

THE STATE
versus
MVURACHENA TADZEMBWA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 17 MARCH 2016

Criminal Review

MATHONSI J: The accused person appeared before a provincial magistrate at Beitbridge charged with seventeen counts of fraud in contravention of section 136 of the Criminal Law Code [Chapter 9:23]. He pleaded guilty to all the charges but had his guilty plea in respect of count 15 altered to not guilty after he had rendered an explanation which struck the court as a defence. He was however convicted of theft in respect of that count following a trial which is a permissible verdict to fraud in terms of s275 as read with the Fourth Schedule of the Criminal Law Code.

The court sentenced the accused individually in respect of each count giving an aggregate sentence of 27 years imprisonment of which 5 years imprisonment was suspended for 5 years on condition of future good behavior. A further 1 year was suspended on condition he restitutes the complainants of the respective sums they were defrauded. That left an effective sentence of 21 years imprisonment which sentence, by any standards, does not fit the offence neither does it fit the offender.

The facts in respect of all the counts are similar. The accused, who was known to the complainants as a money changer, would take their money on the pretext that he was going to change it to a different currency. He would disappear with the money which he subsequently converted to his own use as he lived large in Harare, Tanzania and Zambia where, like the biblical prodigal son, he spent all of it and nothing was recovered, a typical spent thrift. That way he was able to prejudice the complainants of various sums totalling R995 960-00 and US\$105 690-00.

When he appeared before a provincial magistrate in Beitbridge he was convicted of 16 counts of fraud and one of theft and sentenced aforesaid. In arriving at that sentence the magistrate reasoned as follows:

“In assessing the appropriate sentence for the accused person the court took into account what the accused person said in his mitigation. He is a first offender. He pleaded guilty to most of the charges and did not waste the court’s time.

In aggravation is the prevalence of the offences. The accused breached the complainant’s trust. He planned the offences well and boldly executed them. He benefited highly from the commission of the offences since all of the money was not recovered. His moral blameworthiness is very high. The offences are serious. Accused used his prior knowledge of the complainants and trust to steal large sums of money from them. The aggravation far outweighs the mitigation and a custodial sentence will be just.”

There is something which the court did not address at all. It is that the accused person is said to be “a foreign currency exchange dealer.” The question which arises is whether he is a legal dealer or illegal one. This was not canvassed at all, but considering that the accused person resides at Lutumba village under Chief Sthaudze and was transacting with the complainants generally from Dulibadzimu bus terminus in Beitbridge the probability is that he is an illegal money changer. The complainants wanted to change currency illegally. That on its own is relevant in assessing sentence as it goes to the moral blameworthiness of the accused person. Illegality can only beget illegality.

In addition, the sentences imposed induce a sense of shock. Although the magistrate came to the conclusion that a custodial sentence is the appropriate one, she did not explain why it had to be such a lengthy term. She did not explain why some of the counts were not treated as one for purposes of sentence when they related to kindred offences committed on the same day using the same *modus operandi*. She appears to have adopted a “tariff” approach to sentencing which has its serious disadvantages especially as the determination of sentence is a matter for the discretion of the court. There was therefore a misdirection in the assessment of sentence which has resulted in an unduly lengthy term of imprisonment completely disproportionate to the offences.

While uniformity of sentences may be desirable, that is, imposing uniform sentences in respect of similar offences or those offences of kindred nature, the desire to achieve uniformity

should not be allowed to interfere with the free exercise of discretion by the sentencer. The prime consideration in exercising sentencing discretion should be the achievement of a sentence befitting the relevant facts and the circumstances of the accused person. See *S v Fazzie and Others* 1964 (4) SA 673 (A) 684 A; *S v Reddy* 1975 (3) SA 757 (A) 759H (both quoted with approval in *S v Mugwenhe and another* 1991 (2) ZLR 66 (S) 69 D –E).

In that case (*S v Mugwenhe and Another*) EBRAHIM JA made the crucial point at 71A – C that:

“All that is being suggested is that judicial officers exercise their judicial discretion to the full and acknowledge where necessary the shortfalls of existing penal policy. The dynamism necessary for this approach is not achieved by reference to alleged ‘tariffs’ of sentences for specific categories of offences. Invariably when dealing with sentences the court refers, or is referred to, innumerable cases which purportedly lay down the limits of the range of appropriate sentences for the case actually before it. All but the most dogmatic will confess the narrowness of this approach; for it becomes apparent that it is by no means easy to treat the various cases as entirely uniform and even less so to attempt to extract therefrom a means of propounding a precise statement of principles which can be invoked before the courts which would guide it in respect of the quantum of the sentence to be imposed. (see e.g. *S v Ncube* HB 19/86; *S v Machetbi* 1974 (2) SA 369 (T); *S v Mutadza* 1983 (1) ZLR 123 (HC); *S v Ndlovu* HH 197/87.”

The magistrate appears to have been intent on punishing the accused person separately in respect of each count and was informed only by the value of the prejudice in arriving at sentences ranging from 6 months to 4 years imprisonment. That tariff approach led to a sentence of 27 years imprisonment. Although 5 years was suspended on condition of future good behavior only 1 year was suspended to condition of restitution.

It has been said before that where the sentencing court considers it necessary to suspend a portion of the sentence on condition of restitution, it must make it possible for the accused person to fulfill the condition in order to benefit. An accused person serving 21 years imprisonment will have no motivation whatsoever to retribute the complainants only to benefit one year reduction of sentence. It is just a drop in the ocean and therefore a useless exercise of discretion as clearly the accused person will not take up the offer. At the same time, the complainants will not be served by such a sentence because they will not be compensated. See *S v Mukura and Others* 2003 (1) ZLR 596 (H) 599 G- 600A where HUNGWE J said:

“Where a court considers suspending part of the sentence, subject to the stated conditions, it must not ask the impossible of the person in whose favour the suspension is granted, just as one must not, when imposing a fine, impose a fine of such severity that it cannot be paid. In such circumstances, the condition is unrealistic and bears no relation to any desire by the offender to comply with it. The condition must be reasonably capable of fulfillment. If it is not, then it is not the kind which should be made a condition of suspension: See *R v Lamb* 1969 (2) RLR 193 (A).”

See also *S v Zulu* HB 174/11.

In my view, the accused person is indeed a pathological fraudster who deserves to be severely punished for his transgressions. He fleeced seventeen different people of large sums of money. However the sentence of 27 years imprisonment is patently excessive, unreasonable and induces a sense of shock. This is a matter in which complainants dealt with an illegal money changer and in a way voluntarily assumed the risk attendant to such activity. These were kindred offences in which the same *modus operandi* was employed and the first five offences were committed on the same day, 18 December 2015. The next eight offences were also committed on the same date, 19 December 2015 with count 15 falling on 6 December 2015 and counts 16 and 17 coming on 23 July 2015.

I take the view that an appropriate sentence would be achieved by grouping counts 1, 2, 3, 4, and 5 as one for purposes of sentence. Counts 6, 7, 8, 9, 10, 11, 12 and 13 should be treated as one. Counts 14, 16, 17 and for convenience only, 15 as one.

In the result, it is ordered that:

- (a). The conviction of the accused person in respect of all the 17 counts is hereby confirmed.
- (b). The sentences are hereby set aside and in their place substituted the following sentences:
 - “1. Counts 1, 2, 3, 4, and 5 are treated as one for sentence and the accused is sentenced to 8 years imprisonment of which 2 years is suspended on condition he restitutes the complainants in those counts in the sums of R367000-00; R121200-00; \$9800-00; R400000-00 and R100 000-00 respectively.
 2. Counts 6, 7, 8, 9, 10, 11, 12 and 13 are treated as one for sentence and the accused is sentenced to 4 years imprisonment of which 1 year imprisonment is suspended on condition that he restitutes the complainants in those counts in the sums of

\$8000-00; \$3700-00; \$4000-00; \$3500-00; \$4140-00; \$1100-00; R7760-00 and \$3000-00 respectively.

- (c). Counts 14, 15, 16 and 17 are treated as one for sentence and the accused is sentenced to 7 years imprisonment of which 1 ½ years imprisonment is suspended on condition he restitutes the complainants in those counts in the sums of \$10 000-00; \$5000-00; \$12400-00 and \$35000-00 respectively.

Of the remaining 14 ½ years imprisonment 5 ½ years imprisonment is suspended for 5 years on condition the accused does not, within that period commit any offence of which dishonesty is an element for which, upon conviction, he is sentenced to imprisonment without the option of a fine.

Effective sentence: **9 years imprisonment.**”

Mathonsi J.....

Makonese J agrees.....