JEFFERY MUSEMWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 18 September & 9 October 2023

Criminal Appeal

Appellant in person
Miss *F Kachidza*, for the respondent

ZHOU J: The appellant was convicted of five counts of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was acquitted on one count which was count 3. Counts 1 and 2 were taken as one for sentence, and 12 years imprisonment was imposed. For counts 4, 5 and 6 the appellant was sentenced to 8 years imprisonment on each count. The total for all the counts was therefore 36 years imprisonment. The learned magistrate suspended 5 years imprisonment on condition of good behaviour, and a further 3 years imprisonment on condition of restitution. The effective period of imprisonment is therefore 28 years.

The appellant is appealing against both conviction and sentence.

The court *a quo* found, that the appellant had committed the offences hence the verdict of guilty was returned in respect of the five counts.

The appellant set out seven grounds of appeal against conviction. In the first ground of appeal the appellant states that he was a victim of "dock identification" and complains that the court *a quo* should not have accepted the evidence of his identification. The appellant was apprehended at the scene of crime in count 6. He was apprehended at the time of committing the crime. After he had been apprehended he emptied his pockets of the jewellery that he had stolen. There could therefore be no question of his identity being mistaken.

In all the other counts the appellant spent some time with his victims holding them hostage. They had ample time to observe him. In respects of count one the appellant is the one who entered the house and ordered everyone to lie down. Complaint did not lie down and appellant held him by the neck, yelling at him. He was clearly seen. The room and entire house was well lit. The appellant and his accomplices spent about one and half hours with the victims. The witnesses could not have failed to identify him. In count 2 the witness was truthful in that he did not claim to have identified the accused. In count four (4) the appellant was clearly identified by the witness Joane Gay Martin who was also the complainant. An axe that the appellant hand during the robbery was recovered from him, thus linking him to the offence. The court *a quo* found that the appellant had not challenged the witness' evidence regarding his eyes. Similarly, in count five the appellant was positively identified by the complainant Takavadii Magwenzi Nyamakura. The witness also described the axe that appellant wielded. The house was well lit. The evidence of the witnesses as to how they recognized the appellant was sufficient to sustain the conviction.

The second ground of appeal blames the court *a quo* for noting that the appellant had not challenged a witness about the property taken and its value. This ground of appeal is irrelevant in relation to the conviction. The value of the property would only be relevant to the sentence. It is therefore a misplaced ground of appeal.

The third ground of appeal is that the court *a quo* erred in dismissing appellant's defence yet the investigating officer had not checked what time the appellant had left Lincoln Macheka's residence. The time of his departure from Lincoln's residence is irrelevant because the appellant was apprehended at the scene of crime when he had just committed the robbery. In any event, the learned magistrate took note of the glaring inconsistences in the evidence of the appellant. In his defence outline he had stated that he had come to visit his neighbour. Later on, he changed and said that he had visited an uncle is when it became apparent that the story of a neighbour staying in Vainona when the appellant was staying in Chitungwiza could not stand. After all, whether he had visited a neighbour or uncle is irrelevant, because he ended up committing a robbery.

The fourth ground of appeal suggests that the onus was placed upon him because the magistrate commented on his failure to call Macheka as a witness. Macheka's name did not

come from the state but from the appellant himself who sought to rely on Macheka's evidence. However, appellant does not show what Macheka's evidence was and how it would have assisted him since he was apprehended at the scene of crime.

The fifth ground of appeal alleges that the court *a quo* misdirected itself by relying on the *modus operandi* of the robbers in the absence of direct evidence against the appellant. There was indeed direct evidence, because the appellant was positively identified by his victims. The axe which he used in some of the robberies was identified by at least two witnesses. That axe was recovered from him. Further there is the fact that in count 6 he was apprehended at the scene.

The appellant states in the sixth ground of appeal that the court *a quo* erred when it noted that he did not challenge the witnesses in count 6 regarding where he was arrested. The equivocal statements of the appellants do not amount to a challenge in the face of the solid evidence of the state witnesses that appellant was apprehended at the premises where he had committed the robbery. The court *a quo* believed the witnesses who testified on that aspect and made findings based on credibility. There is no misdirection in respect of those findings that would justify a contrary conclusion.

In the seventh and last ground of appeal the appellant repeats the same argument about where he had been arrested adding only the aspect of the jewellery. The witnesses who testified and were believed, stated that the appellant emptied his pockets of jewellery after he had been apprehended. The appellant has not shown why acceptance of their evidence would amount to a misdirection. It is clear from the circumstances that the jewellery that the appellant was removing from his pocket is that of the complainant in count six. The witness testified and was believed, that appellant was apprehended as he tried to jump over the perimeter fence. The witness who apprehended the appellant had not seen him taking the jewellery from the complainant and could not have just created a story against a total stranger. Appellant was therefore trying to conceal evidence by throwing away the jewellery.

All the grounds of appeal against sentence are meritless. The conviction is unassailable.

As regards the sentence, the first ground of appeal is that the sentence induces a sense of shock. Sentencing is a matter that falls within the discretion of the trial court. An appellate court does not readily interfere with the exercise of that discretion in the absence of evidence to show that the discretion was not exercised judicially. The court a quo did consider the mitigating

factors including the fact that he was a family man with a wife and child and that he spent nearly two years in prison before his case was finalized. These mitigating factors were weighed against the aggravating features of the offences, such as the violent nature of the crimes, the fact that there was invasion of the right to privacy, in the case of count six the complainant was dragged from the bath undressed and her dignity was impaired. She had to beg the robbers to allow her to wrap a towel around her body. The threat to axe a child in one count and the putting of a knife on the neck of a child in another count show the diabolic nature of the appellant's conduct. When all these factors are considered, the sentence imposed is actually on the lenient side. The maximum penalty allowed for robbery is imprisonment for life (s 126(2)(a) of the Code).

The different counts were properly treated separately in passing sentence. The offences were committed on different days, at different places and against different victims. There was no misdirection in the approach taken. Actually the appellant benefited from the magnanimity of the learned magistrate who treated counts one and two as one for purposes of sentence. The appellant made robbery his way of life and should not expect to be treated as if he was the victim. For these reasons, the second and third grounds of appeal against sentence are without merit.

All in all, the appeal against sentence just like the appeal against conviction, is without merit.

In the result, **IT IS ORDERED THAT**:

1. The appeal is dismissed in its entirety.

CHIKOWERO J:……

National Prosecuting Authority, respondent's legal practitioners.