

GODWIN MAZURU

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J AND ZISENGWE J
MASVINGO 15 & 16 JULY, 2020

Criminal Appeal

O. Mafa, for the appellant
E Mbavarira, for the respondent

MAWADZE J: The issue which arises in this matter is rather a novel one.

It is important for counsel to apply their minds to all matters which they deal with especially statutory offences. I find it unfair that counsel would not endeavour to carry out any meaningful research but rather swallow hook, line and sinker all what would have happened in the lower court. This is what happened in this matter and both counsel later admitted that they also doubted the propriety of the charge preferred against the appellant but nonetheless did not raise any eye brows.

The appellant was convicted by the Provincial Magistrate sitting at Masvingo of Contravening section 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to fraud on 27 December 2019.

The charge is couched as follows;

"In that on a date unknown to the Prosecutor but during the month of November 2019 and at House Number 360 Rutenga, Mwenezi, Godwin Mazuru knowing that a South African KIA motor vehicle registration number HHK 082 EC had no relevant papers to stay in Zimbabwe removed the KIA registration number plates and fixed it with his Isuzu pick up Zimbabwe truck registration plates ADL 2342 intending to deceive the Zimbabwe Republic

Police and the Zimbabwe Revenue Authority to act upon the misrepresentation to their prejudice."

The agreed facts in this matter are as follows;

The 37-year-old appellant resides at No. 360 in Rutenga, Mwenezi and is self employed as a mechanic.

During the month of October 2019 one Molitsane Gedion gave the appellant his South African KIA registration number HHK 082 EC which had developed a mechanical fault to fix. Molitsane Gedion proceeded to South Africa. The appellant fixed the said motor vehicle.

In November 2019 the appellant affixed the Zimbabwe registration number plate ADL 2342 of his Isuzu vehicle on the KIA vehicle which is registered in South Africa registration number HHK 082 EC. Thereafter the appellant started to drive the KIA vehicle in Zimbabwe. Police received a tip off resulting in the appellant's arrest.

In the trial court the appellant pleaded guilty to the charge of fraud. He was sentenced to 12 months imprisonment of which 4 months imprisonment were suspended for 5 years on the usual conditions of good behaviour leaving an effective prison term of 8 months.

Aggrieved by the sentence the appellant appealed to this court against the sentence only.

The thrust of the grounds of appeal is that the court *a quo* misdirected itself by imposing an effective custodial sentence instead of a fine or at worst community service.

The respondent being the state, find merit in the grounds of appeal and is of the view that an effective custodial sentence is not warranted in the circumstances. Instead the respondent is of the view that the court *a quo* should have imposed a fine or ordered the appellant to perform community service.

What exercised my mind in this appeal is the propriety of the charge of fraud preferred against the appellant in light of the agreed facts. The admitted proscribed conduct is that the appellant affixed false registration number on a South African registered vehicle which registration numbers are for his Zimbabwean registered motor vehicle. Now the question which then arises is whether this conduct *per se* amounts to the offence of fraud as defined in Section 136 of the Criminal Law (Codification and Reform) Act, [Cap 9:23]? I share a different view.

In casu the appellant is charged of contravention section 136 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] which relates to fraud and is couched as follows;

"136. Fraud

Any person who makes a misrepresentation.

(a) Intending to deceive another person or realising that there is a real risk or possibility of deceiving another person, and

(b) Intending to cause another person to act upon the misrepresentation to his or her prejudice, or realising that another person may act upon the misrepresentation to his or her prejudice;

Shall be guilty of fraud if the misrepresentation caused actual prejudice to another person or is potentially prejudicial to another person;"

It is difficult to fathom how the appellant's conduct in this matter fits into the proscribed conduct quoted above. To whom was the misrepresentation made? Who acted on the alleged misrepresentation and in what manner or had the potential to so act? What is the nature of actual or potential prejudice caused and to who? Are all these questions answered by the agreed facts? Certainly not.

In my respectful my view the appellant's conduct offends the provisions of section 44 (2) (e) of the Vehicle Registration and Licencing Act [*Chapter 13:4*] which provides as follows;

"Forgery of licence, registration, mark or number

(1) (a) irrelevant

(b) Irrelevant

(2) Any person who

(a) irrelevant

(b) irrelevant

(c) irrelevant

(d) irrelevant

(e) uses on any vehicle a licence, temporary licence or temporary identification card issued in respect of another vehicle.

Shall be guilty of any offence and liable to a fine not exceeding level six or to imprisonment for period not exceeding one year or both such fine and imprisonment"

This, in my respectful view, is what the appellant did and it amounts to a criminal offence.

The next question which arises is how the rectify this anomaly.

This court is sitting as an appeal court.

In order to rectify this anomaly recourse should be made to the provisions of Part VII of the High Court Act [*Chapter 7:06*] which deals with criminal appeals to the High Court specifically section 41(h). It provides as follows

"41. *Supplementary powers of the High Court.*

For the purposes of this part, the High Court may, if it thinks it is necessary or expedient in the interest of justice.

(a) - (g) *irrelevant*

(h) *exercise any powers of review conferred upon the High Court by section twenty-nine;"*

This provision empowers the High Court sitting as an appellate court to exercise its review powers as provided for in section 29 if it is in the interest of justice or expedient to do so. I find it unnecessary and tedious to quash these proceedings and remit the matter to the court *a quo* for a trial *de novo*. Further, it is in the interest of justice that the appellant be punished for his unlawful conduct rather than to be allowed to go scot free on a technicality.

