HB 145/17
HCA 114/16

RUNYARARO GIFT PATSIKA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & MATHONSI JJ
BULAWAYO 5 & 8 JUNE 2017

Criminal Appeal

E. Mandipa for the appellant
Ms S. Ndlovu for the respondent

MATHONSI J: The appellant was convicted by a provincial magistrate in Gweru of 11 counts of fraud in breach of s136 (1) (a) of the Criminal Law Code [Chapter 9:23]. He was sentenced to a total of 13 years imprisonment of which 3 years was suspended for 5 years on condition of future good behaviour. A further 3 years was suspended on condition he restituted the complainant the sum of $15 835,00 on or before 31 July 2013. He had swindled his employer, Industrial Sands, a total of $18 335,00 and only $2 500,00 was recovered.

He has appealed against sentence only because according to him the sentence is so severe as to induce a sense of shock. The court *a quo* did not lend weight to the strong mitigation that was presented and erred in not ordering the sentences to run concurrently. As a result, it ended up with a sentence which was excessive in the circumstances.

The appeal is opposed by the state. Ms *Ndlovu* for the state submitted that the global sentence is appropriate in the circumstances considering the amount involved and that the appellant stole from an employer breaching the trust given to him by his employer.

Counsel for the appellant crafted the grounds of appeal and indeed the submissions in support thereof without regard whatsoever to the fact that the court *a quo* had in fact grouped the counts for purposes of sentence thereby addressing the criticism that the sentences should have been made to run concurrently. Counts 1 to 3 were treated as one and 3 years imprisonment was

imposed. Counts 4 and 5 as one, attracted 2 years imprisonment. Counts 6 to 10 were treated as one and a sentence of 5 years was imposed while count 11 was treated on its own and a sentence of 3 years was imposed. This brought the total tally of 13 years.

The opposition by the state also completely overlooks the fact that the trial magistrate has made a concession that the sentence is excessive. In her response to the grounds of appeal the magistrate stated:

> "The trial magistrate has taken cognizance of the current sentencing trend from the High Court and Supreme Court in cases of this nature. At the time the court was of the view that the sentence imposed was appropriate. I have however following the recent decided cases in particular the ones quoted by the appellant, have come to mind that the sentence imposed by the trial court was probably excessive. I therefore seek the higher court's guidance in this regard."

In my view the trial magistrate must be commended for adopting the approach of grouping the kindred counts and treating them as one for purposes of sentence. This has been shown to help normalize the ultimate sentence bringing it within reasonable levels. It has always been the sentencing policy of the courts in this jurisdiction where multiple counts are closely connected in terms of time and nature to treat them together or as a way of ensuring that the punishment is not duplicated and that its cumulative effect is not too harsh.

While this is not a rule of thumb, it is the practice that those counts which are related in the manner and time in which the offences were committed may well be put together for purposes of sentence. See *S* v *Tadzembwa* HB-85-16. The other option would be to impose a globular sentence in respect of all counts which the court considers appropriate in the circumstances. That is the point made by NDOU J in *S* v *Nyathi* 2003 (1) ZLR 587 (H) 588C-G, 589A;

> "This is mathematics in sentencing. *In casu*, although the individual sentences imposed in each count are in no way excessive, their cumulative effect is so excessive as to call for interference. See *S* v *Hassim* 1976 (2) PH H 58 (N). It is trite that there are no hard and fast rules dictating whether a court should treat a number of counts separately or together for the purpose of sentence. A trial court has a very wide discretion and, provided that discretion is exercised on reasonable grounds, an appeal court or review judge will not interfere: See *S* v *Coetzee* 1970 (4) SA 83 (RA). The sentence must, of course fall within the court's jurisdiction; see *S* v *Makurira* 1975 (3) SA 83 (R). Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is a useful way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect not too harsh on the accused. Nevertheless, the practice is undesirable and should only be adopted by lower courts in exceptional cases: see *S* v *Young* 1977 (1) SA 602 (A); *S* v *van Zyl* 1974 (1) SA 113 (T) and *S* v *van der Merwe* 1974 (4) SA 523 (N).
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> Trial magistrates must adopted this approach sparingly and only in exceptional instances in the interests of the accused. Once this approach is, however, adopted then the principles set out in *S* v *Chirwa* HH-79-94 and *S* v *Sifuya* 2002 (1) ZLR 437 (H) must be followed. In the *Chirwa* case, GARWE J (as he them was) said at p3 of the cyclostyled judgment:
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>> 'The position is now fairly well settled that in cases involving multiple counts, the correct approach to sentence is either to take all counts as one for the purposes of sentence and then impose a globular sentence which the court considers appropriate in the circumstances or alternatively to determine an appropriate sentence for each count taken singly so that the seriousness of offence is properly reflected. The court would then determine a realistic total which it considers appropriate in the circumstances and where necessary the severity of the aggregate sentence on all the counts taken together may be palliated by ordering some counts to run concurrently with others.'
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> It seems to me that the learned trial magistrate adopted a combination of the two approaches. The trial magistrate erred by failing to palliate the aggregate sentence in order to come up with a realistic total."

I have said that the trial magistrate in the present matter must be commended for combining the sentences and coming up with 4 groups. However, she ought to have realised that even after that the aggregate sentence of 13 years was still unrealistic in the circumstances. So it is either she abandoned the formular altogether in favour of the globular approach or she palliated the aggregate sentence to come up with a realistic total.

Looking at the manner in which the counts were grouped and the sentences imposed for each group, it is clear that the trial magistrate was leaning in favour of a "tariff" approach to sentencing. It has serious disadvantages as it impairs the sentencing discretion of the court. For instances counts 1 to 3 with a total of $3 600,00 the sentence imposed was 3 years imprisonment. Counts 4 to 5 had a total of $2 500,00 and the sentence was 2 years imprisonment. Counts 6 to 10 had a total of $8 300,00 and the sentence imposed was 5 years imprisonment. Count 11 which stood alone had $3 600,00 and attracted a sentence of 3 years. It was pure mathematics condemned by NDOU J in *S* v *Nyathi, supra*. The desire to achieve uniformity in sentences should not be allowed to interfere with the free exercise of discretion by the sentencing court.

In *S* v *Musvazvi* HB-70-17 the accused person had been convicted of 2 counts of fraud in contravention of s136 of the Penal Code after stealing a total of $16 711,20 from an employer. Although the section provides for the imposition of a fine, I was satisfied that stealing that amount from an employer made it a bad case, which disqualified him from the imposition of a fine or community service. Imprisonment was unavoidable. However, taking into account that he was a first offender who had fallen from grace having lost his employment there was need to tamper justice with mercy. Taking the counts as one for sentence he was sentenced to 5 years imprisonment with 3 years suspended.

It occurs to me that this case rhymes with the *Musvazvi* case. The same approach in sentencing should be adopted.

In the result, it is ordered that:

1. The appeal against sentence is hereby upheld.
2. The sentence of the court *a quo* is set aside and in its place is substituted the following sentence:

> "All counts are treated as one for purposes of sentence and the appellant is hereby sentenced to 5 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition he does not, during that period, commit any offence involving dishonesty for which, upon conviction, he is sentenced to imprisonment without the option of a fine. Of the remaining 4 years, 2 years imprisonment is suspended on condition he restitutes the complainant through the Registrar of the High Court, the sum of $15 835,00 on or before 30 September 2017.
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> Effective sentence 2 years."

Bere J …………………………………… I agree

Gundu & Dube, c/o Dube-Tachiona & Tsvangirai, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners