

REPORTABLE (44)

FREDERICK WILHEM AUGUST LUTZKIE
v
CHIEF IMMIGRATION OFFICER

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & BERE AJA
BULAWAYO, NOVEMBER 28, 2016 & JULY 25, 2017

F Girach, with *V Majoko*, for the appellant

H Magadure with *E Mukucha*, for the respondent

GARWE JA:

[1] This is a stated case referred to this court pursuant to the provisions of s 21 (3) of the Immigration Act, [*Chapter 4:02*]

FACTUAL BACKGROUND

[2] The appellant is a South African citizen. On 6 June 2014, he appeared before the Magistrates' Court charged with contravening the Immigration Act [*Chapter 4:02*] and the Civil Aviation Act, [*Chapter 13:16*]. The exact nature of the allegations preferred against him is not apparent from the record but is irrelevant for the purpose of the stated case before this court. Following a trial, he was convicted on both counts and sentenced to an effective three and a half years imprisonment. He was not given the option a fine. On 12 June 2014 he was served with a notice of prohibition. In terms of the notice, the appellant had, in terms of s 14 (1) (e) of the Immigration Act, become a prohibited person. It is apparent from the notice that he had attained that status on account of the term of imprisonment without the option of a fine imposed upon him.

[3] Dissatisfied, the appellant appealed to the High Court against sentence only. On 12 May 2015, the High Court set aside the sentence of imprisonment and in its place imposed the following:

“On each count US400 or in default of payment 6 months imprisonment. In addition, 12 months imprisonment wholly suspended for 5 years on condition the accused does not commit any offence involving contravening of Civil Aviation Act and the Immigration Act for which he is sentenced to imprisonment without the option of a fine.” (sic)

[4] On 19 August 2015, the appellant flew into the country through the Joshua Mquabuko Nkomo International Airport in Bulawayo. He was refused entry on the basis that he was a prohibited person in terms of s 14 (1) (e) (i) of the Immigration Act.

[5] Following the refusal by the respondent to admit him, the appellant appealed to the Bulawayo Magistrates’ Court in terms of s 21 (1) of the Immigration Act. At the hearing of the appeal before the Magistrate, the appellant argued that the alteration of the sentence from one of imprisonment to a fine materially altered his status and consequently the prohibition effected on 12 June 2014, predicated as it was on the sentence of imprisonment, now fell away. The respondent, on the other hand, whilst acknowledging that the sentence had been altered by the High Court, now argued that the appellant remained a prohibited person, not on account of the sentence, but the mere fact of his conviction.

[6] It is perhaps apt to point out at this stage that during the appeal proceedings before the Magistrates’ Court, the basis upon which the respondent sought to justify the decision to prohibit the appellant from entering the country had changed. The basis, before the appeal hearing, had been that the appellant had become a prohibited person owing to the fact that he had been sentenced to a term of imprisonment without the option of a fine. During the appeal however, the respondent sought to argue that the sentence of a fine that was imposed by the High Court was irrelevant. The mere fact of conviction formed the basis of the prohibition.

[7] At the request of both parties, the court *a quo* couched the question of law arising from the facts as follows:

“Whether a successful appeal against sentence in the High Court setting aside a sentence which was the reason for prohibition has an effect of terminating an initial prohibition which came into being as a result of a sentence imposed by the court *a quo*.”

[8] It is clear, however, that following submissions made by both parties in the court *a quo*, a further issue that arose but was not captured in the referral, was whether it is the fact of conviction, and not sentence, which remains the paramount consideration. This issue arose for the reason that a person attains prohibited status by operation of law once the circumstances itemised in subparagraphs (i) and (iii) of subsection (1) (e) of s 14 of the Immigration Act are established or found to exist. As will be shown later in this judgment, this line of argument was abandoned by the respondent before this court.

[9] There was a further attempt by the respondent to raise, for the first time before this court, a further issue, namely, whether in terms of s 14 (1) (i) of the Immigration Act, the appellant had become a prohibited immigrant by reason of him having been convicted of contravening the Immigration Act. This submission will be dealt with shortly.

APPELLANT'S SUBMISSIONS BEFORE THIS COURT

[10] In submissions before this court, the appellant argued that the decision that is sought from this court is whether a declaration of prohibition consequent upon a sentence of imprisonment which is set aside on appeal and substituted with a fine on appeal remains valid. It was the appellant's further submission that the respondent cannot treat this matter as an open-ended enquiry as he has tended to change his stance on why the applicant remains a prohibited person. In the Magistrates' Court the respondent had taken the stance that the appellant was a prohibited person because he had been sentenced to a term of imprisonment without the option of a fine. Once the respondent became aware that the sentence of imprisonment had been set aside, his stance

changed. He then argued that it was the mere fact of conviction which rendered him a prohibited immigrant. The respondent now seeks to argue that the appellant is a prohibited immigrant on account of the fact that he was convicted of an offence for which he was sentenced to imprisonment without the option of a fine, whether such imprisonment is suspended or not. The appellant submits that the use of the word “such” in the phrase “whether such imprisonment is suspended or not” in s 14 (1) (e) (ii) is pertinent, as it can only relate to a term of imprisonment that is imposed as the effective sentence, whether suspended or not.

