

THE STATE
versus
MORISHA MAHOVE & ANOR CRB D119-20/09
and
EVANS CHIKONYA CRB D135/09
and
ELIZABETH CHAORA & ANOR CRB D152-3/09
and
MOSES SANDE CRB D116/09
And
FINISH DZINZI CRB D1581/08
And
RODRICK SUMBURERO CRB D1621/08
And
PROSPER MUNGORORO CRB D1515/08
And
PATRICK BARANDA & ANOR CRB D1571-2/08
And
JOHN MANGARE, THREE ORS CRB D1550-3/08
and
BRIAN CHINENGUNDU & ANOR CRB D1569/08
and
LUCKSON KAPESI CRB D111/09
and
OWEN SANTRAU CRB D17/09

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 8 July 2009

CHITAKUNYE J: The above cases were all presided over by the same trial magistrate at Mt Darwin. In cases 1 to 11 the accused persons were convicted of the crime of unlawful entry into premises and theft. In case 12 the accused was convicted of the crime of theft.

The accused were all convicted on their own pleas of guilty. The convictions were proper and are thus confirmed. I however have misgivings on the sentences imposed in each case. In all the cases of unlawful entry into premises and theft each accused was sentenced to two years imprisonment. Where there were two or more counts the accused

was sentenced to two years imprisonment for each count. For the theft case the accused was also sentenced to two years imprisonment.

The uniform sentence of two years was regardless of the circumstances of each case. No portion of the sentence was suspended on any condition despite the fact that all the accused were first offenders who readily pleaded guilty. In many of the cases the accused were youthful first offenders aged between 19 and 22 years who deserved a chance to reform.

In some cases all the stolen property was recovered whilst in other cases part of the property was recovered. There were also cases where no property was recovered.

In his reasons for sentence the trial magistrate referred to the case of *S v Mururo & Anor* HH 198-2000 as his authority for imposing the sentences of two years imprisonment. The magistrate clearly misunderstood what the judge said in that case. Upon perusal of that case I did not understand the judge to be laying a single sentence for offences of unlawful entry and theft. I also did not understand the judge to be laying a foundation for not suspending a portion of the sentence or for that matter treating young first offenders the same as mature first offenders. At p 1 of the cyclostyled judgment the judge said:

“House breaking normally attracts sentences of two or three years effective imprisonment even where no unusual aggravation is present.”

That in my view did not mean that invariably any one convicted of house breaking offences had to be imprisoned for two years with no other conditions irrespective of the individual circumstances of each case. In any case these courts have on a number of occasions emphasized the need to avoid a tariff approach to sentencing. In *S v Dube and Anor* 1995 (2) ZLR 321 at p 326 B-C KORSAN JA had this to say:

“It has been said time and again in our courts that the punishment should not only fit the crime, it should fit the person as well. If that is to be, there can be no place for a tariff sentence in respect of any crime with regard to which the courts’ discretion is not fettered by statute law; for the circumstances of the offender and other factors of mitigation or aggravation may vary infinitely. Be it as serious as murder, the sentencing authority is enjoined to consider all factors, both in aggravation and mitigation of sentence and, in the exercise of its discretion, to impose a just punishment. A sentence based on a tariff is indicative of an abortion of judicial discretion, which is tantamount to a misdirection.”

See also *S v Mayberry* 1985(1) ZLR 192 at 194-5

In *S v Mugwenhe & Anor* 1991(1) ZLR 66 EBRAHIM J cited with approval the words of BOTHER JA in *S v Reddy* 1975 (3) SA 757 (A) at 759H wherein he said that:

“Though uniformity of sentences, that is of sentences imposed upon accused persons in respect of the same offence, or in respect of similar offences of a kindred nature, may be desirable, the desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged.”

In short, it is the responsibility of each judicial officer to consider all the factors and circumstances placed before him in arriving at a just sentence. The sentence must be individualized to the particular offender. Failure to individualize the sentence is a misdirection. It makes a mockery of the reasons for sentence that the judicial officer purports to have taken into account in assessing the sentence, yet time and again these courts have strongly warned judicial officers against paying lip service to mitigatory features. It is an act of dishonesty to tell an accused person that the court has considered their personal mitigatory features when in fact and in truth no such features have been considered.

In *casu*, the trial magistrate abdicated his responsibility to exercise judicial discretion in assessing sentence. Had he exercised judicial discretion and applied appropriate sentencing principles as enunciated by these courts in various cases, he would certainly have arrived at varying sentences.

It is trite that in considering sentence such factors as the value of the property stolen and recovered be considered. The circumstances of the recovery are also important in assessing what weight to attach to the aspect of the recovery.

In the present cases there are cases where all the stolen property was recovered intact yet the accused were given same sentences as in cases where none of the property was recovered.

The sentences imposed did not take into account the value of the property stolen or the manner of the break-ins and theft yet these are key factors in the assessment of sentence. It is my view that had the trial magistrate exercised judicial discretion in a judicious manner he would no doubt have come up with different sentences on a case to case basis.

It is pertinent to point out that the trend in our jurisdiction has been to spare first offenders from effective imprisonment unless the circumstances are such that imprisonment is the only suitable option. See *S v Munukwa* 2002 (1) ZLR 169.

Another disconcerting aspect is that in all the above cases none of the accused had any portion of their sentences suspended on any condition. The trial magistrate did not consider suspending any portion of the sentences. No reason or explanation was given for such failure. Though it is not a rule that first offenders who are being imprisoned are entitled to have a portion of their sentence suspended, as was stated in *S v Gorogodo* 1988(2) ZLR 378, I am of the firm view that failure to consider or to give reasons for not suspending portions of the sentences on suitable conditions, where the sentences are not long, is a misdirection. These courts have time and again emphasized the need to give first offenders the chance to reform by not sending them to effective imprisonment. Where for good reasons imprisonment cannot be avoided, then at least a portion of the sentence must be suspended so that they serve what is absolutely necessary.

In *S v Dube & Anor supra* at p 327 E KORSAH J said that:

“it is a salutary practice of our courts to suspend, in appropriate cases, a portion of the custodial sentence imposed on young first offenders, on condition of good behavior, so as to operate as a deterrent of a personal nature.”

See also *S v Chirara & Ors* 1990 (2) ZLR 156 (H).

A term of imprisonment may also be suspended on condition of restitution. In the above cases no investigation was made on the desirability of restitution and the ability of the accused to make good the loss to complainants. This was a misdirection on the part of the trial magistrate.

Whilst confirming the convictions in all the above cases I am unable to do the same with the sentences. Due to the areas of misdirection pointed to above the sentences will be set aside.

Accordingly the sentences are hereby set aside and are substituted by the following sentences:

1. S v Morisha Mahove & Anor CRB D119-20/09

The two counts as one for sentence twenty four months imprisonment of which four months imprisonment is suspended for five years on condition that the accused does

not within that period commit any offence involving dishonesty and for which he is sentenced to a term of imprisonment without the option of a fine.

2. S v Evans Chikonya CRB 135/09

For three counts of unlawful entry and theft, each count: two years imprisonment. Total six years imprisonment of which 11/2 years is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

3. S v Elizabeth Chaora & Anor CRB152-3/09

Each accused: Twenty four months imprisonment of which 6 months is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he/she is sentenced to a term of imprisonment without the option of a fine.

4. S v Moses Sande CRB 116/09

Eighteen months imprisonment of which 6 months imprisonment is suspended for five years on condition the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

5. S v Finish Dzinzi CRB D1581/08

Eighteen months imprisonment of which four months imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

6. S v Rodrick Sumburero CRB D1621/08

Twenty four months imprisonment of which 6 months is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

7. S v Prosper Mangororo CRB D1515/08

Eighteen months imprisonment of which six months imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to imprisonment without the option of a fine.

8. S v Patrick Baranda & Anor CRB D1571-2/08

Each accused: - Twenty four months imprisonment of which four months imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

9. S v John Mangare & 3 Ors CRB D1550-3/08

Each accused: Twenty months imprisonment of which four months imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

10. S v Brian Chinengundu & Anor CRB D1569-70/08

Each accused: Twenty four months imprisonment of which six months imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

11. S v Luckson Kapesa CRB D111/09

Count 1:- Eighteen months imprisonment

Count 2:- Four months imprisonment.

Total; twenty two months imprisonment of which six months imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

12. S v Owen Santrau CRB D17/09

Twenty months imprisonment of which six months imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

CHITAKUNYE J:.....

KUDYA J: agrees.....