

THE STATE
versus
EDWARD BHEDHA MAKIWA
and
PRESSMORE MUKONI

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 22 MARCH 2018

Criminal Review

MATHONSI J: Both accused persons are aged 18 years, they are both unemployed and hail from Zvishavane. They appeared before a magistrate at Zvishavane and were on 15 February 2018 convicted of three counts of robbery. In count one they were each sentenced to 4 years imprisonment of which 1 year imprisonment was suspended for 5 years on condition of future good behaviour. Of the remaining 3 years 2 months imprisonment was suspended on condition each restitutes the complainant in the sum of \$200-00 by 30 April 2018.

In count two each was sentenced to 3 years imprisonment none of which was suspended. In the last count they were each sentenced to 3 years imprisonment of which 2 months imprisonment was suspended on condition they each retribute the complainant the sum of \$180-00 by 30 April 2018. This then left the two very youthful offenders with an effective 8 years and 8 months imprisonment, an aggregate sentence which offends all sense of justice. In fact two very critical issues arise from the sentence. Firstly it is that magistrates should avoid by all means suspending extremely small portions of an otherwise very heavy sentence on condition of restitution, when it is obvious that the accused person serving a long term of imprisonment will have no incentive whatsoever to pay restitution under those circumstances.

In order to be meaningful and to benefit an accused person a suspension of part of the sentence on condition of restitution must substantially reduce the sentence so that it will entice the accused person to retribute and derive benefit. Honestly what is the point of suspending two months of a total prison term of well over 8 years. It is pointless because an accused person serving such a long term would rather see it through than to be bothered with looking for money

to pay restitution and still remain behind bars for several years. When that is considered against the fact that restitution is directed at benefiting the complainant it becomes apparent that a sentencer who engages in such activity fails completely in achieving anything. Neither the accused nor the complainant will relate to such a sentence.

Secondly, it is a kind of sentence where mathematics plays such a huge role in shaping the punishment that the purpose of sentencing is completely lost and the final aggregate sentence becomes so divorced from both offenders that it is reduced to the abstract. How can anyone applying their mind properly to the task at hand settle for 3 year prison terms for each of the 3 counts ending up with a total of 9 years imprisonment for accused persons who are so young they actually pass as boys? The sentence is so disproportionate to all the circumstances of the accused persons and the offences themselves it does not make sense at all.

The facts in the first count are that at about 2000 hours on 17 November 2017 the two accused persons acting in connivance with two others who were convicted and sentenced separately intercepted Martin Kadzimu, a police officer stationed at Criminal Intelligence Unit in Masvingo, as the good cop found his way home along an unnamed road near Delta Beverages in Zvishavane. They grabbed him by the neck while threatening him with a machete, and forcibly took from him a Samsung cellphone, a mobiwire cellphone, a black wallet containing \$14-00, bank, national registration and police cards all valued at \$400-00. Having robbed the complainant, they escaped and nothing of the stolen items was recovered.

In count two the facts are that the quartet accosted the complainant Fidelis Nyamazana along Drinkwater Street in Zvishavane on 17 November 2017 and grabbed him by the neck. They forcibly took two cellphones, and a wallet containing his national identity card and bank card before vanishing from the scene. Of the stolen property worth \$463-00 property worth \$363-00 was recovered following their arrest.

In the last count, the same group used the same *modus operandi* to rob Nobert Shava of a Huawei 535 cellphone valued at \$360-00 which was never recovered. When the two accused persons appeared before the trial court they pleaded guilty to the three charges and, upon conviction, they were sentenced aforesaid.

In mitigation of sentence the first accused stated that he is 18 years old, is unemployed, is single and has no savings or assets to his name. He stated further that he had been influenced by his colleagues to commit the offence. The second accused also stated that he is 18 years old, he is unemployed, is single and has no savings or assets of his own. He committed the offences because he was drunk. While acknowledging their youthfulness when assessing sentence and that they were first offenders who had pleaded guilty thereby showing remorse and contrition, the trial court stated that robbery is a prevalent offence which involves the use of violence. Therefore their “moral guilt” was very high.

In my view the magistrate paid lip service to the mitigatory features of the case. There were very weighty mitigatory factors in that the accused persons are youthful offenders who pleaded guilty. They are first offenders who had shown remorsefulness and contrition. While it is accepted that robbery invariably attracts a custodial sentence, each case must be looked at on its own facts and circumstances.

