

THE STATE
versus
MASIIWA GERALD
and
CHIKARE CLEVER

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 3 March 2017

Criminal Review

MAFUSIRE J: In *S v Chitepo*¹, in the course of a review judgment, in a matter in which the charges preferred against the accused person and the sentence meted out to him had been mishandled, I wrote:

“I caution in passing that great care and precision should always be taken and exhibited in the drafting of criminal charges and the handling of criminal matters. Criminal proceedings affect some of the fundamental human rights and freedoms enshrined in the Constitution, namely the right to liberty, and even the right to life.”

It was the same problem in this matter.

The second accused [***“the accused”***] was charged with three counts arising out of a single criminal enterprise. The allegations against him were that he was the conductor-cum-loader for a certain bus that was intercepted at the Beitbridge Border Post with quantities of copper and several packs of cigarettes. The bus had already crossed the Zimbabwean side of the border with South Africa. The goods were hidden in some false compartment above the fuel tank.

The first count was framed as contravention of s 3 of the Copper Control Act, *Cap 14:06*. The charge sheet read:

“Deal or possess copper without a licence – in that on the 19th day of March 2016 and at Beitbridge Border Post, Chikare Clever unlawfully had in his possession 1363.30 kilogrammes of copper without a permit or license in contravention of the said Act ...”

¹ HMA 03-17

The accused was not represented. He pleaded not guilty. His defence was that on the day in question he was off-duty. He was a mere passenger en route to South Africa. He knew nothing about the contraband. He insinuated that those that knew about the stuff were the driver, i.e. the first accused, and some two other crew members that had run away upon the arrival of the police.

A full trial ensued. The court disbelieved the accused's defence. It was right to do so. The evidence showed that the accused knew full well about the contraband. Among other things, upon being questioned by the police, he went inside the bus, pulled out a spanner and opened the hidden compartment where the stuff was. It was him that showed it to the police. The police said upon enquiry, the bus driver had referred them to the accused whom he said would know better. The driver had confirmed that he and the accused had been the only two crew members on the day. The police denied that anyone had run away or that anyone had told them of anybody running away.

The accused was convicted. For count one he was sentenced to a fine of \$250, or in default, thirty days imprisonment.

The problem was with the charge. Section 3 of the Copper Control Act prohibits dealing in copper without a licence. It says:

“Any person who carries on trade or business as a dealer otherwise than as a holder of a licence shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.”

Thus, the offence created by this section, as read with the definition of “licence” in sections 2 and 4 of the Act, is the carrying on of a trade or business as a dealer [in this case, in copper] without the appropriate dealer's licence. So the State had to prove, among other things, that the accused was carrying on, or purporting to carrying on, trade or business in copper but without the relevant licence. That might well have been what the accused was doing. But that is not what the evidence established. What the evidence established was mere possession of the copper.

Of course, the heading to s 3 of the Act refers to a prohibition against dealing in copper without [a] licence. But then, what is meant by “dealing” is to be discerned from the substantive provision. It is to carry on trade or business as a dealer in copper without a licence.

No attempt was made to lead evidence that this was what in fact the accused was doing. The circumstances of the accused's possession of the stuff was highly suspicious. But suspicion alone is neither proof nor evidence. Suspicion is merely an apprehension of something wrong, a hunch. It generally forms the basis of an investigation to dig up the evidence required. This was not done.

The record does not show that the accused was ever asked to account for the copper, i.e. to explain his possession of it. From the evidence, he seemed quite cooperative. He was the one that opened the false compartment. The State witnesses, comprising the arresting detail and the investigating officer, both said that without the accused showing them, they would not have discovered the contraband on their own.

Section 10 of the Copper Control Act makes it an offence for failure to give a satisfactory account of possession of copper. It reads:

“Any person who is found in possession of copper in regard to which there is a reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable to a fine not exceeding level eight or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”

There are several elements to this offence. It is not just mere possession that is criminalised. It is [1] possession of the copper; [2] in circumstances in which there is a suspicion that the copper was stolen; and [3] the person in possession fails to give an account of such possession, or if he does, [4] such account is unsatisfactory.

In this case, there was only possession. There was no evidence at all that the police suspected that the copper had been stolen. All they said was that they had been tipped that the bus was carrying copper and cigarettes which were intended to be smuggled to South Africa. However, when they intercepted it, they did not call upon the accused to account. It was never established whose copper it was, and what the accused meant to do with it. Why did that bus have a false compartment anyway? None of this was investigated.

Thus, it follows that except for possession, none of the other elements of the offence under section 10 was proved.

When I raised the query, the trial magistrate first conceded the anomalies and then went on to suggest that the charge should have been either possession of copper, or in the alternative, dealing in copper. However, and with all due respect, it could not

be either. As shown above, the case was poorly investigated and poorly prosecuted. There was no evidence to sustain either of the offences.

In the circumstances, the conviction on count one is hereby quashed and the sentence set aside.

The second count preferred against the accused was “smuggling”, purportedly in contravention of s 182 of the Customs and Excise Act, *Cap 23:02*. The charge was worded thus:

“In that on the 19th day of March 2016 and at Beitbridge Border Post, Chikare Clever unlawfully exported 1363,30 kilogrammes of copper and 40 packs each with 6 bricks containing 10 x 20 Mega Blue cigarettes without a permit or licence in contravention of the said Act ...”

The Customs and Excise Act defines “*smuggling*” as, among other things, any importation, or exportation, or attempted importation or exportation of goods with intend to defraud the State or to evade any prohibition, restriction or regulation on the importation or exportation of any goods required to be accounted for under the Act.

