

THE STATE

Versus

- (1) **NDABEZINHLE MOYO – CRB 394/08**
(2) **DALOKUHLE TSHABA – CRB 154/08**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 FEBRUARY 2009

Criminal Review

NDOU J: Both accused persons were convicted by a Bulawayo Magistrate in different trials. I propose to deal with both these matters under this judgment as the problem that I am concerned with is similar. I referred the matters to the Office of the Attorney General and they indicated that they do not support the convictions in these matters.

The salient facts of these matters are the following. The members of an organisation going under the name of the Zimbabwe Anti-Piracy Organisation, in conjunction with the Zimbabwe Republic Police carried out raids at businesses that were selling copied compact discs and so called DVDs. The accused persons were selling or displaying for sale these items resulting in their arrest and prosecution for “selling or hiring out” [in respect of Moyo] and possession [in respect of Tshaba] infringed copies of DVDs and CDs in contravention of section 59 of the Copyright and Neighbouring Rights Act [Chapter 26:05]. This is novel prosecution in this region for the protection of the creations of the human mind. This is a welcome development in our jurisdiction where copyright infringement is very rife but enforcement is extremely low. This scenario has resulted in the confusion of the public as to the source of the goods, products or service. In the circumstances intellectual property rights infringement has to be curbed with zeal and determination. Having said so, I should hasten to say that such a battle has to be within the confines of our procedural law. This then brings me to the procedural flaws in these two cases. In order to enhance the appreciation of the offences the accused persons were facing I propose to cite section 59 which creates the offences. Section 59 provides:

- “(1) Any person shall be guilty of an offence if, at a time when copyright subsists in a work, he does any of the following things in Zimbabwe without the authority of the owner of the copyright in the work-

- (a) in relation to an article which is an infringing copy and which the person knows or has reason to believe is an infringing copy –
- (i) he makes it; or
 - (ii) otherwise than for his personal and private use, imports it into Zimbabwe or exports it from Zimbabwe; or
 - (iii) in the course of business, he possesses it or exhibits it in public or distributes it; or
 - (iv) he sells it or lets it for hire or offers or exposes it for sale or hire; or
 - (v) otherwise than in the course of business, he distributes it to such an extent that the owner of the copyright is prejudicially affected;
- (b) in relation to an article which is specifically designed or adopted for making copies of the work and which the person knows or has reason to believe is to be used for that purpose –
- (i) he makes it; or
 - (ii) he imports it into Zimbabwe or exports it from Zimbabwe; or
 - (iii) he possesses it in the course of business; or
 - (iv) he sells it or lets it for hire or offers or exposes it for sale or hire.
- (2) Any person who causes a literary or musical work to be performed in public knowing that copyright subsists in the work and the performances constitutes an infringement of the copyright, shall be guilty of an offence.
- (3) ...
- (4) ...
- (5) A person guilty of an offence under this section shall be liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or both such fine and such imprisonment in respect of each article to which this offence relates.”

In the Moyo case:

The accused was charged in count 1 for contravening section 59(1)(a)(iv) i.e. selling infringing copies of DVDs and CDs. When the essential elements were canvassed this is what he was asked,

- “Q Is it correct that on the 1st of February 2008 and at 42 Nicoz House, Bulawayo you offered for sale or hire 50 blank CDs and 49 DVDs which were infringed copies without the owner’s consent?
- A - Yes
- Q Correct that you had reason to believe that the DVDs were infringed copies?
- A - Yes

- Q - What was your intention?
 A - I wanted to raise money for my school
 Q - Do you have any defence to offer
 A - No
 Q - Any lawful right?
 A - No
 Q - Is your plea a genuine admission of the charge, facts and essential elements as put to you?
 A - Yes
 Verdict: Guilty as charged.”

There are several problems with this count. First, the charge sheet alleges the CDs and DVDs were blank. This implies that there was nothing copied in the CDs and DVDs. Without copying there is obviously no infringement if they are blanks, unless if it is a trademark infringement under the Trade Marks Act [Chapter 26:04]

Second, there is no essential element canvassed on which copyright is allegedly infringed. Who is the owner of such copyright?

Third, there is no essential element canvassed on the subsistence of copyright at time. The elements of the charge have not been satisfactorily explained and the conviction cannot stand – *S v Svondo* 1984(1) ZLR 140(H). It is trite law that the trial magistrate must ensure that the accused fully understands the nature of the charge. To do this, he/she should examine the charge before it is put to the accused in order to remedy any defects and to clarify any obscure points. The court must also ensure that several elements of the offence are understood and admitted by the accused – *Criminal Procedure in Zimbabwe* – by J R Rowland at 17-6; *S v Sikarama & Anor* 1984(1) ZLR 170(H) and *S v Dube & Anor* 1988(2) ZLR 385 (S).

In count 2 the accused was charged with “possession of equipment designed or adopted for making infringed copies” in contravention of section 59(1)(b)(iii). There are equally many flaws in this count. First, the penalty clause refers to specifically designed or adopted articles. The charge sheet and the facts do not allege that the articles in question were specifically designed or adopted. So on essential elements of the offence is missing from the charge sheet. Second, I am indebted to Mr W. Mabaudhi who made written representations on behalf of the Attorney General. He stated:-

“The possession or an ordinary computer capable of burning music CDs and DVDs cannot on its own constitute an offence. Modern computers are being manufactured with those basic drives. From the reading of the record of the

court *a quo* there is nothing peculiar about the computer that was taken as an exhibit and later forfeited to the state. No evidence was established from the summary trial that it was used in the commission of any offence. It is for these reasons that the Attorney General's Office will not support the convictions."

The essential elements explained to the accused in count 2 are not consistent with those in the offence created under section 59(1)(b)(iii).

In the Tshaba case

At least these were infringing copies. The only problem is that there is no element that copyright was still in subsistence. The trial magistrate made an erroneous assumption that the mere possession of non-original copies of work of art constituted an offence under this Act. It is vital that the charge should be framed pursuant to the provisions of the Act.

In view of the above, the convictions cannot stand.

Accordingly, the convictions in these two matters are quashed and sentences set aside. It is ordered that trials de novo take place before a different magistrate.

Kamocha J I agree