

GABRIEL MUKAMBACHAZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA AND MUZENDA JJ
MUTARE, 30 September 2020

Criminal Appeal

E Chatambudza, for the Appellant
M Musarurwa, for the Respondent

MWAYERA J: On 30 September 2020 we dismissed an appeal against sentence lodged by the appellant. We gave an *extempore* judgment and undertook to avail the written reasons in due course.

These are they:

The appellant was convicted by the Regional Magistrate Mutare following his plea to Robbery as defined in s 126 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The brief facts of the matter being that the appellant together with accomplices used force and violence threatening the complainants with a pistol, machete using a rope to assault the complainants caused the complainants to relinquish control of a chub safe containing USD \$25 000-00, 97 grams gold, US \$5 000-00, 1 HP Samsung laptop, 2 cell phones, Samsung galaxy tablet and 2 wrist watches. The property of total value US \$ 35 690-00 of which on property of value US \$ 1 200-00 was recovered.

Pursuant to the plea of guilty the appellant was convicted and sentenced to 12 years imprisonment of which 3 years imprisonment was suspended for 5 years on usual conditions of good behaviour and a further 2 months imprisonment suspended on conditions of restitution leaving an effective sentence of 7 years imprisonment. The appellant's accomplice who had a previous conviction was sentenced differently for the obvious reason that he was not a first offender. He was sentenced to 12 years of which 2 years were suspended on conditions of restitution and the previously suspended 6 months prison term was brought into effect. The accomplice had an effective prison term of 10½ years imprisonment.

The appellant dissatisfied with the conviction and sentence imposed on him by the trial court lodged the present appeal. The appellant abandoned the appeal against conviction and persisted with the appeal against sentence. The appellant raised 5 grounds of appeal as follows:

1. “The court *a quo* erred in passing an excessively harsh sentence that induces a sense of shock.
2. The court *a quo* erred in failing to appreciate that the appellant was a first offender who pleaded guilty to the offence and therefore deserved lenient sentence.
3. The court *a quo* erred in failing to note that the sentencing trends have since changed and courts must endeavour to pass corrective, educational and retributive sentences as opposed to punitive sentences that condemns and destroys the offenders.
4. The court *a quo* erred in paying a lip service to the strong and compelling mitigatory factors advanced by the appellant which should have resulted in substantial reduction of sentence.
5. The court *a quo* erred in imposing a similar sentence with co-accused who had previous convictions in circumstances where appellant was a first offender and ought to have been treated differently with his co-accused.

The appellant in his prayer suggested a sentence of 5 years imprisonment of which 2 years is suspended on conditions of good behaviour. A further 2 years suspended on conditions of restitution, leaving an effective 1 year imprisonment. During the hearing Mr *Chatambudza* for the appellant suggested 6 to 7 years sentence 2 years being suspended on conditions of good behaviour and 3 years for restitution leaving an effective 1 or 2 years. I propose to comment on reasons for the variance in the suggested sentences latter.

The brief facts of the matter are as follows: The appellant together with 2 accomplices hatched a plan to rob the complainant at his place of residence. The appellant was armed with a pistol while his accomplices were each armed with a rope and a machete. The appellant and accomplices approached the complainant under the pretext of selling gold to him. The appellant and accomplices then produced the weapons including pointing a pistol at the complainant while at the same time demanding money. By using force and violence the appellant stole US \$ 25 000-00, phones, laptop, a Samsung galaxy tablet, wrist watch and 97 grams of gold. The total value of property stolen is US \$ 35 690 of which property of value US \$ 1 200-00 was recovered.

A reading of the record of proceedings reveals the Magistrate's reasons for sentence. The Trial Magistrate ably weighed the circumstances of the matter in conjunction with mitigatory and aggravatory factors. The trial court appreciated the sentencing principle of matching the offence to the offender and ensuring that justice is done. In an appeal against sentence the question is not really whether the sentence imposed is wrong or right neither is it a matter of suggesting that if I was presiding over I would have imposed 6 years and not 7 years. See *Muhomba v State* SC 57/13. What falls for consideration is simply whether or not the sentencing court properly and judiciously exercised its sentencing discretion. I earlier mentioned that the appellant's counsel oscillated from suggesting a sentence between 5 and 7 years in a clear indication that sentencing task is a discretion aspect which is not stone casting to the extent of sentence being one size fits all. What is central in assessing an appropriate sentence is the fact that the sentencing court considers all the circumstances of the matter, the nature of the offence, the offender and precedents on similar offences; weighing the offence to the offender in a manner enabling attainment of justice.

