1. JIMSON GUDO
   Versus
   THE STATE

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HIGH COURT OF ZIMBABWE
MAWADZE J & WAMAMBO J
MASVINGO, 10 September, 2021

Ms. I. Moyo for the Appellant
Ms M. Mutumhe for the Respondent

Criminal Appeal

MAWADZE J: On 21 July 2021 after hearing arguments from counsel we proceeded to deliver an *extempore* judgement. The resultant order issued was as follows;

> "*It is ordered that the appeals in respect of sentence in both matters CRB CA 75/20 and CA 76/20 be and are hereby dismissed for lack of merit."*

On 6 September 2021 I received a letter from *Ms I Moyo* counsel for the appellant in both matters in which she requested written reasons for the judgement. These are they;

Both appeals relate to the same appellant. He was convicted on the same day by the same magistrate sitting at Mwenezi on 9 May 2020. Both matters proceeded in terms of section 271 (2)

(b) of the Criminal Procedure Evidence Act [*Chapter 9:07*]. The appellant in both matters was sentenced to effective custodial sentences.

Dissatisfied with the sentences imposed in both matters the appellant approached this court. The appellant is represented by *Ms I Moyo* in both matters and *Ms Mutumhe* represents the respondent in both matters.

At the commencement of the hearing of both matters *Ms Moyo* for the appellant in CA 75/20 and CA 76/20 applied for the consolidation of the two appeals. The application for consolidation was supported by *Ms Mutumhe* for the respondent being the state. This application for consolidation was informed by the fact that similar issues arise in both matters and that both matters were being argued by *Ms Moyo* for the appellant and *Ms Mutumhe* for the respondent. Consequently we granted the application for the consolidation of the two appeals.

The facts of the two matters are as follows;

a) RE: CA 75/20

In this matter the appellant then aged 26 years was jointly charged with Givemore Madzidzi aged 33 years and Isiah Dzingai aged 36 years. They all reside in Mwenezi, Masvingo.

The offence in this matter relate to robbery as defined in section 126 (i) of the Criminal Law Code [*Chapter 9:23*]. All the 3 accused pleaded guilty to the charge.

The agreed facts are that on the night between 21 April 2019 and 22 April 2019 the appellant teamed with other five persons [the other three are still at large] and proceeded to Vililvili Netone and Telcel boosters in Mwenezi. Both boosters were being manned by a security guard called Paul Keke. This was around midnight.

The appellant and his colleagues stealthily approached the said security guard. They grabbed him from behind and tied him with a piece of wire.

They overpowered the hapless security guard and dispossessed him of the keys to the boosters. The security guard was dragged into the guard room where he was locked in. The appellant and his colleagues opened a separate room and stole 2 by 2 volts generator batteries and 8 by 12 booster batteries all valued at US $ 4 200. After their arrest on 7 April 2020 some property whose value is not specified was recovered.

In mitigation the appellant who has four children and is unemployed implored the court to impose a lenient sentence on account of his plea of guilty. He also requested the court to prevail

upon the prison officers so that he would be treated well in prison. By then the appellant in all probabilities had accepted that a custodial sentence was not avoidable.

All the 3 accused persons were first offenders. Each of them was sentenced to 25 months imprisonment of which 10 months imprisonment was suspended for 5 years on the usual conditions of good behaviour. The effective prison term for each of them is 15 months.

The appellant raises five grounds of appeal against sentence. However these grounds are not only repetitive but also contradictory. They all amount to one issue wherein the appellant simply begs for mercy. The contradiction is that the appellant requests for a non-custodial sentence but in his prayer submits that and effective prison term of 5 months would meet the justice of the case.

b) RE: CA 76/20

In this matter the appellant was jointly charged with Givemore Madzidzi for theft as defined in section 113 (i) of the Criminal Law Code [*Chapter 9:23*].

The undisputed facts are that on 1 May 2019 at around midnight the appellant teamed up with three other persons (the other two are still at large) and proceeded to Mavange Village, Chief Neshuro, Mwenezi, Masvingo where they stole 6 by 100 watts solar panels. The six solar panels were erected at a local community project and are valued at US $1 600. After their arrest only property valued at US $500 was recovered.

In mitigation the appellant disclosed that they had used one of his accomplice's motor vehicle to commit the offence (that is to carry the loot). Again his plea was to be treated well in prison.