RESPONDENT’S SUBMISSIONS BEFORE THIS COURT

[11] Before this court the respondent argued that the issue is the interpretation of s 14 (1) (e) (ii) of the Immigration Act and, in particular, whether the appellant remained a prohibited person. Mr *Magadure*, for the respondent, accepted that para (i) and (iii) of s 14 (1) (e) of the Act are not applicable to the appellant. The stance earlier adopted by the respondent that it is the fact of conviction alone which is relevant was abandoned.

[12] Whilst accepting that the original sentence of imprisonment imposed on the appellant was altered on appeal, the respondent has argued that the fact that in addition to a fine, the appellant was sentenced to 12 months imprisonment but which was suspended, puts him within the contemplation of s 14 (1) (e) (ii) of the Act, which provides that a prohibited person includes a person who has been convicted of any offence, common law or statutory, not specified in Part 1, for which he is sentenced to imprisonment without the option of a fine, whether such imprisonment is suspended or not.

[13] I understand the respondent to be saying this. The sentence of imprisonment was, on appeal, altered to a fine. That is not a problem. But he was, in addition, sentenced to a term of twelve months’ imprisonment which was suspended for five years on certain conditions. Since s 14 (1) (e) (ii) of the Act makes it clear that the suspension of such term of imprisonment is irrelevant,

the fact remains that a term of imprisonment was imposed on him. On that score alone, the appellant remains a prohibited person. I pause to note that this line of argument does indeed represent a shift by the respondent in his attempt to justify the prohibited status of the appellant.

[14] The respondent has also submitted that s 14 (1) (i) provides that a person is a prohibited immigrant by virtue of a contravention of the Immigration Act, whether or not a prosecution has ensued for such contravention. Because the appellant contravened the Immigration Act, he is a prohibited immigrant on that basis alone.

[15] The above submission was taken for the first time in supplementary heads of argument filed with this court but was not addressed during oral submissions. The appellant too did not respond to the submission. In my view, in a stated case, such as the present, a party cannot be allowed to raise, in supplementary heads of argument, new issues of law not hitherto canvassed before the court *a quo*, unless both parties have had the opportunity to deal adequately with the issues so raised. Moreover, the essence of a stated case involves stating a particular question or questions of law arising upon agreed facts and requesting this court to determine the question or questions of law arising therefrom. This cannot happen if parties were to be given the freedom to abandon the issue or issues referred and to raise their own issues of law at the hearing of the stated case.

[16] The decision of this court was essentially requested on the correct interpretation of s 14 (1) (e) which comprises three sub-paragraphs. During argument *attention* shifted to sub paragraph (ii). At no stage were submissions made on whether or not the appellant also remained a prohibited person in terms of s 14 (1) (i), which section provides for a prohibited immigrant status where a person has entered or remained in Zimbabwe in contravention of the Act, whether or not there has been a prosecution. In the circumstances, and regard being had to the fact that this is a stated

case, it is not permissible for the respondent to shift goal posts in the way he has done in this case and to raise this matter for the first time before this court.

THE ISSUE FOR DETERMINATION

[17] The question referred to this court is whether the successful appeal against the sentence of three and half years, which was the basis of the prohibition of June 2014, and the substitution in its place of a sentence of a fine, and, in addition, a suspended sentence of imprisonment, has an effect of terminating the initial prohibition which had come into being as a result of the sentence of imprisonment which had been imposed.

[18] As already noted, the respondent conceded before this court that the argument previously raised, namely that it is the fact of the conviction and not the sentence which determines the prohibited immigrant status of a person, is not applicable on the facts of this case.

[19] In my view the above concession was properly made. Paragraph (e) of s 14 (1) has three components to it. It refers to a conviction whether in Zimbabwe or elsewhere of (a) an offence specified in Part 1 of the Schedule (b) an offence, whether common law or statutory, not specified under Part 1 of the Schedule, for which a person is sentenced to a term of imprisonment without the option of fine, whether such imprisonment is suspended or not, and (c) an offence specified in Part 11 of the Schedule, other than an offence referred to in subpara (ii), and the person is declared by the Minister in terms subs 2 to be a prohibited person.

[20] On the facts of this case, as correctly conceded by the respondent, subpara (i) is not applicable as the offences in respect of which the appellant was convicted are not specified offences under Part 1. Subparagraph (iii) is also not applicable, for one good reason. The reason is that a person convicted of an offence specified in Part 11 of the Schedule must, *in addition*, be declared by the Minister to be a prohibited person in terms of s 14 (2) of the Act. It is common cause in this case

that there was no such declaration. Consequently, that provision is also not applicable on the facts of this case.

[21] The issue that arises for determination is the interpretation to be given to subpara (ii) of para (e) of s 14 (1) of the Act, given the particular facts of this case.

