

THE STATE

Versus

TAPIWA SIBANDA

And

MOSES SIBANDA

IN THE HIGH COURT OF ZIMBABWE
 MAKONESE J
 BULAWAYO 1 JUNE 2017

Criminal Review

MAKONESE J: This matter has been brought before me for review in terms of section 57 of the Magistrates' Act (Chapter 7:10)

The learned trial magistrate in the court *a quo* forwarded this record for review with the following comment:

“The accused persons were convicted and sentenced today the 11th April 2017 as reflected on the charge sheet. As is reflected in the reasons for sentence, it was my intention to have the counts batched into two groups, i.e. those three counts committed in February to run concurrently. However an error followed which led to the miscalculation of the sentence which resulted in a grand total of 80 months being realised instead of 78 months. If I had carried my calculation well and accurately and in tandem with my reasons upon which the sentence is based the accused should have been sentenced as follows:

Each

Count 1	30 months]	The following counts to run concurrently
Count 2	24 months]	
Count 3	12 months]	
Count 4	12 months]	The following counts running concurrently
Count 5	12 months]	

Count 6 48 months]

For accused 1

Of the total 78 months imprisonment 6 months imprisonment is suspended on condition accused compensate a total of \$221,50 to the four complainants as in counts 1, 3, 4 and 6 via the Clerk of Court by 30 May 2017.

The total effective sentence is 72 months imprisonment.

For accused 2

Of the total 78 months imprisonment 6 months imprisonment is suspended on condition accused compensate a total of \$221,50 to the four complainants as in counts 1, 2, 3, 4 and 6 via the Clerk of Court by 30 May 2017. A further 6 months imprisonment is wholly suspended for 5 years on condition accused does not within that period commit any offence involving dishonesty and unlawful entry for which upon conviction accused shall be sentenced to imprisonment without the option of a fine.

The total effective sentence is 66 months imprisonment ...”

The learned trial magistrate has explained that the anomaly in the sentence was observed by prison officers upon the accused persons’ admission to prison. The trial magistrate has apologised for the error and requests this court to correct the sentence.

This case reflects the disturbing frequency with which the accused persons aged 34 years and 28 years, respectively had committed the cases of unlawful entry into people’s homes and stealing a variety of household goods and effects. For a brief period between 23rd February and 8th April 2017 the accused persons went on a spree of unlawful entry into premises, and in one case having the cheek to break into a residence of a police officer residing in police quarters and making away with a number of household goods.

The trial court examined a number of cases involving unlawful entry and theft and concluded that only a custodial sentence was deemed appropriate. The learned trial magistrate observed that the first accused person was not a first offender but held a relevant previous conviction involving theft. The court relied *inter alia* on the following cases to arrive at a

suitable sentence – *S v Muriro* HH-198-00; *S v Moswathupa* 2012 (1) SACR 259 (SCA); *S v Tasosa* 1997 (1) ZLR 197 (SC) and *S v Famabi* HB-16-09. In imposing sentence in the multiple counts the trial magistrate treated the counts separately. He reasoned that this approach was preferable in that if on appeal or review a count standing alone were set aside, there would be no difficulty in separating the sentence in respect of each individual count. The court took into consideration all the mitigating features of the case and after weighing them against the aggravating factors concluded that a total effective sentence of 72 months was appropriate in respect of the first accused and that a total effective sentence of 66 months was appropriate in relation to the second accused.

I can find no fault in the reasoning of the trial magistrate. I must point out that where multiple counts are involved, the power to impose a globular sentence must be exercised in appropriate circumstances, and only if the sentencing court, in the exercise of its unfettered discretion, considers it necessary to do so. See the case of *S v Ruzaro* 1979 RLR 353.

In the circumstances I have no hesitation in confirming that the proceedings in the court *a quo* are in accordance with real and substantial justice. It is appropriate for this court to correct the sentence of the court *a quo*.

I confirm that the appropriate sentence and as corrected by this court is as follows:

Each

Count 1	30 months imprisonment
Count 2	24 months imprisonment
Count 3	12 months imprisonment

The sentences in counts 1 to 3 are to run concurrently.

Count 4	12 months imprisonment
Count 5	12 months imprisonment
Count 6	48 months imprisonment

HB 134/17
HCAR 729/17
CRB KK 339-40/17

The sentences in counts 4 to 6 are to run concurrently. Of the total 78 months imprisonment 6 months imprisonment is suspended on condition accused compensates a total of \$221,50 to the complainants through the Clerk of Court by 30 June 2017. The total effective sentence is 72 months imprisonment.

Accused 2

Of the total 78 months imprisonment 6 months imprisonment is suspended on condition accused compensates a total sum of \$221,50 through the Clerk of Court by 30 June 2017. A further 6 months imprisonment is wholly suspended for 5 years on condition accused does not within that period commit any offence involving dishonesty/unlawful entry and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine. The effective sentence is 66 months imprisonment.

Moyo J I agree