Judgment No. HB 62/2004
Case No. HCA 210/01

AYANDA NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE & CHEDA JJ
BULAWAYO 17 MARCH 2003 & 20 MAY 2004

N Mathonsi for appellant
H S M Ushewokunze III for respondent

Criminal Appeal

CHIWESHE J: On 25 October 2001 the appellant was arraigned before the Regional Magistrate, Bulawayo on a charge of armed robbery. He pleaded guilty and was duly convicted of that offence. He was sentenced to ten years imprisonment of which two years imprisonment was suspended on conditions of good behaviour.

The appellant has appealed against the sentence imposed on him by the court a *quo*. It is important that the role of an appeal court in an appeal against sentence be pronounced from the outset. The golden rule is laid down in *Ramushu* v *S* S-25-93 where GUBBAY CJ (as he then was) has this to say:

> "In every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be upheld is that sentence is pre-eminently a matter for the discretion of the trial court and the appellate court should be careful not to erode such discretion…"

Put differently an appeal court will not ordinarily interfere with the sentence of the trial court unless it is shown that there was a misdirection or an irregularity on the part of the trial court.

In his notice of appeal the appellant lists the grounds of appeal as follows:

"**Grounds of appeal**

1. The sentence of the Regional Court is so severe and so detached from both the personal circumstances of the appellant and the circumstances of the offence as to induce a sense of shock and apprehension.
2. The learned Regional Magistrate erred both in law and in fact by holding that the amount of $93 000,00 which has not been recovered is a small amount of money which should be ignored and in refusing to suspend a portion of the sentence on condition of restitution, which is a serious misdirection.
3. The court a *quo* erred in not giving due weight to the fact that the appellant had fully co-operated with the police from the time of his arrest and that he had pleaded guilty to the charge.
4. The court a *quo* ignored the fact that the appellant had not benefited from the offence and that there had been no violence in the commission of the offence.
5. The learned magistrate erred in not finding that the prosecution and arrest of the appellant constituted a monumental fall from grace as he was a police officer who ended up sharing prison cells with criminals he had himself arrested.
6. The court *a quo* ignored the numerous other decided cases referred to in mitigation of sentence."

In his notice of appeal the appellant prays that the sentence of the Regional Magistrate be set aside and in its place be substituted a sentence of four years imprisonment of which two years imprisonment is suspended on conditions of good behaviour and a further one year imprisonment is suspended on conditions of restitution.

The agreed facts put before the trial court were as follows:

"Statement of agreed facts

1. The accused in this matter is a male adult aged 26 and resides at house number 5431 Gwabalanda, Bulawayo. He is not employed but is an ex-member of the police force.
2. On the 25th September 2000 the accused teamed up with Abdul Saidi and Oscar Ndebele who are still at large, and went to Plumtree.
3. On arrival at Plumtree the accused went to house number V6 Lakeview where Ayanda Ndlovu at times stays and there collected an unloaded pistol belonging to Oscar Ndebele.
4. Armed with a pistol and a pick handle the accused persons and his two accomplices went to R and F Exchange Bureau and there threatened to

assault the security guard and the three tellers who were on duty there. The accused Ayanda Ndlovu who was now wearing a pulling sock on his face together with Oscar Ndebele who wielded a pistol and Abdul Saidi who was wielding a pick handle, ordered a security guard and the three bank tellers to get into a toilet and closed them inside.

5. The accused persons then looted cash from the drawers and dashed out into their Mazda vehicle registration number 575-702M and got away in it.
6. The accused persons later left their vehicle at a certain homestead in Diba area when it developed a fault and proceeded by foot along Diba Road where they were caught up by the police vehicle which was in pursuit.
7. On catching up with the accused persons, a witness who was in company of the police immediately identified the accused persons to the police while the other two fled dropping a bag containing cash.
8. The amount stolen is $492 263,00 Zimbabwean currency, P310,00 Botswana currency and R16 550,00 South African currency. The amount recovered is $399 146,00 Zimbabwean currency, P310,00 Botswana currency and R16 340,00 South African currency.
9. The accused had no right to rob at all."

