

THE STATE
versus
PRINCE MATSA
and
SIMBARASHE GUMBO

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 25th October, 2016

Criminal Review

MAWADZE J: Both accused persons appeared before the Magistrates Court at Chivi facing 2 counts of theft as defined in s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and 9 counts of unlawful entry into premises in aggravating circumstances as defined in s 131(1) and 131(2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The third accused person defaulted court hence a separation of trial was granted.

Both accused persons pleaded guilty to all the 11 counts and were duly convicted. The convictions of both accused persons in respect of all the 11 counts are in order and are duly confirmed.

What exercised my mind is the appropriateness of the sentences imposed by the trial Magistrate in each of the 11 counts. In particular, I am concerned about the value of the property involved in each count and the sentence imposed for each count. In order for one to appreciate this concern I shall briefly summarise the facts of the matter in respect of all the 11 counts.

All the 11 counts were committed on a date unknown to the prosecutor but in August 2016 in five different villages under headman Chipindu in Chivi.

In respect of counts 1 and 2 of theft the accused persons approached complainants' homesteads after complainants had gone to church. In count 1 they stole 50kg of groundnuts, a pair of pliers and a file all valued at US\$50 of which property valued at US\$12 was recovered. In count 2 they stole vegetables from a garden and a pair of pliers all valued at US\$8 of which nothing was recovered. In respect of counts 3 to 10 the accused persons used an iron bar to force entry into the complainants' houses from which they stole property.

In count 3 they stole a loaf of bread, mealie meal and a bottle of cooking oil valued at US\$6 of which nothing was recovered.

In count 4 they stole two pots, 2 kg of maize meal, a cooking stick and a bottle of cooking oil all valued at US\$22 of which nothing was recovered.

In count 5 they managed to steal a pot valued at US\$12 and it was recovered.

In respect of count 6 they stole 10kg of mealie meal, 5 kg of rice, 1 kg cremora powder, 12 x 50g of royco, some matemba, 2 litres of cooking oil and US\$100 all valued at US\$50 of which nothing was recovered.

In count 7 the accused stole a pot, a bottle of peanut butter and some sadza all valued at US\$22 for which nothing was recovered.

In count 8 they stole one satchel bag, a necklace, some washing powder and a bath soap all valued at US\$11 of which nothing was recovered.

In respect of count 9 the accused stole a pair of white shoes, pair of tennis shoes, a bag, jean trousers, a shirt, vest, two t-shirts, a wallet, US\$80, a pair of black shoes and a nokia cellphone all valued at US\$255 of which only property valued at US\$53 was recovered.

In count 10 both accused stole a pair of shoes, some washing powder, electric bulbs and a bottle of orange crush drink all valued at US\$39 of which property valued at US\$12 was recovered.

Lastly in count 11 the complainant who is a shop attendant left the shop to go and bath. The accused persons then approached the shop and opened the closed but unlocked door and stole 10 x 20 packets of cigarettes, 2 x 200 ml of chateau and US\$50 all valued at US\$74 of which nothing was recovered. It is not clear from the agreed facts how the accused were arrested after committing all these offences.

In assessing the appropriate sentence, the trial Magistrate treated counts 1 and 2 of theft as one and sentenced each of the accused persons to 4 months' imprisonment. In relation to counts 3,4,5,6,7,8,9, and 10 each count was treated separately and each accused was sentenced

to 6 months' imprisonment. In count 11 each accused was sentenced to 8 months' imprisonment. This means that each accused was sentenced to a total of 60 months imprisonment. The trial Magistrate suspended 12 months' imprisonment in respect of each accused person on the usual conditions of good behaviour for 5 years and a further 3 months imprisonment on condition each accused person pays restitution to the complainants in count 6 of US\$75, count 9 of US\$101 and count 11 of US\$37 by 30 November 2016.

It is not clear why restitution was not ordered in respect of complainants in counts 1,2,3,4,7,8 and 10 in which property valued at US\$38, \$8, \$6, \$22, \$22, \$11 and \$27 respectively was not recovered. My assumption is that probably in the exercise of his or her discretion the trial Magistrate deemed the actual prejudice in counts 1,2,3,4,7,8 and 10 to be insignificant to warrant an order to suspend part of the sentence on condition of restitution.

The effective term of imprisonment in respect of each of the accused is 45 months.

The total value of the property stolen in respect of all the 11 counts is US\$649 and property valued at US\$77 was recovered hence the actual prejudice is property valued at US\$572.

