eventually arrived and the accused and his team sold them the copper wire. The accused accompanied the illegal copper dealers to Harare where the copper was to be sold. As alluded to above, he was paid in foreign currency for his effort. This was a well planned and executed theft by a gang of offenders. In count 1 the accused's moral blameworthiness was properly held by the learned Regional Magistrate to be of a high degree. The sentence of 5 years imprisonment cannot be faulted. In count 2, however, the accused was convicted of theft by finding, so to speak. His moral blameworthiness was far less than the one in count 1. The value of stolen copper wire is less than in count 1. There was no preplanning and execution by the accused. If anything, the conduct revealed in the facts is of mere temptation after finding the copper wire in the bush. The learned Regional Magistrate misdirected himself when he did not distinguish the sentence in count 2 from the one in count 1. As far as count 2 is concerned, I am at large on the question of the sentence. The sentence of 5 years in count 2 is disturbingly inappropriate calling for interference – *S* v *Ramushu* SC 25-93; *S* v *Sidat* 1997(1) ZLR 487 (S) and *S* v *Coetzee* 1970(4) SA 83 (RA). The sentence in count 2 has to be reduced in the circumstances.

Accordingly, the convictions are confirmed but the sentence is set aside and substituted by the following:

"Count 1 - 5 years imprisonment
Count 2 - 3 years imprisonment

Total - 8 years imprisonment of which 3 years is suspended for 4 years on condition the accused in that period does not commit any offence involving theft or dishonesty and for which he is convicted and sentenced to imprisonment without the option of a fine."

Cheda J ………………………… I agree

Jumo, Mashoko & Partners, accused's legal practitioners
Attorney-General, respondent's legal practitioners