

NGONIDZASHE DUWA
and
WILSON MAHWITE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 22 September 2015

Criminal Appeal

B Mugomeza, for the appellants
I Muchini, for the respondent

HUNGWE J: The appellants were convicted on their own plea to contravening s 44 (1) (a) of the Vehicle Licensing and Registration Act, [*Chapter 13:14*] (“the Act”). They were each sentenced to 12 months imprisonment of which 3 months were suspended on condition of good behaviour. They noted an appeal against both conviction and sentence. The sole ground of appeal before us is that the section under which the appellants were charged did not create an offence. The state conceded that the appeal against sentence ought to succeed for the reason that whilst the Act provided for a fine or imprisonment, the appellants were sentenced to a custodial term without the option of a fine. Clearly, this constitutes a serious misdirection warranting interference from this court.

The facts which were admitted by both appellants were that they had altered the rear registration plate of their vehicle so that it reflected a completely different identity to the original plate. Such conduct, as unequivocally and unreservedly admitted by both appellants, is a contravention of s 44 (2) (b) of the Act rather than 44 (1) (a). The erroneous reference to the wrong section is cured by the evidence. The body of the charge sheet correctly describes the unlawful conduct which both appellants admit. No prejudice will be suffered by both appellants if this court corrected the charge to read “44 (2) (b)” instead of “44 (1) (a). In the exercise of this court’s inherent powers of review, the charge will therefore be amended to read “contravening s 44 (2) (b) of the Vehicle Registration and Licensing Act, [*Chapter 13:14*]. The other “ground of appeal” set out in the Notice was not proceeded with in the Heads. I assume that it was abandoned.

As regards sentence, the respondent has properly conceded that the sentence imposed in the court *a quo* cannot stand since it flies in the face of the penalty provisions set out in s 44 of the Act. It is trite that where a statute provides for a fine or imprisonment for a contravention of any of its provisions, the court must consider the imposition of a fine first before resorting to imprisonment. This is especially so where the accused is, as here, a first offender. The reason given by the trial court for settling on the custodial sentence appears to be that the motivation for the commission was the desire to commit further offences. Even so, the appellants were entitled to a fine for the reason that they had not admitted to this motivation. They were first offenders too. In my view, the concession by the state is proper. An appropriate sentence would be a fine in light of all the circumstances of this case. I take note of the fact that only the first appellant filed his heads and has made an appearance. However, in the exercise of this court's review powers, I will consider that his appeal, on the basis of his Notice, is properly before this court in terms of the rules.

Consequently, the conviction of both appellants for contravening s 44 (2) (b) of the Vehicle Registration and Licensing Act, [*Chapter 13:14*] is confirmed. The sentence imposed in the court *a quo* is set aside and in its place the following is imposed:

“Each accused: US\$200.00 or in default of payment 3 months imprisonment. In addition each accused is sentenced to 3 months imprisonment wholly suspended for five years on condition the accused is not, during that period, convicted of any offence involving a contravention of s 44 of the Vehicle Registration and Licensing Act, [*Chapter 13:14*], for which he is sentenced to imprisonment without the option of a fine.”

CHIWESHE JP agrees

Mugomeza & Mazhindu, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners