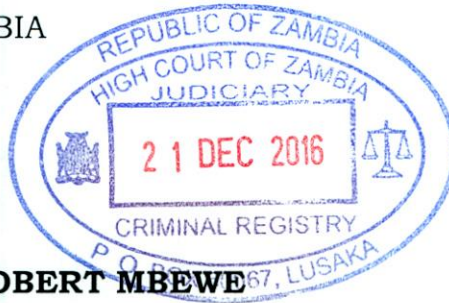


IN THE HIGH COURT FOR ZAMBIA

HPA/45/2014

HOLDEN AT LUSAKA

(Criminal Jurisdiction)



ROBERT MBEWE

VS

THE PEOPLE

Before the honourable Judge F. M. Chisanga in open court this 21st day of December 2016

For the Appellant: Ms. G. Mukulwamutiyo, Legal Aid Board

For the State: Ms. L. M. Hambayi, NPA

JUDGMENT

Cases referred to:

- 1. McNally vs United States 483 U.S. 350 1987**
- 2. Goodwin vs Philips, Commonwealth Law Reports Vol 7, 1908-9 Paragraph 1 at P 1**

Other works referred to:

- 1. Oxford Advanced Learned Dictionary.**
- 2. Craies on Statute Law 4th Ed P.303**

The appellant, now a convict, stood charged with the offence of fraudulent appropriation of power contrary to section 290 of the Penal Code CAP 87 of the Laws of Zambia.

Particulars of the offence were that Robert Mbewe, on dates unknown but between 1st November 2013 and 20th March 2014 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together with others unknown did fraudulently divert or abstract electric power to the use of house number N59 Valley View also known as Mutendere East, the property of ZESCO Limited without any lawful authority.

When called upon to plead, the appellant pleaded guilty. He admitted that he diverted power to the use of house number N59 Valley view. He said he did it fraudulently; he was not allowed to divert the power by ZESCO. A statement of facts detailing commission of the offence preferred against the appellant was produced by the prosecution. The trial magistrate convicted the appellant of the subject offence accordingly, and sentenced him to 18 months imprisonment with hard labour, with effect from the 23rd June 2014.

The convict was apparently shocked at the severity of the sentence meted out to him, and decided to appeal. The notice of appeal filed into court indicated, as grounds of appeal, that the convict is a first offender, and the custodial sentence is too harsh. Further, that the offence he stands convicted of provides for a fine upon conviction.

When learned counsel for both sides appeared before me, they indicated that they would rely on the submissions that were to be filed. Heads of arguments were filed in on behalf of the appellant. In arguing the appeal, learned counsel recited section 290 of the Penal Code. She thereafter referred to the Electricity

(AMENDMENT) ACT of 2003, sections 21 and 24 thereof. Section 21 of the said Act proscribes the wrongful or unlawful abstraction or diversion of electricity. It equally prohibits causing to abstract or divert electricity wrongfully or unlawfully. The penalty is enacted in section 24 of the said Act. A person found guilty of that offence is liable to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding five years or both.

Learned counsel then implored the court to adopt the sentence provided for under the Electricity Act considering that the offence is akin to the offence the appellant stood convicted of under the Penal Code. In furtherance of that submission, learned counsel referred to the doctrine of Lenity which, according to counsel, establishes the rule that in construing an ambiguous criminal statute, the court should resolve the ambiguity in favour of the defendant. Further reference was made to ***McNally vs United States 483 U.S. 350 1987¹***, as the locus classicus of the said doctrine. According to learned counsel, ambiguity arises from the divergent penalties provided for under section 290 of the Penal Code on the one hand, and section 24 of the Electricity (amendment) Act of 2003 on the other hand. It is contended that when two statutes conflict, the later enactment supercedes the earlier. Therefore, the electricity (Amendment) Act 2003 being a later statute, supercedes the Penal Code. This is the effect of learned counsel's submission, and the court is urged to impose the sentence prescribed by the Electricity Act, so that the ambiguity created by the two statutes on sentencing is construed in the appellant's favour.

I have not seen heads of argument from the respondent, but will proceed to determine the appeal nonetheless.

I have considered learned counsel's submissions. This appeal is against sentence only. While satisfied with the conviction for an offence committed contrary to section 290 of the Penal Code, the appellant is dissatisfied with the sentence meted out to him under the said section. He invites the court to impose the sentence prescribed under section 24 of the Electricity Act. In support of this argument, he prays in aid the doctrine of Lenity, which states that ambiguity in criminal cases should be resolved in favour of the defendant. According to the appellant, the divergent penalties prescribed under the two enactments give rise to ambiguity.