The circumstances of the offences are that the robberies in counts one and two were committed on the same day and therefore by virtue of proximity of occurrence they should have been treated as one for purposes of sentence. Apart from that, in all three cases other than grabbing the complainants by the neck, none of them was assaulted or injured although a machete was used to threaten them into submission. It cannot be said therefore that the circumstances make them extreme cases of robbery. Reference to violence does not sit very well with the circumstances as it paints a wrong picture.

There is also an element of suggestibility alluded to by the accused persons to the effect that they may have been influenced by other people. In fact two other accused persons were separately charged with the same offences. Their ages were not given and therefore the court did not have the benefit of knowing if they had an over-bearing influence on these two accused persons who are only 18 years old. The state did not bother to challenge that part of the mitigation. Any doubt should have been for the benefit of the accused persons, as it is possible the other two could have been the principal offenders.

As I have said the practice is that where there is a multiplicity of counts, those which are related in the manner and time in which the offences were committed may be taken together for

purposes of sentence. See *S v Tadzembwa* HB-85-16. The other option would be to impose a globular sentence in respect of all the counts. It is always undesirable to adopt a tariff or mathematical approach to sentencing, that is to say, to assess the same sentence for each count, as the aggregate sentence may turn out to be so excessive as to induce a sense of shock. In the words of NDOU J in *S v Nyathi* 2003 (1) ZLR 587 (H) at 588 C-G:

“This is mathematics in sentencing. In *casu*, although the individual sentences imposed in each count are in no way excessive, their cumulative effect is so excessive as to call for interference. See *S v Hassim* 1976 (2) PH H 58 (N). It is trite that there are no hard and fast rules dictating whether a court should treat a number of counts separately or together for purposes of sentence. A trial court has a very wide discretion and, provided that discretion is exercised on reasonable grounds, an appeal court or review judge will not interfere: See *S v Coetzee* 1970 (4) SA 83 (RA). The sentence must, of course fall within the court’s jurisdiction: See *S v Makurira* 1975 (3) SA 83 (R). Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is a useful way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect not too harsh on the accused.”

In *S v Chirwa* HH 79-94 (unreported) which was followed in *S v Sifuya* 2002 (1) ZLR 437 (H) at 439 E-G, GARWE J (as he then was) recommended a globular sentence in cases involving multiple counts or to treat the counts separately to determine an aggregate sentence which is then palliated by ordering some counts to run concurrently with others. He said:

“The position is now fairly settled that in cases involving multiple counts, the correct approach to sentence is either to take all counts as one for purposes of sentence and then impose a globular sentence which the court considers appropriate in the circumstances or alternatively to determine an appropriate sentence for each count taken singly so that the seriousness of each offence is properly reflected. The court should then determine a realistic total which it considers appropriate in the circumstances and where necessary the severity of the aggregate sentence on all the counts taken together may be palliated by ordering some counts to run concurrently with others.”

Considering all the factors of this case including the ages of the accused persons who, at their young ages, should not really be punished like mature people and should be not be destroyed by a lengthy prison term, I think a combination of the methods of joining some of the counts for sentence and suspending part of the sentence on condition of restitution and good behaviour will achieve a reasonable aggregate sentence.

In the result, it is ordered that:

1. The convictions of the accused persons are hereby confirmed.
2. The sentences are set aside and substituted with the following:
 - “(a) Counts 1 and 2 are treated as one for purposes of sentence and each accused is sentenced to 3 years imprisonment of which 1 years imprisonment is suspend for 5 years on condition they do not, during that period commit any offence involving violence for which they are sentenced to imprisonment without the option of a fine.
 - (b) Count 4, each accused is sentenced to 24 months imprisonment of which 12 months imprisonment is suspended for 5 years on condition they do not during that period commit any offence involving violence for which upon conviction they are sentenced to imprisonment without the option of a fine.
 - (c) Of the remaining 3 years, 1 year is suspended on condition they each retribute the complainant in count 1 Martin Kadzimu the sum of \$200-00 and the complainant in count 2 Nobert Shava the sum of \$180-00 each through the clerk of court Zvishavane by 30 April 2018.

Effective sentence: 2 years.”

Takuva J agrees.....