

THE STATE

Versus

DOUGLAS OLIVER PEARMAN

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 1 JULY 2024

Criminal Review

KABASA J: - The accused appeared before the trial Magistrate charged with contravening section 60(1) (a) of the Electricity Act, Chapter 13:19, that is abstraction or diversion of electricity.

The charge was not couched correctly or cited rather. It ought to have been cited as contravening 60 A (1) (a) of the Electricity Act. The error in citation however is of no moment as the accused knew what the charge was and what it is he is alleged to have done.

The accused pleaded guilty and was convicted on his own plea of guilty. He was sentenced to 6 months imprisonment the whole of which was suspended on condition he pays restitution in the sum of Zig 40 268. 98 which is the amount of electricity consumed without being paid for.

The record was placed before a Regional Magistrate on scrutiny. The Regional Magistrate queried the propriety of the sentence and the citation of the charge. He referred to the Electricity Amendment Act No. 7/2023 which appeared to have set a minimum mandatory sentence for an infraction of section 60 A (1)(a) and such sentence to be imposed unless there are special circumstances peculiar to the case.

In response to the query the trial Magistrate acknowledged that it was an oversight on his part as he had not looked at Act No. 7/2023 which now provides for a minimum mandatory sentence. He was silent on the citation of the charge.

On receipt of the response the scrutinising Regional Magistrate referred the record to this court highlighting the Electricity Amendment Act No. 07/23 which introduced a minimum mandatory sentence in the absence of special circumstances.

I looked at the Amendment 7/23 and observed that in section 2 thereof it provides that

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“2. Amendment of section 60 A of CAP. 13:19

Section 60 C (“Transportation of material used in connection with generation, transmission, distribution or supply of electricity”) of the principal Act is amended –

- (a) in subsection (1) by the deletion of “and liable to a fine not exceeding level 14 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment” and the substitution of “and if there are no special circumstances peculiar to the case as provided for in subsection (4), be liable to imprisonment for a period of not less than ten years.”
- (b) in subsection (2) by the deletion of “to imprisonment for a period not less than one year” and the substitution of “to imprisonment for a period not less than ten years.”

Section 60 A relates to “offences in relation to electric current and apparatus.” The charge *in casu* related to abstraction or diversion of electric current and so the charge was under section 60 A not section 60 C. Section 60 C relates to transportation of material used in connection with generation, transmission, distribution or supply of electricity.

The Amendment in section 3 thereof speaks to the amendment of section 60 C (2) where the penalty was a level 14 fine or 5 years imprisonment to a mandatory 10 years unless special circumstances exist.

In essence therefore Amendment 7/23 effectively amended section 60 C under both section 2 and section 3.

I therefore queried with the Regional Magistrate as regards which amendment related to section 60 A. In his response he explained that after going through the Amendment 7/23 he

observed what I had observed, that section 60 A was not amended. Only the heading purports to amend it but it was not amended.

I must just pause and commend the Scrutinising Regional Magistrate for taking the time to check the relevant statute when the record was placed before him on scrutiny. In response to my query he apologised for having raised the query with the learned trial Magistrate and for referring the record to this court. I must say the scrutinizing Magistrate has absolutely no reason to apologise. He was observant in raising the query in the first place because Amendment 7/23 does purport to amend the penalty provision in section 60 A (1) (a).

The legislature, in my view intended to amend section 60 A (1) (a) so that the abstraction or diversion of electricity would now attract a minimum mandatory 10 year sentence unless there are special circumstances. The intention did not translate into the intended amendment as both section 2 and section 3 of that amendment speak to the same section 60 C. I must say the failure to observe and attend to such a glaring anomaly is disconcerting.

It cannot be argued that the intention was to provide the same mandatory minimum sentence for an infraction of section 60 A and section 60 C of the Electricity Act and so one must read into the provision such intention.

In *Kingdom Bank Workers Committee v Kingdom Bank Finances Holdings* HH 302-2011 PATEL J (as he then was) had this to say on interpretation of statutes –

“In an enactment –

- (a) headings and marginal notes and other marginal references therein to other enactments, and
- (b) notes, tables, indexes and explanatory references inserted therein as part of any compilation or revision in terms of the Statute Law Compilation and Revision Act [Chapter 1:03]:

shall form no part of the enactment and shall be deemed to have been inserted for convenience of reference only.(my emphasis)

The traditional common law rule of statutory interpretation is that a heading does not form part of the operative provision. See *R v Hare* [1934 1 KB 354 at 355. However, the context of the provision under scrutiny may dictate otherwise. The modern tendency is to accept that, while headings cannot control the plain words of a statute, they may be regarded as preambles in order to explain ambiguous provisions or words in the statute.”

The heading in section 2 of Act 7 of 2023 is therefore not part of the enactment. Such heading can only be a preamble and what follows thereafter must be the operative provision. The operative provision speaks to the amendment of section 60 C.

If there is an intention to amend section 60 A such is still to be expressed as Act 7/2023 has not expressed that intention.

In casu, the 60 year old offender by-passed his electricity meter using a 2. 5 m cable so that he would use electricity without paying for it. A routine check by the ZESA loss control official discovered the offence.

The trial court considered the plea of guilty, the offender’s age and the fact that an order for restitution would make good the loss occasioned to ZESA in deciding to impose a wholly suspended 6 months imprisonment.

The sentence is within the trial Magistrate’s discretion and having observed that section 60 A was not amended, the penalty provision of a fine not exceeding level 14 or imprisonment not exceeding five years still stands.

The charge will be amended to read contravening section 60 A (1) (a) as such amendment will not prejudice the offender.

That said, the conviction and sentence are in order. The proceedings are accordingly confirmed.

Kabasa J.....