The word "*ambiguous*" is defined as something that can be understood in more than one way, or something that has different meanings. The word "*ambiguity*" is defined as the state of having more than one possible meaning or a word or statement that can be understood in more than one way or the state of being difficult to understand or explain because of invoking many different aspects. See **Oxford Advanced Learner's Dictionary**.

Examination of section 290 of the Penal Code, and sections 21 and 24 of the Electricity Act CAP 433 of the Laws of Zambia reveals no ambiguity. It cannot be said section 290 of the Penal Code is ambiguous. It is clearly stated so that one would not be at a loss to understand what is proscribed in that section. The same applies to section 21 of the Electricity Act. What I see is that under

section 290 of the Penal Code, the prescribed sentence is 5 years, while section 24 of the Electricity Act prescribes a fine or imprisonment for a period not exceeding five years, or both. It is on this basis that it is said there is a conflict between the two provisions.

I am alive to the position that where an Act dealing with a particular subject is wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, the earlier Act is repealed by implication. See ***Goodwin vs Philips, Commonwealth Law Reports***².

The learned author of ***Craies on Statute Law 4th Ed P.303*** puts the principle in this way:

“The court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can from the language of the latter, imply the repeal of an express prior enactment i.e., the repeal must if not express flow from necessary implication”.

The question to be addressed then is whether the two enactments, that is, section 290 of the Penal Code on one hand, and sections 21 and 24 on the other are so inconsistent or repugnant that they cannot stand together.

Section 290 of the Penal Code pursuant to which the appellant was charged and convicted enacts the following:

290. *Any person who fraudulently abstracts or diverts to his own use or to the use of any other person any mechanical, illuminating or electrical power derived from any machine, apparatus or substance, the property of another person, is guilty of a felony and is liable to imprisonment for five years.*

Sections 21 and 24 of the Electricity Act on the other hand stipulate:

21(i) *Any person who without legal right, abstracts or causes to be abstracted, or diverts or causes to be diverted, any electric current, or consumes or uses any such current knowing the same to have been wrongfully or unlawfully abstracted or diverted, shall be guilty of an offence.*

24. *Any person who is guilty of an offence under this Act shall be liable in respect of each offence to a fine not exceeding one hundred thousand penalty units, or to imprisonment for a period not exceeding five years, or both.*

It will be observed that under section 290 of the Penal Code, the offence is not specific to electrical power. It applies to mechanical and illuminating power. Section 21 of the Electricity Act however, only proscribes abstraction or diversion of electric current. It cannot therefore be said that section 21 of the Electricity Act has impliedly amended section 290 of the Penal Code. To be borne in mind too, is section 41 of the Interpretation and General Provisions Act CAP 2 of the Laws of Zambia, which enacts the following:

41(1) Where an Act or omission constitutes an offence against any two or more statutory enactments or both under a statutory enactment and the Common Law or any customary law, the offender shall be liable to be prosecuted and punished under either or any of such statutory enactments or at Common Law or under customary law, but shall not be liable to be punished twice for the same offence.

(2) For the purpose of this section, "statutory enactment" means any order in Council, British Act or written law.

This enactment puts to rest the suggestion that an offence and the penalty for such offence should reside in one statutory enactment, at any given time. In arguing that the latter enactment impliedly amends the earlier one, sight has been lost of section 41 of CAP 2. Clearly, the effect of that provision is that it is competent to create the same offence in more than one statutory enactment. I thus reject the argument that section 290 of the Penal Code has been amended by implication.

It is apparent that the prosecution elected to charge the convict pursuant to section 290 of the Penal Code, instead of section 21 of the Electricity Act as by law allowed. The accused person was aware of the section pursuant to which the charge was preferred, and pleaded guilty to that charge. The sentence prescribed under section 290 is five years imprisonment. There is no option of a fine in that section, and it must be assumed the appellant was aware of this.

The learned trial magistrate, in exercising the discretion conferred upon him to decide the length of imprisonment, decided to sentence the convict before him to a term of 18 months imprisonment with hard labour. That sentence does not come with a sentence of shock to this court at all. The statement of facts revealed that the convict had diverted electricity from a ZESCO installation, and was consuming that electricity without paying for it. Therein lay aggravation. It is one thing to divert electric current once and utilize it, and quite another to divert it for continuous domestic consumption. Contrary to learned counsel's submission, aggravation is apparent from the facts. Even had the appellant been convicted pursuant to section 21 of the Electricity Act, a custodial sentence would have been appropriate. On the foregoing, the appeal against sentence is devoid of merit, and is accordingly dismissed. The convict will be taken into custody immediately so as to serve the sentence imposed on him by the trial court.

Dated the 21ST day of December 2016



F.M. CHISANGA
HIGH COURT JUDGE