Section 182 of the Act reads:

“[1] Any person who smuggles any goods shall be guilty of an offence and liable to-

[a] a fine not exceeding level fourteen or three times the duty-paid value of the goods, whichever is the greater; or

[b] imprisonment for a period not exceeding five years;

or to both such fine and such imprisonment.”

Thus, neither the definition of “*smuggling*” in s 2 of the Act, nor s 182 that creates the offence, requires the absence of a licence or a permit to establish the offence. The charge sheet needs not have referred to “... *without a permit or a licence* ...” However, this is not a big point. That anomaly was not fatal. Among other things, no prejudice was suffered. The elements of the offence were clearly established. The evidence was clearly sufficient to convict. Therefore, the conviction under count two is hereby confirmed.

Nonetheless, the above anomaly serves to emphasise the importance of precision in the drafting and treatment of charges. For statutory offences, it is important to stick as closely as possible to the actual wording of the statute.

The court *a quo* sentenced the accused to a fine of \$500, or in default, ninety days. But this was for both counts two and three. Count three was framed as “*unlawful possession of goods liable to excise duty*”, in contravention of s 184 [e] of the Customs and Exercise Act. The particulars of the charge were:

“In that on the 19th day of March 2016 and at Beitbridge Border Post, Chikare Clever not being a person licensed to manufacture goods liable to excise duty, had, without authority, in his possession, or custody, 40 packs each with 6 bricks containing 10 x 20 Mega Blue cigarettes liable to excise duty or surtax upon which such duty or surtax had not been paid.”

Section 184 creates miscellaneous offences. Paragraph [e] creates the offence of an unlicensed person being in possession, custody or control, without lawful authority, of any manufactured goods, or partly manufactured goods, that are liable to excise duty or surtax where such duty or surtax has not been paid.

Both the charge and the conviction for count three were proper. The conviction is hereby confirmed.

The penalty for the offence under s 184[e] of the Customs and Excise Act is a fine not exceeding level twelve, or three times the duty-paid value of the goods that are the subject of the offence, whichever is the greater, or imprisonment for a period not exceeding five years, or both such fine and such imprisonment.

The court *a quo*, without explanation, imposed one sentence for both counts two and three, namely the fine of \$500 aforesaid, or in default, ninety days. That was manifestly irregular.

When I sought an explanation, the trial magistrate conceded the anomaly. But he was referring to count two [smuggling] and count one [possession of copper] as the two that he had improperly combined for the purposes of sentence. But that had not been what I queried. What I had queried was his combining count two [smuggling] with count three [non-payment of excise duty or surtax] for the purpose of sentence.

The trial magistrate, mistakenly referring to counts two and one, felt that he been justified in treating them as one for the purposes of sentence since, in his own words: “... *they had been committed concurrently ... with the same motive and intention ...*”

With respect, that explanation, whether for one or other of the counts that had been combined, was not satisfactory. If any two could be combined, as the magistrate argued, then there was no logical reason why he did not combine all three. He only combined two, yet all three emanated from a single criminal enterprise.

The three counts hung on different and separate, stand-alone statutory offences, each with its own prescribed penalty. In all three, a fine is the first option. The trial court intended to, and did, impose fines.

Fines cannot be ordered to run concurrently. Each count had to be sentenced separately. Combining counts two and three, as the court did, was a misdirection.

For count two, the prescribed fine is an amount not exceeding level fourteen [\$5 000], or three times the duty-paid value of the goods involved. The goods involved were copper and cigarettes. Although the copper was said to be valued at \$68 165, it seems nobody bothered with the duty-paid value. The State said the exportation of copper is prohibited. But for the cigarettes, the duty-paid value was assessed at \$1 731-36. Three times that amount is \$5 194-08. That means, in assessing the appropriate fine, the magistrate could go up to an amount not exceeding \$ 5 194-08.

For count three, the prescribed fine is an amount not exceeding level twelve [\$2 000], or three times the duty-paid value of the goods involved. The goods involved were cigarettes, the duty paid value of which, as said already, was \$1 731-36. Thus, again the court could go up to \$5 194-08 for the appropriate fine.

Given the misdirection aforesaid, the combined fine of \$500 for counts two and three is hereby set aside. It means this court is now at large to use its own discretion to assess the appropriate fines.

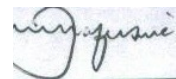
For count two the accused is sentenced to a fine of \$250, or in default of payment, twenty five days imprisonment.

For count three, the accused is sentenced to a fine of \$200, or in default of payment, twenty days imprisonment.

In the result, the court *a quo* is directed to recall the accused and pronounce to him the following final result:

- 1 The conviction and sentence in count one, i.e. contravention of s 3 of the Copper Control Act, *Cap 14:06* [“deal with copper without a licence”] are hereby set aside;
- 2 The conviction in count two, i.e. contravention of s 182 of the Customs and Excise Act, *Cap 23:02* [“smuggling”] is hereby confirmed;
- 3 The conviction in count three, i.e. contravention of s 184[e] of the Customs and Excise Act [“non-payment of duty or surtax on manufactured goods by unlicensed person”] is hereby confirmed;
- 4 The combined fine of \$500 for both counts two and three above is hereby set aside and substituted with the following:
 - 4.1 for count two, a fine of \$250, or in default of payment, twenty five days imprisonment;
 - 4.2 for count three, a fine of \$200, or in default of payment, twenty days imprisonment
- 5 Both the copper and the cigarettes shall be forfeited to the State.

3 March 2017



MAWADZE J agrees: _____