

THE STATE

Versus

TICHAWANDA FAMABI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 FEBRUARY 2009

Criminal Review

NDOU J: The accused person was convicted of eighteen (18) counts of unlawful entry into premises in contravention of section 131(2)(e) of the Criminal Law Codification Reform) Act [Chapter 9:23] by a Regional Magistrate sitting in Bulawayo. Nothing turns on the convictions. He was sentenced to four(4) years imprisonment on each count resulting in a total of seventy-two (72) years. Of that total, 10 years was suspended on the usual conditions of good future behaviour and thirty-six (36) years on condition the accused pays restitution. From what the accused said in mitigation, he will unlikely pay restitution. The reality is that he has used up the stolen money and disposed of the stolen property. He is unemployed and has no meaningful assets. He is likely going to serve 62 years imprisonment.

In most of the counts, the individual sentences of 4 years imprisonment imposed are not in no way excessive, but their cumulative effect is so excessive as to call for interference – *S v Hassim* 1976(2) PH H58(N) and *S v Nyathi* HB-60-03.

Whichever way one looks at it, a sentence of 26 years (assuming the accused affords restitution) or 62 years if he fails to pay restitution, is manifestly excessive and is in excess of the out limit our courts would ordinarily impose for offences of dishonesty – *S v Sawyer* HH-231-99; *Sifuya v S* HH-77-02; *S v Chikanga* SC 123-99 and *Chirwa v S* HH-79-94. In *S v Sherman* SC 117-84, McNALLY JA remarked:

“How does one begin to measure the outer limit of a sentence in a case of this magnitude? One may say that even murder with actual intent often attracts a sentence of 16 – 18 years. One may ask – what sentence would be appropriate where a quarter of a million dollars is stolen and nothing recovered? What sentence would be appropriate where two or six million dollars is involved? This considerations and suggestion suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such crimes.”

In light of the above, the learned Regional Magistrate misdirected herself on the question of sentence and I am at large as far as sentence is concerned. The

sentence is disturbingly inappropriate calling for interference – *S v Sidat* 1997(1) ZLR 487 (S); *S v Coetzee* 1970(4) SA 83 (RA); *S v Ramushu & Ors* SC 25-93 and *S v Mundowa* 1998(2) ZLR 392 (H).

Accordingly, I confirm the convictions in all 18 counts. I, however, set aside the sentence by the trial court and the following is substituted:

“Each count - 18 months imprisonment. Of the total of 27 years imprisonment, 7 years is suspended for 4 years on condition the accused in that period does not commit any offence involving theft or dishonesty and for which he is convicted and sentenced to imprisonment without the option of a fine. A further 10 years imprisonment is suspended on conditions the accused pays restitution to the complainants as outlined in the Regional magistrate’s original sentence by not later than 27 February 2009.”

Cheda J I agree