I find comfort in the provisions of section 29 (2) (b) (viii) of the High Court Act [*Chapter 7:06*]. Which deals with the review powers of this court. It states as follows;

"29. *Powers on review of criminal proceedings*

(1) (a) *irrelevant*

(b) *irrelevant*

(c) *irrelevant*

(d) *irrelevant*

(2) (a) *irrelevant*

(b) (i) – (vii) *irrelevant*

(viii) *if the convicted person has been convicted of any offence and an inferior court or Tribunal could on the indictment, summons, or charge have found him guilty of some other offence, whether because it was, according to law, a competent verdict or because that other offence had been alleged as an alternative count, and on the findings of the inferior court or Tribunal must have been satisfied of facts which proved guilty of that other offence, the High Court may substitute for the inferior court or Tribunal a judgement of guilty of that other offence whether or not the convicted person has been acquitted of that offence, and may.*

A. *Subject to the proviso of sub paragraph (ii) substitute a different sentence for that imposed at the trial," (my emphasis)*

Put simply I understand this to mean that it is competent for this court in this exercise of its review powers, even sitting as an appellate court to correct an error made by an inferior court where the inferior court convicts an accused person of the wrong charge when the facts disclose a different offence. The proviso is that the substituted charge should be a permissible verdict or was put as an alternative charge. Thereafter this court may proceed to sentence the accused on the basis of the corrected charge.

Part XV of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*], section 273 to section 276 deals with permissible verdicts.

As per the 4th Schedule of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] the offence of contravening section 44 (2) (e) of the Vehicle Registration and Licencing Act [*Chapter 13:14*] is not a permissible verdict to the offence of fraud (section 136 of the Criminal Code [*Chapter 9:23*]) for which the accused was charged and convicted of by the court *a quo*. Ordinarily, this would have been the end of the matter as I would not have been the able to competently invoke the provisions of section 29 (2) (b) (viii) of the High court Act [*Chapter 7:06*] *supra*. However in terms of section 274 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] it is still competent for this court to correct this anomaly even if the offence of contravening section 44 (2) (e) of the Vehicle Registration and Licencing Act [*Chapter 13:14*] is not a permissible verdict to the offence of fraud *per ser*. This is so when one places reliance on the

general provision in section 274 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It provides as follows;

"274. Conviction for crime other than that charged.

Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such facts proved and if it is not proved that he or she committed the crime charged."

In casu the appellant was charged with the crime of contravening section 136 Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to fraud but the facts and essential elements of his conduct relate to contravening section 44 (2) (e) of the Vehicle Registration and Licencing Act [*Chapter 13:14*]. Be that as it may he may still be convicted of the offence of contravening section 44 (2) (e) of the Vehicle Registration and Licencing Act [*Chapter 13:14*] on the basis of the facts alleged and admitted hence proved.

The proscribed conduct, which the appellant admits to, is that he affixed registration number plates of a Zimbabwean registered vehicle on to a South African registered vehicle. This in my view does not amount to the offence of fraud as defined in contravening section 136 Criminal Law (Codification and Reform) Act [*Chapter 9:23*] but amounts to contravening section 44 (2) (e) of the Vehicle Registration and Licencing Act [*Chapter 13:14*]. The appellant clearly admits that this is what he did. He cannot possibly have any defence to the offence of contravening section 44 (2) (e) of the Vehicle Registration and Licencing Act [*Chapter 13:14*]. In that vein there is no prejudice if this court takes the necessary corrective measures by convicting him of the correct charge and sentencing him accordingly.

As regards sentence the appellant is a first offender. He is married with two children. Appellant is self-employed and realises \$900. He has savings of \$ 500 and owns a motor vehicle valued at US \$4 500.

Appellant explained that he acted in the manner he did because the owner of the South African vehicle had not communicated with the appellant.

The mischief which is prohibited by the offence provided for in contravening section 44 (2) (e) Registration and Licencing Act [*Chapter 13:14*] is to ensure *inter alia* that vehicles on our

roads are properly licenced and are not used for any other nefarious activities. The appellant's conduct is even more frowned upon as he affixed number plates of a Zimbabwean registered vehicle and proceeded to drive the foreign registered vehicle without following due process.

Be that as it may I find no reason why a fine is not appropriate in this matter.

In the result I make the following order;

1. The charge of contravening section 136 Criminal Law (Codification and Reform) Act [*Chapter 9:23*] proffered against the appellant be and is hereby altered to read contravening section 44 (2) (e) of the Vehicle Registration and Licencing Act [*Chapter 13:14*].
2. The verdict entered by the court *a quo* be and is hereby amended to read as;
"Guilty of contravening section 44 (2) (e) of the Vehicle Registration and Licencing Act [Chapter 13:14]."
3. The appeal in respect of sentence be and is hereby upheld.
4. The sentence imposed by the court *a quo* be and is hereby set aside in its entirety and substituted with the following;
"Appellant is to pay a fine of \$1 000.00 or in default of payment two months imprisonment."
5. The appellant is granted time to pay the fine up to 24 July 2020 by 1600 hours which payment shall be made at the clerk of court Mwenezi Magistrates court on or before that said date.

Zisengwe J agrees.....

Mutendi, Mudisi & Shumba, appellant's legal practitioners

National Prosecuting Authority respondent's legal practitioners