The appellant's legal practitioner addressed the trial court at length in mitigation of sentence. He highlighted the following factors.

That the appellant was then 26 years old. That he was married with one minor child aged four. His wife is unemployed. He owns a house in Cowdray Park. He was a police officer based in Plumtree until August 2000. At the time the offence was committed he was unemployed. He was awaiting his terminal and pension benefits from the police. He was expecting a total of $101 000,00. He had no personal savings. He had been in custody prior to sentence for an aggregate of four months. He is a young man of no means. It was his financial difficulties that had forced him to commit the offence. He is a first offender who pleaded guilty and showed contrition.

As for the circumstances surrounding the commission of the offence the following factors were highlighted:

- The accused person and his accomplices used an unloaded pistol and a pick handle to threaten the complainants.
- No-one was physically assaulted and no violence was perpetuated.
- The accused himself was unarmed.
- The accused co-operated with the police at the time of arrest.
- All the money was recovered save for the sum of $93 117,00.
- The accused was offering to restitute and had the means to so restitute in view of his terminal benefits.
- The accused had been influenced by his accomplices both of whom were at large.
- The accused did not benefit anything from the offence.
- The accused was incarcerated for four months awaiting sentence.
- The accused has been seriously embarrassed by being incarcerated by his former colleagues in the Zimbabwe Republic Police in the same cells as criminals he himself had arrested.
- The offence was a momentary fall from grace and totally out of character.

In her reasons for sentence the learned Regional Magistrate was careful to balance the mitigatory features of the case against the aggravating features. She recognised the fact that the appellant was a young first offender with a family to support and that he had admitted the offence. She however noted that the appellant had been convicted of a very serious offence. She noted as an aggravating feature that the appellant was a former police officer and thus a custodian of the law. He did not live up to expectations in that regard. She noted that although the pistol was not

loaded at the time his victims were not aware of that fact and were therefore subjected to considerable fear and anxiety.

The learned Regional Magistrate noted in aggravation that the offence was committed by a gang and involved pre-planning on the part of the appellant and his accomplices. She also noted that a large sum of money including foreign currency was taken. Fortunately the bulk of this money was recovered.

The learned Regional Magistrate rightly pointed out that she had no option but to send the appellant to prison. She proceeded to sentence the accused person to a period of ten years in prison but suspended two years on condition of good behaviour because "you admitted these allegations and that you are also a first offender."

I think that the magistrate should have in her reasons for sentence not only mentioned all the mitigatory features but gone on to weigh these as against the aggravatory features and indicated the weight to be attached to these factors. As things stand the impression given is that she gave more prominence to the factors in aggravation and down played those factors in mitigation. Whilst the global sentence imposed cannot be said to be out of line with the range of sentences normally imposed in offences of this nature I feel that she should have suspended a good portion of the sentence in view of the other mitigatory features which she appears not have taken into account. At least she should have given reasons as to why these should not be taken account of or why they may be insignificant. In that regard the learned Regional Magistrate misdirected herself. The misdirection is more pronounced when she adopted the attitude that it was futile to suspend any portion of the sentence on grounds of restitution in view of the small amount outstanding. Well, $93 117,00 in the year 2000 (or 2001 when the appellant was sentenced) was not a small amount.

Whilst it was only a small fraction of the total amount stolen it was not in my view an amount so small as to be considered insignificant.

I am of the view that it would be in the interest of justice, given the mitigatory features of this case, that the sentence of the court a *quo* be substituted by the following sentence:

> "Ten years imprisonment of which three years imprisonment is suspended for a period of five years on condition the accused is not convicted within that period of any offence of which dishonesty or assault on the person of another is an element and for which he is sentenced to imprisonment without the option to pay a fine.
>
> A further period of one year imprisonment is suspended on condition that the accused restitutes the complainant in the sum of $93 117,00 through the Clerk of the Magistrates' Court, Plumtree, by 4pm on 30 June 2004."

The appeal succeeds to that extent.

Cheda J ………………………… I agree

Coghlan & Welsh appellant's legal practitioners
Criminal Division of the Attorney-General's Office respondent's legal practitioners