

**THE STATE**

**VERSUS**

- 1) **NEVER MOYO**
- 2) **NOEL KHUMALO**
- 3) **KWANELE EMMANUEL NKOMO**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 16 NOVEMBER 2006

Review Judgment

**CHEDA J:** The case before me has been forwarded to me in terms of the review procedure.

The salient facts are that the three were charged with 7 counts of armed robbery and one count for Contravening Section 4(1) of the Fire Arms Act [Chapter 10:09] as read with section 1 of Part L11 of the Criminal Penalties Amendment Act No. 22/2001. That is being found in possession an Fabrique Nationale Browning pistol and a star pistol. They pleaded guilty and not guilty in some counts but were, however, convicted on all the counts and sentenced as follows:-

- |           |  |
|-----------|--|
| “Count 1: | Each 10 years imprisonment                 |
| Count 3:  | Each 10 years imprisonment                 |
| Count 4:  | Each 10 years imprisonment                 |
| Count 5:  | Each 10 years imprisonment                 |
| Count 6:  | Accused 1 and 3 each 10 years imprisonment |
| Count 7:  | Each 10 years imprisonment                 |
| Count 8:  | Each 5 years imprisonment                  |

Accused 1 and 3 were sentenced to a total of 65 years while accused 2 was sentenced to a total of 55 years imprisonment. Each accused had 10 years imprisonment suspended on condition accused does not within 5 years commit any offence of which dishonesty is an element for which upon conviction he is sentenced to imprisonment without the option of a fine”.

## HB No. 114/06

The convictions in my view are proper and therefore nothing turns on them, however, it is the sentences which could not escape my attention.

Accused were no doubt notorious armed robbers who instilled deep fear in their victims wherever they struck. Property of substantial value was stolen from the complainants.

I take judicial notice that during the commission of these offences the nation was engulfed by fear and trepidation as the accused reigned terror on the nation. That, they deserve to be put away for a longtime admits of no doubt. Accused 1 and 3 were sentenced to a total of 65 years while accused 2 to a total of 55 years.

Accused 2 and 3 were sentenced to an effective 44 years and 6 months while accused 1 was sentenced to 53 years and 6 months imprisonment.

The sentences imposed on these offenders deserve a close examination. It is generally accepted that sentencing is the most difficult aspect in the conclusion of a trial.

The judicial officer has to battle with this aspect in the midst of both philosophical and academic concepts which intrude upon the practical business of sentencing.

My view, is that, in as much as judicial officers have a duty and determination to deter or eradicate crimes in society, all their efforts in the long run seem to be equally futile. The causes of crime and their solutions lie not only in the legal system but in society itself.

Therefore judicial officers should always been in mind that long term imprisonment do not necessary deter would-be offenders.

Ultimately, therefore, sentences imposed by the courts by and large must have support of concerned and right thinking citizens. But, it is the same society which can easily be revulsed by the court's imposition of unnecessary lengthy prison terms as they

## HB No. 114/06

may view them as being out of step with the offences committed, thereby rendering them meaningless.

While there should be proportionate punishment to be meted out to the criminal, it can not be done measure for measure. The view was also expressed by the Ontario Court of Appeal was expressed in *R v Warner, Urquhart, Martin and Muller* (1946) O.R 808 at 815 where Roach JA stated:

“It should be said at once that the purpose of punishment for crime is not that, though the medium of a Judge who is authorised by law to impose it, vengeance may be wreaked upon the guilty for their crime, as though crime was private in character ---- punishment----- is the expression of the condemnation by the State of the wrong done to society. These must, therefore, always be a right proportion between the punishment imposed and the gravity of the offence. It is in that sense that it is said that certain crimes “deserve” certain punishment and not on any theory of retribution”.

Even though the Canadian authorities are not part of our criminal law, it is my view, however, that their decisions, help in shaping our own jurisprudence as well. In my view, the sentence imposed on an accused should be shaped and determined by the following factors amongst others: -

- 1) the degree of premeditation by such offender.
- 2) the circumstances surrounding the conviction of the offence.
- 3) the gravity of the crime committed in some instances in regard to which the maximum punishment provided statute is an indication.

## HB No. 114/06

- 4) the attitude of the offender after the commission of the conviction of the crime, as this serves to indicate the degree of criminality involved and throws some light on the character of the participant.
- 5) the previous criminal record, if any, of the offender.
- 6) the age, mode of life, climate and personality of the offender.
- 7) any recommendation presented to the court as a pre-sentencing report from an official designated to assist in assessing the accused and;
- 8) case authorities in relation to similar offences.

It should be borne in mind that prison life is a rigorous punishment and should therefore be imposed with sympathetic consideration.

Therefore the mere thought of going to prison in some instances is a deterrent than the going to prison itself, see *R v Anderson* (1972); 56 C v App. R 863 and *R v Sargeant* (1974); 60 C v App. R74.

Severe sentences in crimes of this nature have indeed been previously imposed, see *Parazango v AG* 11/78; *Mberi and others v S* SC 52/82. There is therefore a need to pass harsh sentences but, however, this should be within reason. In light of the above and case authorities above, I am of the view, that the totality of the sentences imposed by the learned regional magistrate are in the circumstances out of step with the decided cases. If left as they are, they may negatively affect society which they are supposed to assist.

It should not be forgotten that at any irrespective of how bad an offender in the eyes of society is, he is still entitled to humane treatment for it is his human right to be so treated. It is for this reason that the sentences imposed should not amount to total condemnation by society.

## HB No. 114/06

The sentences imposed in this matter are in my view mentally disturbing and can not be allowed to stand. The convictions are confined but the sentences are set aside and substituted as follows: -

Each Accused:            Counts 1,2,3,4,5 and 7 treated as one for the purposes  
   of sentence - 20 years imprisonment  
   Count 8: 5 years imprisonment  
   Total - 25 years imprisonment

Accused 1 and 3: Count 6 only – 10 years imprisonment to run concurrently with the rest of the counts.

Total effective imprisonment (each accused) =25 years imprisonment.

Ndou J..... I agree