[22] For the sake of clarity, that paragraph applies to a person convicted anywhere in the world of a common law or statutory offence, other than an offence specified in Part 1 of the Schedule, for which the person *is sentenced to imprisonment without the option of a fine, whether such imprisonment is suspended or not.*

[23] The appellant was convicted by the Magistrates' Court of two offences and sentenced to three and a half years' imprisonment. In terms of para (e) (ii) of s 14 (1), by operation of law, the appellant would have become a prohibited person following that sentence.

[24] As already noted, the High Court, on appeal, substituted that sentence with a fine and *in addition*, a term of imprisonment suspended for five years on condition of good behaviour. The argument by the parties centres around the implications of the term of imprisonment which was imposed in addition to the fine.

ISSUE IS ONE OF INTERPRETATION

[25] The issue therefore is the interpretation to be given to the words "for which he is sentenced to a term of imprisonment without the option of a fine, whether such imprisonment is suspended or not."

[26] The golden rule of interpretation is that words are to be given their ordinary and grammatical meaning, unless doing so results in an absurdity, in which case a court can depart from such ordinary meaning, but only to the extent necessary to cure such absurdity. It is also part of our

law that in construing the meaning of a statute or the intention of the legislature, a court should lean towards a construction that makes sense rather than nonsense, a construction that achieves justice rather than injustice.

[27] It is clear from a reading of s 14 (1) (e) (ii) that the intention of the legislature was to differentiate between, on the one hand, a person sentenced to pay a fine and, on the other, a person sentenced to a term of imprisonment without the option of a fine. The reason for this is obvious. An offence that merits a sentence of a fine is, in general terms, not regarded as a serious offence. *Per contra*, an offence for which a term of imprisonment is imposed without the option of a fine is a serious offence and must be regarded as such. The intention of the legislature, to be deduced from the language of s 14 (1) (e) (ii), is that even if such term of imprisonment is suspended, the offence is a serious one and the convicted person becomes a prohibited person by operation of law.

[28] In the present case, a sentence of a fine, and in default of payment, imprisonment for 6 months on each count was substituted on appeal by the High Court. In addition, a sentence of twelve months' imprisonment was also imposed but its operation was suspended for five years on condition of good behaviour.

[29] In these circumstances, it is clear that the sentence imposed by the High Court was a fine and not a term of imprisonment without the option of a fine. Any other construction would result in an absurdity. It would be nonsensical for anyone to suggest that a convicted person whose sentence of imprisonment is altered to a fine of \$400 has not been given the option of a fine.

[30] The fact that, in default of payment, the High Court further ordered that the appellant undergoes six months' imprisonment is irrelevant. Once the fine is paid, even in instalments that is the end of the matter.

- [31] Indeed it is permissible, where a fine is imposed, to impose a term of imprisonment in default of payment of such fine. Attention is drawn to ss 347 (1) (a) and 358 (2) (c) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]
- [32] The issue that then arises is whether the additional sentence imposed by the High Court of twelve months' imprisonment, suspended for five years on condition of good behaviour, is "the imprisonment without the option of a fine, whether such imprisonment is suspended or not" envisaged in s 14 (1) (e) (ii) of the Act.
- [33] Clearly that cannot be the position. The imprisonment referred to in such para (ii) must surely relate to the main or effective sentence imposed. In other words, in a case where the effective sentence is one of imprisonment, it matters not whether such imprisonment is suspended or not. That would be the operative sentence imposed. In this regard, I agree with Mr *Girach*, for the appellant, that the use of the word "such" before the word imprisonment is significant. It was placed there for a purpose. The purpose was not to include a suspended sentence imposed additionally to a sentence of a fine. It refers to a term of imprisonment that is imposed as the effective sentence following a conviction, whether or not such imprisonment is suspended.
- [34] Argument to the contrary would be absurd. Surely there must be a distinction, for purposes of the Act, between one sentenced to three and a half years' imprisonment and another sentenced to pay a fine and, in addition, a sentence of imprisonment wholly suspended on condition of good behaviour. In the first scenario the person goes to prison immediately. In the second he does not, unless he fails to pay the fine or if, thereafter, he violates the terms of the suspension of his sentence.

[35] It follows from the above that the appellant, having succeeded in having the sentence altered to one of a fine and in addition imprisonment suspended on condition of good behaviour, is not a prohibited person as envisaged in s 14 (1) (e) (ii) of the Act.

COSTS

[36] These should follow the event.

DISPOSITION

[37] In the result, in response to the question referred to this court by the Magistrates' Court, this court makes the following findings:

- (a) The appellant, having become a prohibited person on pronouncement of the sentence of three and a half years, reverted to his original status once the sentence was substituted with one of a fine.
- (b) The suspended sentence of 12 months imposed in addition to the fine is not the term of imprisonment envisaged in s 14 (1) (e) (ii) of the Act.

[38] The respondent is to pay the costs of this referral.

GOWORA JA: I agree

BERE AJA: I agree

Majoko & Majoko, appellant's legal practitioners

Civil Division of the Attorney General's Office, respondent's legal practitioners