

NEWMAN CHIADZWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHINHENGO and MAKARAU JJ
HARARE, 31 July 2003 and 25 February, 2004

P Chiutsi for appellant
S Mushongwe for respondent

CHINHENGO J: The appellant was charged with the offence of contravening s 27(1)(e) of the Copyright Act (Chapter 26:01) ("the Act"). After a trial he was convicted and sentenced to a fine of \$400 and in default of payment to 10 days imprisonment. A further 10 days imprisonment was suspended for five years on condition that during that period, he does not commit any offence involving the sale of artifacts in contravention of the Act for which he is sentenced to imprisonment without the option of a fine. He was also ordered to surrender possession of the alleged infringing artifacts to the complainant. He appealed to this Court against both conviction and sentence.

It was alleged that the appellant bought certain sculptures from one Taurai Chimba between January 2000 and March 2002. Those sculptures were said to be copies of sculptures created and produced by the complainant, a well-known sculptor, Dominic Benhura. The appellant was alleged to have exhibited, by way of trade, the infringing copies at his art galleries at Ambassador Gallery near Boka Auction Floors and at Africa Gallery along Chiremba Road, both in Harare. The alleged infringing copies were sixteen in number and seven of them were inscribed "D.E. Benhura" or "Dominic". It was alleged that the appellant knew that the complainant was the creator of the sculptures and that he had no right to infringe the complainant's copyright.

The appellant's grounds of appeal were that -

- "1. The learned magistrate erred in finding that the complainant had a copyright in respect of the works exhibited.
2. The learned magistrate seriously failed in her judgment to address the issue of whether the complainant has a copyright or not in the artifacts.
3. The learned magistrate failed to consider that the State provided evidence that the complainant is not the originator of the idea but one Vickson Kampande and as such the complainant has no copyright over the works.
4. The court *a quo* did not address the evidence placed before it demonstrating that the complainant had no copyright in the works.
5. Appellant further contends that the court *a quo* misdirected itself in finding that the complainant and the Police had no reason to lie against the applicant.
6. The learned magistrate further misdirected herself by not referring to the provisions of the Copyright Act particularly the failure by the State to comply with s.6 of the Act.
7. The learned magistrate further misdirected herself by failing to consider the fact that the complainant had possession of the artifacts immediately after they were confiscated and as such could have tampered with them.
8. The court *a quo* failed to take note of the contradictions in the State Case as to where the artifacts were exhibited, particularly in the evidence of Constable Murove and the complainant.
9. The judgment herein is so fatally lacking in detail and substance that the conviction is fatally ill-founded".

In the appeal against sentence the challenge was against the imposition of the maximum sentence and the failure to consider that the appellant purchased the sculptures and has suffered financial prejudice.

It seems to me that the main issue for decision in this appeal is whether or not the complainant has or had copyright in the sculptures in question in this matter. If it is found that he had no copyright that would be the end of the matter. If it is found that he had copyright it then becomes necessary to examine the other grounds of appeal.

The appellant was charged under s 27(1)(e) of the Act which provides that -

"(1) Any person who at any time when copyright subsists in a work or other subject matter -

(a)-(d) [not relevant];
(e) by way of trade exhibits in public;
any article which he knows to be an infringing copy of the work or other subject matter shall be guilty of an offence".

The sculptures in issue in this case are encompassed by the definition of "work" in the Act. A reading of s 27(1)(e) shows that the essential elements of the offence are -

- a) copyright must subsist in a work or other subject matter;
- b) the article must be exhibited in public by way of trade;
- c) the accused must know that the article which he exhibits in public is an infringing copy of the work concerned.

In order to establish criminal liability, those elements of the offence must be proved. Whilst the evidence in this case seems to point to the fact that the appellant exhibited certain sculptures in public by way of trade, the real issue is whether or not copyright subsisted in the sculptures and whether or not the appellant knew that the sculptures were infringing copies of the complainant's work. I will first examine whether any copyright subsists in the work.

In terms of s 6 of the Act, copyright subsists in every original artistic work which is unpublished or which is published provided certain other conditions are met. Section 6(4) of the Act provides that the acts restricted by copyright are the reproduction of the work in any material form, publishing the work, including the work in a television broadcast or causing the work to be transmitted to subscribers to a diffusion service.