I have no doubt in my mind that both accused persons' moral blameworthiness is high in this case as they engaged in persistent criminal conduct or enterprise on 11 occasions. The moral blameworthiness of both accused persons is a crucial factor the trial Magistrate indeed took into account in assessing the appropriate sentence see *S v Sawyer* 1999 (2) ZLR 390. They showed total disrespect of other people's proprietary interests and went on a criminal spree of looting the little valuable possessions of the complainants who are mere peasants.

The proper approach the court must take in sentencing all accused persons convicted of more than one count is well settled in our law and was succinctly enunciated by MAKARAU J (as she then was) in *S v Damba & Anor.* 2004 (1) ZLR 296 (H) at 298 D – F. see also *S v Chera & Anor.* 2008 (2) ZLR 58 (H). The trial court can either decide to treat all counts as one for purposes of sentence and impose a globular sentence which would be appropriate or to determine an appropriate sentence for each count separately reflecting the seriousness of the offence in each count. If the latter option is taken the trial court should ensure that the total aggregate sentence in all counts is not unduly excessive.

Both the offences of theft and unlawful entry into premises in aggravating circumstances are serious offences which in the circumstances warranted the trial court to visit the accused persons with custodial sentences. Both accused persons benefited from their criminal conduct. People should feel safe when they leave their premises going about their day to day duties as they cannot carry their houses with them wherever they go. They can only secure their premises by either closing or locking the doors as most of them cannot afford to hire security guards. This seems not to be deterrent at all to persons of accuseds' inclination. The trial court has a very wide discretion in assessing the appropriate sentence. However, this discretion ought to be exercised on rational and reasonable grounds.

I am not satisfied that the trial court properly exercised its discretion in this case. While it was appropriate to treat each count separately for purposes of sentence the trial court failed to ensure that it properly assessed the appropriate sentence in each count. There is no rational basis upon which each of the accused was sentenced to 6 months' imprisonment in respect of counts 3,4,5,6,7,8,9 and 10. As was said by NDOU J. in *S v Nyathi* 2003 (1) ZLR 587 (H) the court should avoid mathematics in assessing sentence. While the said counts all relate to unlawful entry into premises in aggravating circumstances and the modus operandi was the same the various counts can be reasonably distinguished if one takes into account the value of the property stolen. Failure to do so results in an inappropriate sentence which constitute a misdirection. The sentence imposed on each count is so excessive and disturbingly inappropriate. For example in count 3 the value of property stolen is a mere US\$6 and each accused was sentenced to 6 months' imprisonment just like in count 9 where the value of property stolen is US\$255. The trial court in my view simply decided, without an objective basis to impose a sentence of 6 months in each count. The result is that an inappropriate sentence has been imposed on each count thus defeating the goal of coming out with a realistic sentence which is not manifestly excessive see *S v Sifuya* 2002 (1) ZLR 437 (H).

While it was proper to treat each count separately for purposes of sentence my view is that the sentence imposed on each count is excessive and thus constituting a misdirection. I am therefore inclined to interfere with the sentences imposed in each count.

The sentence imposed by the trial court for the reasons I have given must be set aside and substituted with the following;

“Each accused person is sentenced as follows;

Counts 1 and 2 are treated as one for sentence – 2 months imprisonment

Count 3 – 1-month imprisonment

Count 4 – 2 months imprisonment

Count 5 – 1-month imprisonment

Count 6 – 3 months imprisonment

Count 7 – 2 months imprisonment

Count 8 – 1-month imprisonment

Count 9 – 4 months imprisonment

Count 10 – 2 months imprisonment

Count 11 – 2 months imprisonment

Total: 20 months imprisonment of which 3 months imprisonment are suspended for 5 years on condition the accused does not commit within that period any offense involving dishonesty for which the accused is sentenced to a term of imprisonment without the option of a fine.

Of the remainder of 17 months imprisonment, 3 months imprisonment are suspended on condition the accused pays US\$75 to the complainant in count 6 SOPHIA TAKANA; US\$101 to the complainant in count 9 RYAN MUZARAWETU and US\$37 to complainant in count 11 BELINDE RUZIVE all through the Clerk of Court at Chivi Magistrates Court on or before 10 November 2016.

Effective: 14 months imprisonment.”

Each of the accused should be called and advised of the altered sentence.

MAFUSIRE J. agrees