

**SAMUEL MUUNGANIRWA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 7 AND 17 MARCH 2011

Applicant in person

*T Makoni* for respondent

Criminal Trial

**KAMOCHA J:** The appellant appeared in the regional court in Bulawayo facing two counts of theft of motor vehicles and three counts of armed robbery. On the first count, he was alleged to have stolen a Hwange Colliery Mazda B 1800 motor vehicle which had been parked outside a block of flats in Parirenyatwa Street, Bulawayo. The appellant used some unknown object to open the vehicle. It was also not known what he used to start the vehicle. The vehicle was grey in colour written Hwange Colliery on both doors but when it was recovered it had been repainted blue.

In count two he, at gun point, allegedly stole a blue Mazda B 1600 belonging to Cecil Thambo Dlamini on 29 March 2007. The appellant and his colleague asked for a lift from the complainant. Along the way they stopped the driver on the pretext that they had reached their destination but suddenly the appellant drew out a fire arm – a pistol and ordered all passengers in the vehicle to get out while his colleague snatched keys from the ignition. The appellant and his colleague then drove away leaving complainant and his relatives stranded. When the vehicle was later recovered it had been repainted green.

The third count related to theft of a blue Mazda B 3000 on 16 April 2007 belonging to Alois Ndlovu who had parked it outside his house. Using some unknown objects to open and start the engine the appellant drove the vehicle away. He later abandoned the car near Sizane High School after removing its Panasonic car radio and speakers. On his arrest the appellant made relevant indications to the police and also led them to his nephew William Muunganirwa to whom he had given the car radio.

In count four the appellant allegedly robbed the complainant at gun point on 16 April 2007 at about 1930 hours. The appellant and a colleague stormed into the complainant's flat number 64634/2 Tshabalala Flats, Bulawayo where she was watching television with her family.

Appellant and his colleague who were armed with pistols ordered all occupants to raise their hands up and one of them fired a shot in the house. The victims were all ordered to lie down on their stomachs. The appellant and his colleague fired three more shots in the house and thereafter ransacked the whole house stealing cash in the sum of \$32 170 000 Zimbabwean dollars and various items of clothing. The total value of property stolen was \$33 540 000,00 of which only \$1 300 000 was recovered.

Before leaving the premises the appellant and his colleague took the car keys which were on a coffee table. They went out and stole a white Landcruiser Toyota motor vehicle belonging to Fidelis Taurai Chivasa who had visited his relatives at the flat. The vehicle was later found abandoned in Magwegwe West. Its value was \$1,5 billion Zimbabwean dollars.

The appellant pleaded not guilty to all the charges. A full trial took place. Twelve witnesses were called. The trial started on 5 February 2008 and continued up to 20 May 2009 when the appellant altered his plea from not guilty to that of guilty in respect of counts 2, 4 and 5.

He did so after his nephew William Muunganirwa had given his evidence which incriminated him.

The state accepted his pleas in respect of those counts and withdrew after plea counts one and three. He was found guilty in terms of his altered pleas and was acquitted on counts 1 and 3.

The trial court sentenced him as follows:

Count 2: 10 years imprisonment

Count 4: 12 years imprisonment

Count 5: 10 years imprisonment

That gave him a total of 32 years imprisonment of which 8 years imprisonment was suspended for a period of 5 years on the customary conditions of future good behavior. That then left the appellant with a total effective sentence of 24 years imprisonment.

He now appeals to this court against the effective sentence seeking its reduction on the following grounds.

He complained that the court *a quo* had not taken into account that he had altered his pleas from not guilty to guilty. Not too much weight can be attached to that because the appellant only changed his mind on realizing that he was going to be convicted anyway after

the evidence of his nephew William Muunganirwa which had pinned him down. There was also overwhelming evidence from other state witnesses. He had been identified at an identification parade. He only changed his mind after the trial had been going on for over a year after 12 witnesses had testified. His change of pleas was actuated by a realization that he was going to be convicted. It was not actuated by a genuine change of heart and contrition.

He, however, has made a good point in relation to counts 4 and 5 which were committed one after the other in one continuous criminal transaction. It was in fact a single armed robbery wherein amongst the stolen property was a motor vehicle. The armed robbery resembled the American film style. The appellant and his colleague armed with pistols stormed into the flat and ordered all occupants to raise their hands up. They fired a shot in the flat and ordered everyone to lie prostrate before ransacking the whole flat.

Appellant suggested that he had no intention to deprive the owner permanently of the vehicle because it was later abandoned in Pumula suburb. There is no merit in that assertion and it does not assist him.

He further asserted that the shots were not fired by him but by his colleague. He went on to state that the shots were only meant to induce fear into the victims and not to harm or kill anyone. He said three of the shots were fired into the air through the window and one was aimed at a fish tank which was on a room divider, way above the heads of the victims who lay prostrate on the floor. He said the reason for doing this was to rob in a bid to survive from the critical economic effects. There was no intention to injure or kill anybody.

All the above is without merit. It is immaterial whether the shots were fired by the appellant himself or his colleague. They were fired in furtherance of the robbers' mandate. They were acting in common purpose. It is not true that they meant no harm. If they had met with resistance they would have shot dead their victim. That is the whole purpose of arming themselves with firearms during the execution of the robberies. Finally on this head it is baseless to suggest that it was necessary to commit the robberies in order to survive from the prevailing harsh economic conditions. There would be chaos if that were to be tolerated. Only the fittest would survive in a situation contemplated by the appellant.

The appellant also complained about why he was not afforded an opportunity to compensate the complainant on count 4 for the unrecovered property valued at \$32 240 000 Zimbabwean dollars. The trial court misdirected itself in holding that appellant himself had no means to enable him to retribute. He should have been afforded an opportunity to do so as he could summon the assistance of his relatives and friends. The complainant would be happy if she recovered the full value of her stolen property.

Finally he said he was a first offender in a critical health condition, with tuberculosis related symptoms. He had been in custody for 2 years before the matter was finalized. Not much weight can be attached to his assertions bearing in mind that 15 months was spent on the trial. He only waited for 9 months for his trial to commence.

Although he was a first offender there can be no doubt that he is a danger and menace to society. Society needs to be protected from such dangerous people.

His plea that he is in a critical health condition cannot be taken too far. He told the court during the hearing of the appeal that he was HIV positive and was receiving anti-retroviral medication in prison. He was in that condition when he committed the crimes that he has been convicted of. There is therefore nothing to suggest that he is less dangerous now.

In the light of the foregoing the sentence imposed by the trial court is set aside and substituted with the following:

Count 2: 10 years

Count 4 and 5 are taken as one for sentence: 15 years imprisonment

Total: 25 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition accused does not commit an offence of which dishonesty or violence is an element of which upon conviction he is sentenced to imprisonment without the option of a fine.

**Effective: 23 years imprisonment**

Cheda J ..... I agree

*Criminal Division of the Attorney General's Office respondent's legal practitioners*