The word "copyright" is not defined in any helpful manner in the Act. It is defined in relation to acts which a right holder may do or authorize to be done in relation to the work and to the acts restricted by copyright. The Copyright and Neighbouring

Rights Act No. 11 of 2000, published on 17 November, 2000 but not yet in force contains a more helpful definition of "copyright" in s. 9. It states that copyright is a real right which subsists in a work by virtue of the Act and which entitles its owner exclusively to do in Zimbabwe and to authorise others to do in Zimbabwe the things which the Act designates in relation to that work. Copyright must be understood, therefore, as a legal term which describes the rights given to creators for their artistic and literary works. Sculptures, as I have already mentioned, are artistic works. The creators of the original works are protected by copyright and they, or their assigns have the basic right to the exclusive use or authorization to others to use their works on agreed terms. The creator of a work can for instance prohibit or authorise its reproduction in various forms. It is important to bear in mind that copyright law protects only the forms of expressions of ideas not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangements of words, colours, shapes, etc. In *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd* [1976] AC 64, it was held that copyright law is in essence concerned with the protection of the negative right of preventing the copying of physical existing material in the field of literature and the arts. Thus, for copyright to exist there must be existing material that the infringer has copied.

The concept can find further explanation in the decision in *Donoghue v Allied Newspapers Ltd* [1938] Ch 106 where it was held that the law of copyright is concerned only with the protection of the copying of physical material and not with the reproduction of ideas and does not seek to create a monopoly for any particular form of words or design. Copyright is not in the idea but in the material, that embodies that idea.

In this case the complainant was concerned with the most basic right under copyright law - the right to prevent others from making copies of his works.

There is no doubt at all that the complainant would have copyright in his sculptures and that he would be protected by the Act against infringement of his copyright in the sculptures in this regard. In this regard I refer to the sculptures that he had carved and are already in existence. It is, in my view, necessary to determine the wrong which the complainant said has been done.

The evidence adduced at the trial is not at all clear. This may be so because of the obscurity of the subject of copyright. It is not often that our courts are called upon to decide copyright cases.

The evidence shows that the appellant purchased sculptures from a third party, Taurai Chimba. It is these sculptures which, by way of trade, he exhibited in public. The initial question is whether these sculptures infringed the complainant's copyright. In his evidence the complainant could not show that the sculptures were reproductions of his work. The most that he could say was that the sculptures exhibited by the appellant were similar to his work or that they "looked like" pieces of his work. The complainant said that he was the originator of sculpture which show a female form without features such as a nose, mouth or toes. There was a dispute as to whether the complainant or one Vickson Kampande was the original maker of such sculptures. In my view, this dispute is not really material. What is material is whether the maker of the infringing sculptures reproduced the complainant's work i.e. copied it in a material form. There was no evidence, based on a comparison of the pieces, to establish beyond doubt that the alleged

infringing copies were a reproduction of the complainant's existing work.

The complainant, in my view, emphasised more the copying of his idea - that of creating female human forms without features or digits. The facts in the outline of the state case are helpful in an understanding what it is the complainant was concerned about.

In para 3 thereof it is stated:

"The complainant, Dominic Benhura, is an experienced sculptor of world repute who developed a range of pieces of sculpture which are original and distinctly his own creations in 1987. The form and appearance of these pieces of sculpture are distinct and original by virtue of the following features :

- all forms of work repeat a female human form in various postures of family motif like mother and child images;
- all forms have human limbs but the limbs have no digits and the faces have no facial features;
- the faces and limbs are polished black;
- all forms have raw untouched rock for hair and rasped unpolished;
- all forms of sculpture are distinctly marked Dominic Benhura or D Benhura".

The complainant gave evidence which described his sculptures in the same way as in the outline of the state case. The same evidence was given by other witnesses for the prosecution case. The following evidence of the complainant is important:"Q.

Accused says you collected 16 sculptures?Yes because 7 had inscriptions. I am not sure about the figure we collected.In terms of the Copyright Act you must be able to produce 16 sculptures as one (*sic*) collected from accused as original works?We are talking about art not coins. There is no way it can be identical. This material is natural and not artificial. It's not plastic. There is no way they could reproduce exactly the same because that is impossible to get similar stones as (the) ones I use because the stones are quarried from different areas from where I get mine.You acknowledge that it is

impossible that any of your original works can be copied? I am not saying they can't be copied. All I am saying is that they won't be like a reproduction (meaning) it has to be identical. You are saying that they will never be the same? Yes, because of form of stone but would be copies of my work. If they are not similar to your work how can they be copies? They are similar not identical because of stone formation. Q. Do you have items similar to the ones collected from accused? A. No, most of them are overseas. If I did not have exhibits I wouldn't be arguing with you here. Q. Demonstrate from exhibits, similar items as one taken from accused? A. I would not need to see the pieces. Q. Exactly the same. A. No, similar, not exactly (*sic*)" What is clear from this evidence is that the complainant was concerned about the protection not of his copyright as I have endeavoured to define it, but of his idea. His idea being that of a female form which has no features or digits. That to me is an idea which is not protected by copyright law. In order to be graphic about this point of view one has simply to picture a situation where sculptors are prohibited from making sculptures of female human forms whose faces are polished black but without features and whose limbs do not have digits. If that were to be the case, then to my mind copyright law will have been used against copying an idea, which is perfectly permissible, as against reproducing or copying existing works of art. I think some sympathy must be expressed in favour of the complainant especially because the sculptures in issue have some similarity to his own works. But as I have said copyright law is not designed to provide protection of ideas. The second basis for extending some sympathy to the complainant is that there was some passing off of the sculptures by inscribing the name of the complainant on some of the

pieces. This however would be provide a basis for action in delict. The evidence adduced at the trial does not show that Taurai Chimba copied anything other than the complainant's idea. That as I have said is not the subject of protection under copyright law.

Returning now to s. 27(1)(e) of the Act, it must be clear that for an offence to be committed the applicant's work of art should have been reproduced not that his idea should have been adopted. There must be a reproduction of an article in which copyright subsists. The evidence in this case did not establish that any such article was copied or reproduced. S. 27(1)(e) also requires that the accused person should have knowledge that the article which he exhibits is an infringing copy of the complainant's work. As to the requirements for establishing such knowledge see *Paramount Pictures Corp v Video Parktown North* 1983(2) SA 261(T) at 261 F - 262 A, where in reference to *Gramophone Co Ltd v Music Machine (Pty) Ltd & Ors* 1993(3) SA 188 (W) it was said that "knowledge" meant -

"notice of facts such as would suggest to a reasonable man that a breach of copyright law was being committed".

In this case there was no attempt to prove that the appellant had knowledge that a breach of copyright law was being committed. It was undisputed that he purchased the sculptures from another person but it was not shown that he had knowledge that the sculptures were infringing copies of the complainant's work.

The judgment in the court *a quo* was most superficial. The learned magistrate was in my view wide off the mark when she stated in her judgment that -

"The issue is sculptures bearing complainant's name were exhibited and on that

score alone accused had to explain how that happened".

This statement was made in relation to the application for discharge at the close of the State Case which the magistrate dismissed. Further in her short judgment on the merits, the magistrate was again wide off the mark when she said -

"We are faced here with a case of artifacts having the complainant's name and how accused would be exhibiting is only an issue that he alone can explain".

In terms of s 27(1)(e) of the Act the issue is whether the appellant exhibited in public works of art in which the complainant had copyright and whether he did so with the knowledge that the works of art concerned infringed the complainant's copyright.

The essentials of the offence were not canvassed. I am satisfied that the appellant should not have been convicted of contravening s 27(1)(e) of the Act. He may well have been liable in delict but that is a different matter.

In the result the appeal is upheld and the verdict of the court *a quo* is set aside, so also is the sentence. The order relating to the return of the sculptures to the complainant is also set aside.

MAKARAU J, agrees.

Puwayi Chuitsi, appellant's legal practitioners
Office of the Attorney-General, respondent's legal practitioners