HB 26/07
Judgment No. HB 26/07
Case No. HCA 81/05

NIXON CHIWOME

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND BERE JJ
BULAWAYO 20 JANUARY 2006 AND 15 FEBRUARY 2007

P Mabukwa, for the applicant
AV Mabande, for the respondent

Criminal Appeal

NDOU J: The appellant was convicted by a Provincial Magistrate, sitting in Gweru of 59 counts of Theft by conversion. During the trial, the appellant pleaded guilty to all the counts. His appeal is directed against sentence only. The salient facts of the matter are the following. :

The appellant is a male who was aged 27 years at the time. He was employed by the complainant' company, Plate Glass, in Gweru as Manager at Heavy Industrial sites. He abused his position and stole from the employer. On dates ranging between 9 November 2004 to 9 March 2005, the appellant received and took into possession different amounts of money, it having been agreed that the money would be kept in trust by the appellant solely for the purpose of banking into the company's account, at Barclays Bank. The appellant's modus operandi was to deduct various amounts from the monies he was entrusted to bank. The total amount stolen totaled $102 million (old currency) of which nothing was recovered. At the trial the appellant was sentenced as follows:-

"Counts 1 to 12: 5 years imprisonment
Counts 13 to 24: 5 years imprisonment
Counts 25 to 36: 5 years imprisonment
Counts 37 to 48: 5 years imprisonment
Counts 49 to 59: 5 years imprisonment."

Of the total 25 years imprisonment, 5 years was suspended for 5 years on conditions of future good behaviour and another 5 years on conditions he pays restitution of $102 million; on the one hand, the appellant pleaded guilty to all the 59 charges showing genuine contrition. This was common cause during the trial. Even the trial court found that "he has shown contrition and has not wasted the court's time." This factor, was, however, not given due weight. It is trite that the trial court should not only pay lip service by repeating what one is expected to say when a plea of guilty is tendered. The trial court should give due weight to the plea proferred – *S v Buka* 1995(2) ZLR 135(SC); *S v Sidat* 1997(1) ZLR 487 (SC); *S v Katsaura* 1997(2) ZLR 102 (H) and *S v Madembo and Another* HH 17-03.

Further, the appellant is a first offender, a factor that was not given sufficient weight – *S v Ngombe* HH 504-87.

On the other hand, the sheer scale of the crime, being 59 counts, the breach of the employer and employee trust and the amount involved would undeniably warrant imprisonment. The appellant concedes this but protests the length of such imprisonment. Thus the issue to be canvassed is the appropriate length or duration of the imprisonment. It is trite that sentence is preeminently a matter for the discretion of the trial court. The appellant court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive should only be altered if it is viewed as being disturbingly inappropriate – *S v Ramushu and Others* SC 25-93. In this case the Respondent has conceded that the overall sentence imposed by the trial court is disturbingly inappropriate. The concession was properly made. There are no hard and fast rules dictating when a court should treat a number of counts separately or together for purpose of sentence. The trial court has discretion to be exercised reasonably. Whether the counts are taken together or not, the globular sentence should be the one which the court considers appropriate in the circumstances in *S v Nyathi* HB 60-03. The Respondent concedes that the trial court misdirected itself by failing to palate the aggregate sentence to come up with a realistic total –

Chirwa v S HH 79-94; *S v Sawyer* HH 231-99, *S v Sherman* SC 117-84*; S v Chikanga* SC 123-93; *S v Sifuya* HH 77-02 and *S v Nyathi*, supra.

The trial court arrived at an overall sentence which in my opinion is manifestly excessive. Further, in *S v Mupanduki* 1985(2) ZLR 169 (SC) BECK JA said at 175 F to 176E:

"In this connection I record my own respectful agreement with the following recent observations by NICHOLAS JA in *S v Skenjana* 1985(3) SA 51 (AD) at 54I to 55D – observations which I consider to be very pertinent to the insidious temptation to judicial officers to resort to sentences of ever-increasing severity in a vain attempt to stem the tide of increasing law-lessiness a tide that requires many forms of endeavor other than just those that are offered by the powers of sentencing if it is to be contained, let alone reversed. The learned Judge of appeal said:

'My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produces progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant.
Similarly, in regard to the aspect of retribution. This has tended to yield ground to the aspects of deterrence and reformation, but it is not wrong that, in determining a proper sentence, the courts should give some recognition to the natural indignation and the fears and apprehensions of interested persons and the community at large. (See *S v Karg* 1961(1) SA 231 (A) at 236 A-B). In a case such as the present the court must give heed to the demand of ordinary citizen for the condign punishment of robbers who invade the sanctity of the home to commit rapine and violent assault and worse. But that demand may well be satisfied by the imposition of less than the most severe sentence.
Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in *S v Khumalo* and another 1984(3) SA 327 (A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment bring about the complete mental and physical deterioration of the prisoner. Wrongdoers 'must not be visited with punishment to the point of being broken."

The Respondent conceded that a considerable reduction in the prison sentence is called for. I am in agreement.

In the result therefore the appeal against sentence succeeds to the following extent:

The sentence imposed by the trial court is set aside and substituted as follows:-

Counts 1 to 36 treated as one for the purpose of sentence: 5 years imprisonment.

Counts 37 to 59 treated as one for the purpose of sentence: 3 years imprisonment.

Of the total of 8 years imprisonment, of which 5 1/2 years is suspended as follows:

2 years is suspended for 5 years on condition the accused in that period does not commit any offence of which theft or dishonesty is an element and for which he sentenced to imprisonment without the option of a fine, and, 3 1/2 years is suspended on condition the accused pays restitution of $102 000 (revalued) to the complainant through the Clerk of Court, Gweru Magistrates Court by not later than 28 February 2007.

Bere J…….. I agree

Tizirai Chapwanya and Mabukwa, C/o T Hara and Partners, applicant's legal practitioners
Criminal Division of Attorney General's Office, respondent's legal practitioners