Judgment No. HB 42/07
Case No. HCA 223-5/01

ISAAC MUNYORO

And

NGQABUTHO MHLANGA

And

TINEI USAI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 18 JULY 2005 AND 22 MARCH 2007

R Nyathi, for the appellants
A V Mabande, for the respondent

Criminal Review

NDOU J: The three appellants were arraigned before a Bulawayo Provincial Magistrate on 6 November 2001 facing a theft involving property worth $16 300,00 of which $12 000,00 was recovered. The appellants pleaded not guilty but were convicted. They were each sentenced to 18 months imprisonment half of which was suspended on conditions of good behaviour. The brief facts are that the complainant resides at number 6 Hampshire Drive, Hillcrest, Bulawayo. On 24 February 2001 the complainant had a misunderstanding with one Tendai Chiosevedza. Tendai is elder sister to the third appellant and also wife to the complainant's uncle. The first and second appellants were unknown to the complainant prior the date of the offence. Third appellant invited first and second appellants to the scene of crime to try and resolve the dispute. The complainant testified. Her testimony was to the effect that during a fracas that had broken out, several windows were smashed around the house. When the appellants arrived, she

said first and second appellants had in fact introduced themselves as police officers. First and second appellants ordered the complainant and others out of the house stating that the

house was not theirs. She then categorically stated that it was the first appellant who then grabbed her mobile phone and snatched it and threw it to the second appellant. At that point it was again her testimony that other persons present there were mother, one Cathrine, Mrs D De Souza and her sister Christine. She also saw the third appellant holding her shoes in one hand and trying to carry a table with the other. However, as regards her purse containing a CABS bank card and $1500 her evidence was to the effect that it dropped from her brassiere during the commotion, but she could not say as to what became of it. Regarding the recovery of the cellular phone the complainant testified that the appellant's mother directed her to go and check for it in the garden. Unfortunately, first appellant's mother was never called to confirm that assertion and thus it remains as hearsay evidence, that supposedly led to the recovery of the cellular phone. The second witness called by the prosecution was Cathrine De Souza. She stated that she only knew third appellant as a young sister to her aunt. She knew first and second appellants only in connection with the case. Her testimony confirmed that of the complainant in a number of respects. First, she testified that the fracas had resulted from the domestic dispute between her sister-in-law, Tendai and her husband Denny De Souza (her husband's young brother). She even took the estranged couple through a counselling session. Second, she said she witnessed Tendai, her siblings and the first appellant running into the yard and smashing windows. She testified, as did the complainant, that they took refuge in the corridor, as the gang broke a total of forty-two(42) window panes. Third, she saw first and second appellants come into the house, confront then in the

passage and she heard then introduce themselves as police officers. Fourth, she saw that the complainant was holding a cellular phone which the first appellant snatched and pass it on to the second appellant. She also said the appellants and other persons in their company took them to the neighbouring house during the forced eviction, where they then telephoned the police. That upon arrival of the police, the appellants jumped over the pre-cast wall to Tendai Chisevedza's house. She said that she saw the third appellant holding the complainant's

shoes and she even pleaded with the appellants to return the complainant's property to no avail. The cellular phone was recovered in a patch of growing pumpkin crops in the same boundary area the appellants fled through on their way to Tendai's house upon the arrival of the police.

The trial court also made a finding that there was credible evidence that the third appellant, in the company of the first an second appellants, were seen taking the complainant's shoes and a kitchen table and placing them in a vehicle parked outside. So, there is clear evidence that the appellants, acting in common purpose, took the complainant's cellular phone , shoes and kitchen table. The phone was found in the garden so the only issue is whether there was an intention to deprive the owner permanently of it. The shoes were never recovered. The complainant's purse (containing $1 500 fell off when she was under attack. No-one was seen taking it but after the arrival of the police a search was carried out with no success. On the issue of the theft of the cellular phone and the shoes the evidence is overwhelming and the finding of the trial court cannot be faulted. However, on the question of the purse and the cash contained therein, there is a possibility that one of the several persons involved in the fray picked them. It is common cause that several people were involved in the domestic fray apart fro the appellants. One cannot infer that it was the

appellants who picked it after it dropped. Accordingly, the appeal against conviction partly succeeds.

As for the sentence is concerned, the re-direction of the stolen property in this case, must necessarily result in he reduction of the sentence. In any event, the respondent had already conceded that an effective sentence of imprisonment was uncalled for. I am in agreement with that original concession. The appellants were young at the time of the offence with their ages ranging between 20 and 26 years. They were first offenders. Their initial involvement in the matter was not about stealing but taking sides with a friend or relative involved n this domestic fight. The theft was mere out of termptation when the opportunity presented itself

during he fray. Sentencing of offenders must be a rational and not a capricious process – S v Antonio & Ors 1998(2) ZLR 64(H). The trial court paid very little weight to the fact that the appellants were first offenders. *S* v *Chitanda* HH-215-89 and *S* v *Kanoyerera* HH-167-89. The cellular phone was recovered a few minutes after the theft upon the arrival f the police. The pair of shoe that was not recovered does not justify imprisonment. As rightly pointed out by Mr *Mabande*, for the respondent, a sentence of imprisonment is a severe and rigorous form of punishment which should be imposed only a s a last and not first resort and where no other form of punishment will do – *S* v *Mangena* HH-28-98; *S* v *Mugaviri* HH-154-99 and *S* v *Gumbo* 195(1) ZLR 163(H). The respondent conceded that a sentence of community service would have been appropriate, a submission that the appellants are in agreement with. I agree, but that option is no longer appropriate due to the lapse of time and reduction in the quantum of the stolen property.

Accordingly, the appeal succeeds as follows:

1. In respect of the conviction, the appellants are only convicted of theft of the cellular phone and the pair of shoes.
2. In respect of the sentence, the sentence is set aside and substituted as follows:
   Each: 9 months imprisonment the whole of which is suspended for 5 years on condition the accused in that period does not commit any offence involving theft or dishonesty and for which he/she is convicted and sentenced to imprisonment without the option of a fine.

Cheda J …….I agree

Marondedze, Nyathi & Partners, appellants' legal practitioners
Criminal Division of the Attorney-General's Office, respondent's legal practitioners