Each accused was sentenced to 12 months imprisonment of which 2 months imprisonment was suspended for 5 years on the usual conditions of good behaviour leaving and effective prison term of 10 months.

Just like in CA 75/20 the four grounds of appeal in CA 76/20 virtually amount to one issue in which the appellant pleads for leniency. In his prayer the appellant believes a sentence of 3 months wholly suspended on condition he performs community service would be in order.

In my respectful view the voluminous heads of argument in both appeals bring nothing new to the table. There are no legal issues which can exercise one's mind at all. In all fairness the heads of argument are replete with the obvious and well known general principles of assessing an

appropriate sentence in a criminal matter. Similar cases are repeatedly cited regurgitating the same principles. The chorus is the same as it were. What I find missing is how, in specific terms, is it being said the court *a quo* misdirected itself in assessing the sentence in both matters.

I therefore find no reason at all in this judgement to tread along the same well beaten path by repeating the same principles and citing any case law. All I can do is to show that the court *a quo* as per the reasons for sentence was well alive of the need to strike a balance between the mitigatory and aggravatory factors in arriving at the sentences imposed in both matters. This is also well captured in the brief and succinct heads of argument files by the state (being the respondent).

To be fair to *Ms Moyo* for the appellant her oral submissions were a big yawn. She clearly and visibly lacked the conviction of what she uttered. She repeatedly said the court *a quo* over emphasised the interests of the local community in both cases without demonstrating in specific manner why she arrived at such a conclusion. *Ms Moyo's* oral submissions were more of a plea for clemency rather than a demonstration or identification of the misdirection on the part of the court *a quo*.

It is trite that the question of an appropriate sentence is the domain of the trial court. The appellant court can only interfere with the exercise of such discretion if there is a serious or material misdirection which offends the notion of justice.

In *casu* it is accepted that the appellant is a first offender. He pleaded guilty to the charges in both matters. Part of the stolen properly was recovered. Imprisonment would obviously negatively impact upon him and his dependants.

To my mind the aggravating factors, after a careful analysis, far out weigh the mitigatory factors. In brief I may simply highlight some of them.

In respect of the offence of robbery this is inherently a serious offence especially where gratuitous violence is administered to a helpless victim. The fact that the two boosters were guarded did not deter the appellant and his accomplices. This was clearly a gang offence involving six people. This shows pre planning and premeditation. As per the agreed facts the offence was not only well planned but meticulously executed successfully. The offence was committed under the veil of darkness to avoid detection. The security guard was physically abused, violated and traumatised. The motivation in this case was purely for selfish reasons, personal gain and greed.

The appellant and his colleagues were oblivious to the interests of the local community and the value of such infrastructure like boosters in this day and age. They simply decided to vandalise such infrastructure for narrow, personal and monetary gain. The owners of the infrastructure were prejudiced and the local community was deprived of as important communication tool. Such primitive and selfish interests retard development.

After commuting the offence of robbery, the appellant was not done yet. He decided to look for solar panels. Again the theft offence was a gang offence.

The appellant targeted solar panels which were useful to a community project. This adversely affected many innocent local villagers. Such conduct again is driven by selfish interests and greed. The appellant derived benefit from this conduct.

It is correct that the sentences imposed in both matters fall within the threshold within which the option of community service should be considered. However the relevant issue in both cases would be whether the option of community service would meet the justice of both cases.

I am of the firm view that community service is inappropriate in both cases. Such a sentence would send wrong and harmful signals to persons of like mind. It would ridicule and put into disrepute the noble concept of community service.

While one may say an effective sentence of 25 months in both cases is rather on the severe side, the point remains that an effective custodial sentence is appropriate. The appellant's conduct deserves the biting and sharp edge of the court's teeth. It deserves censure.

At the end of the day I find no misdirection at all in how the court *a quo* exercised its discretion in assessing sentence in both matters. There is therefore no objective basis for this court to interfere with the decision of the court *a quo* in both matters. The appellant made his bed and he should be content to lie on it.

It is for these reasons that the appeals in both CA 75/20 and CA 76/20 were dismissed for lack of merit.

WAMAMBO J agrees…….

Mutendi, Mudisi, & Shumba, counsel for the appellant

National Prosecuting Authority counsel, Respondents Legal Practitioners