The first ground of appeal that the sentence passed is excessively harsh and induces a shock cannot be sustained when one looks closely at the well-reasoned basis for sentence. A gang armed with weapons including a pistol used force and violence to induce submission into taking property of high value. A sentence in the region of 12 years with portions suspended for good behaviour and restitution is in sync with sentences imposed for gang armed robbery. This ably dispels the third ground of appeal.

The second ground that the court *a quo* failed to appreciate that the appellant was a first offender who pleaded guilty is just an assertion not backed by any substance. The court *a quo* actually recognised the plea of guilty and that appellant is a first offender. The court did not pay lip service to the plea as evidenced by suspension of 3 years on conditions of good behaviour. The plea of guilty and that the accused is a first offender was reflected and credited by suspension of a portion of the sentence on conditions of good behaviour and suspension of another portion on conditions of restitution. The criticism of the trial court on not having due regard and credit to the plea of guilty is baseless. The fourth ground of appeal again crumbles since the court *a quo* considered all mitigatory factors.

The last ground of appeal that the court *a quo* erred by imposing a similar sentence to the appellant's co-accused who had a previous conviction is false. It is settled that co-perpetrators should ordinarily be treated uniformly when it comes to sentence. Different sentences should only be imposed in circumstances where it is just to differentiate

perpetrators who acting with common purpose and in concert accomplish an unlawful enterprise. In this case the co-accused and repeat offender was sentenced to 12 years of which 2 years were suspended on conditions of restitution. Nothing was suspended on conditions of good behaviour as was done for the appellant. The suspended prison term of 6 months emanating from the previous conviction was also brought into effect. The appellant's effective prison term of 7 years is certainly not the same as the 10½ years effective prison term for the co-accused. The last ground of appeal lacks merit and therefore it cannot stand.

It is apparent that the court *a quo* was alive and conscious to sentencing principles. All relevant factors namely the plea of guilty, aggravatory and mitigatory factors and circumstances of the case were properly canvassed in an endeavour to come up with an appropriate sentence. See *State v Makunike* 2015 (2) ZLR 404 in which the court emphasized the need to consider the aims of sentencing in deciding an appropriate and proportionate sentence for each individual case. Both counsel in their heads cited relevant cases of robbery and or armed robbery which reveal the trend in sentence for the serious and prevalent offence of robbery which invariably involves premeditation and determination. See *Farai Kambarami and Another v The State* HH 273/14. *Bothwell Taurai Nyamade v The State* HMT 6/20 and *S v Madondo* 1989 (1) ZLR 300 (H). In the *Madondo* case comments by GREENLAND J as he then was are pertinent.....

“The starting point is to accept that robbery is an inherent serious offence. It may properly be regarded as *iniquitos* as it usually involved premeditation, criminal resolve and purpose brazen execution, and attack on a human victim with the attendant disregard of that person's right to personal security and forceful dispossession of whatever property the victim has for the victim is often terrifying and degrading experience. He is injured in his person and property. The perpetrator acts with contempt and callousness. It is therefore proper to regard robbery as particularly reprehensible form of criminal behaviour and that attitude should be reflected in the sentence.”

In the present case the court *a quo* cannot be faulted for imposing an effective prison term for a robbery committed in aggravatory circumstances. An armed gang forcefully executed the unlawful enterprise and got away with property of high value. The Trial Magistrate in reasons for sentence revealed a clear thought process culminating in the sentence imposed. The sentencing court has a discretion which should not be lightly interfered with. The sentence imposed should only be interfered with in situations where the sentencing court would have injudiciously exercised its discretion leading to glaring serious misdirection amounting to injustice. (See *S v Mungwenhe* 1991 (2) ZLR 66, *Rumushu and Others v The State* SC 25/93).

In the present case there is no misdirection evinced by the court in the manner it assessed on appropriate sentence. The sentence imposed is in sync with sentences imposed in cases of similar nature. See *Mpolis Ndlovu and Anor v The State* HB 266/18 for robbery of similar nature, a sentence of 12 years effective was confirmed. In this case the trial court in full appreciation and recognition of the totality of the circumstances of the matter assessed a befitting sentence that meets the justice of the case. There is clearly no basis for interfering with the sentence imposed by the trial court. All the grounds of appeal raised have no merit and as such they cannot be sustained.

Accordingly the Appeal is dismissed.

MUZENDA J agrees _____

Rubaya and Chatambudza, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners