JECONIAH NYATHI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J & CHEDA AJ
BULAWAYO 28 JANUARY & 21 FEBRUARY 2013

Appellant in person
L. Maunze respondent's counsel

Criminal Appeal

KAMOCHA J: The appellant appeared in the Bulawayo regional court facing twelve charges of crimes which he and his colleague committed in three days. Six of the offences were allegedly committed on 24 October 2006, four on 25 October 2006 and two of them on 26 October 2006.

Count 1: On 24 October 2006 he and his colleague were alleged to have been unlawfully found in possession of a .38 special revolver without a valid firearms certificate in respect of it in contravention of section 4(1)(a) of the Firearms Act [Chapter 10:09].

Count 2: It was alleged that on 24 October 2006 they were also found to be in unlawful possession of 4 x 9mm live rounds of ammunition in contravention of section 4(4)(a) of the Firearms Act [Chapter 10:09].

In count 3 he and his colleague were alleged to have robbed, on 24 October 2006, one Abel Ncube of his Dig wheel Humber bicycle valued at $50 000 Zimbabwe dollars.

In count 4 the allegation was that on 24 October 2007 in order to facilitate the robbery of Abel Ncube they tied him to a tree and stole his bicycle and then left him still tied to the tree thereby depriving him of his freedom of bodily movement in contravention of section 93 (1)(a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23].

Count 5 is another robbery which also took place on 24 October 2006. The appellant and his colleague were armed with a loaded revolver and an axe and robbed Khondo Ndlovu of

a bag full of an assortment of items of grocery valued at $16 000,00 and his bicycle valued at $40 000,00.

In count 6 the accused and his colleague like in count 4 tied the complainant Khondo Ndlovu to a tree with a rope in order to facilitate the robbery. They left him tied to the tree thereby depriving him of his freedom of bodily movement in contravention of section 93 (1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

The offence in count 7 was committed on 25 October 2006 at Aleck Ndlovu's homestead, Tsheguta village in the Malalume area the accused persons who were armed with a revolver and axe and using the said weapons attempted to rob Simelinkosi Ndebele of South African Rands.

Count 8 was attempted murder in that on 25 October 2006 at the same place when the complainant escaped through the window and fled the accused fired two shots towards her with the revolver but missed their target.

Count 9 was a charge of unlawful entry into the house of Handsome Ndlovu at Tsheguta village, Malalume area of Plumtree on 25 October, 2006.

The tenth count is one of theft in that while they were inside the house they stole from there, property valued at $495 500 most of which was recovered except for property valued $500,00.

Count 11 was yet another unlawful entry into the house of Handsome Ndlovu the following day – 26 October 2006.

While inside the house they stole from there, property valued at $1 947 000,00 of which property valued at $45 000,00 was recovered.

Both accused pleaded not guilty to all the counts but were convicted of all counts despite their protestations. They were then sentenced as follows:

Count 1 - 7 years imprisonment

Count 2 - 1 year imprisonment

Counts 3, 5 and 7 the robbery charges were treated as one for sentence: 8 years imprisonment

Count 4 and 6 taken as one for sentence - 10 years imprisonment

Count 8 - 10 years imprisonment

Counts 9 and 11 the two counts of unlawful entry into a house - 2 years

Counts 10 and 12 charges were treated as one for sentence - 6 years imprisonment

Of the total of 44 years imprisonment 10 years imprisonment was suspended for a period of 5 years on the customary conditions of future good behaviour.

Aggrieved by the decision of the trial court the appellant filed this appeal against both conviction and sentence and sought leave of this court to prosecute an appeal in person. Leave to prosecute an appeal against conviction was refused but the appellant was granted leave to prosecute his appeal in person against sentence only.

The appellant contended that the sentences meted against him were manifestly excessive and induced a sense of shock in him.

The state counsel made some concessions which, in my view, were proper. He conceded that the accused should have been charged with a single count in respect of counts 1 and 2. They should have been charged with contravening section 4(4)(b) of the Firearms Act [Chapter 10:09] possessing the firearm and rounds of ammunition without a licence for which the sentence provided is a fine not exceeding level six or imprisonment not exceeding one year. Accordingly counts 1 and 2 are merged into one count. The original sentences of the court *a quo* are hereby set aside and substituted with a sentence of 1 year imprisonment.

Counts 3 to 6

In respect of these counts the accused robbed two different complainants at different times. In order to effectively and successfully rob their victims the accused tied each of them to a tree and thereafter robbed them of their respective property and left them still tied to the trees. They were charged with two counts of robbery and two counts of depriving them of their bodily movement in contravention of section 93 (1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Respondent's counsel properly conceded, in my view, that there was an impermissible splitting of charges. Instead of charging the appellant and his colleague with two counts of robbery and two counts of depriving their victims of bodily movement, they should have been charged with just two counts of robbery. I agree.

In the result the convictions and sentence of 10 years imprisonment in respect of counts 4 and 6 are hereby set aside.

The two robberies were committed in aggravated circumstances. In each case the appellant and his colleague left their victims tied to trees and went away. Similarly the attempted robbery in count 7 was committed in aggravated circumstances in that they struck their victims with an axe handle and threatened to shoot her.

These three counts were treated as one for sentence and the appellant and his colleague were sentenced to 8 years imprisonment. There is no reason why this court should interfere with that sentence. It is hereby allowed to stand.

The respondent's counsel had contended that the two robbery charges should each attract a sentence of 8 years imprisonment and the attempted robbery 6 years imprisonment. This court would then be substituting the trial court's sentence with a more severe one. That would be undesirable. This court will therefore not accede to that suggestion.

Nothing turns on the sentence imposed in respect of the last four counts. The sentences imposed are not out of step with the sentences normally meted for those offences. The appeal accordingly fails in respect of the sentences on those counts.

The sentences now stand as follows:

Count 1 - 1 year imprisonment

Counts 3 and 5 the two robbery charges and count 7 one attempted robbery are treated as one for sentence - 8 years imprisonment

Count 8 one count of attempted murder - 10 years imprisonment

Counts 9 and 11 the two counts of unlawful entry - 2 years imprisonment

Counts 10 and 12 the two counts of theft - 6 years imprisonment

Total: 27 years imprisonment of which 10 years imprisonment is suspended on the conditions formulated by the trial court.

Cheda AJ ……. I agree

Attorney-General's Office respondent's legal practitioners