REPORTABLE (33)

(1) JACOB CHIBUNHE (2) MASIMBA CHIBUNHE
v
THE STATE

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MATHONSI JA & MUSAKWA JA
BULAWAYO: 17 MARCH 2025 & 19 MARCH 2025

The appellants in person

T. M. Nyathi, for the respondent

MAVANGIRA JA:

[1] This is an appeal against the judgment of the High Court sitting at Bulawayo ("court *a quo*") wherein the court sentenced the first appellant to three years imprisonment for each of the 17 counts he had been convicted of, with some counts being ordered to run concurrently, resulting in a total effective sentence of 45 years imprisonment. Similarly, the second appellant was sentenced to three years imprisonment for each of the 18 counts he had been convicted of, with certain counts running concurrently, leading to a total effective sentence of 48 years imprisonment.

BACKGROUND FACTS

[2] The appellants were charged along with two others before the Provincial Magistrates Court ("the trial court") sitting in Gweru, with 18 counts of contravening s 60 A(3) of the Electricity Act [*Chapter 13:19*] ("the Electricity Act"), as read with s 2 (3)(b) of the Electricity Amendment Act, published in Statutory Instrument No. 12 of 2007. All the 18

counts involved vandalising, cutting, damaging, destroying, or interfering with apparatus used for transmitting, distributing or supplying electricity.

[3] The respondent alleged that from 11 February to 29 June 2013, the appellants went all around the town of Gweru, with two other accomplices engaging in a coordinated criminal enterprise that involved the theft of transformer oil totaling 11 530 liters. They caused widespread power outages and significant financial losses to the Zimbabwe Electricity Supply Authority ('ZESA'), the national electricity supplier. The first appellant pleaded not guilty to all counts, whereas the second appellant pleaded guilty to only one count while denying the rest.

PROCEEDINGS BEFORE THE TRIAL COURT

[4] The respondent's case was that the appellants, acting in concert with accomplices James Mahachi and Francis Madziva, used a red Honda Fit with registration number ACW 7466 to go around Gweru committing crimes involving theft of transformer oil. The respondent contended that over a period of 5 months, generally between 8:00 pm and 8:00 am, the appellants targeted at least 18 transformers, siphoning off a total of 11,530 liters of oil, thereby causing damage valued at no less than $96,750. Allegedly, the stolen oil was sold to omnibus operators with whom they had an established market.

[5] At the trial, the state called one Onias Mutambirwa, a Loss Control Officer at ZESA, to testify. He testified that transformer oil theft led to extended power outages, sometimes lasting several days, affecting critical infrastructure and causing severe economic losses. He explained that a single transformer costs between $36 000.00 and $90 000.00 to replace, and that the total damage from the appellants' actions exceeded $96 750. The witness

further testified that the first appellant had a visible scar on his neck, which he suspected resulted from an electrocution incident during the commission of one of the offences.

[6] The state also adduced evidence from Wellington Tadzirapa who was employed as a driver at Chengeta Tours. He testified that he got to know the appellants through the conductor of his public omnibus who informed him that the appellants usually sold diesel. He contended that he bought fuel from them repeatedly for some days. He stated that the fuel was significantly cheaper than the market price because it was going for US$30.00 for 30 litres whereas the normal price was US$42.00. Two other witnesses, drivers from Musemwa and Tube Tours, corroborated this testimony, stating that they too had bought fuel from the appellants on multiple occasions.

[7] Detective Jephta Kayela from the Central Investigation Department Minerals Unit was also called to testify. He stated that after gathering intelligence, law enforcement agents tracked the appellants and discovered some abandoned 25 liters containers at a crime scene. A hosepipe was still connected to a transformer, actively draining oil, suggesting that the perpetrators had fled abruptly. The detective further testified that the appellants voluntarily led the police to multiple locations where transformer oil had been stolen, reinforcing the case against them.

[8] In his defense, the first appellant denied all charges and stated that he was in Harare when the alleged offenses took place. He adduced evidence from Alice Nyashanu, his wife, to support his *alibi*. However, the respondent produced evidence which placed him at the crime scene. As for the second appellant, he admitted to having stolen 90 litres on 28 June 2013 but denied involvement in the remaining 17 charges. He testified that the testimonies

by the commuter omnibus drivers were made under duress because their jobs were threatened by the police.

[9] The trial court found that the offenses were not isolated incidents but part of a larger, systematic operation that demonstrated careful planning and execution. The court found that the appellants deliberately targeted multiple transformers over a sustained period, operating in a coordinated manner to siphon transformer oil. Also, the appellants acted with full knowledge that their actions would disrupt electricity supply, causing significant financial losses to ZESA and adversely affecting communities. The court found that the appellants had an established market for the stolen oil and took calculated steps to avoid detection, reinforcing the conclusion that their actions were premeditated. In the result the court found the appellants guilty of the charges preferred against them. The first appellant was acquitted of one count. Due to the severity of the offenses and the sentencing limitations of the trial court, the matter was referred to the High Court for sentencing.

DECISION OF THE COURT *A QUO*

[10] The court upheld the convictions of the appellants, having found that the convictions were justified. It noted that the appellants did not present any special circumstances that would warrant a departure from the mandatory minimum sentence provided for in the Act. The court observed that the appellants engaged in a series of premeditated criminal activities, methodically targeting multiple transformers over several months. The thefts were carefully planned, with a specific vehicle used, operations taking place solely at night, and the stolen oil being quickly sold. The court concluded that these offenses were not random or isolated, but rather part of a consistent pattern of deliberate criminal behaviour, warranting a severe custodial sentence.

[11] Furthermore, the court *a quo* made a finding that the appellants' actions had severe consequences. The damage to the transformers resulted in prolonged power outages that affected businesses, industries, and households. The financial losses suffered by ZESA, coupled with the broader economic disruptions, warranted a sentence that reflected both the gravity of the offenses and the need for deterrence.

[12] Having found that no special circumstances existed as to warrant the imposition of a sentence lessor than, the mandatory sentence of 10 years per each count as provided for in the Electricity Act but that such approach meant that the appellants would be sentenced to abnormally excessive years in prison. The first appellant would get 170 years and the second appellant 180 years imprisonment. The court then proceeded to structure the sentences to balance the severity of the crimes with a degree of leniency. The first appellant was thus sentenced to three years imprisonment for each of the 17 counts, with some counts running concurrently, resulting in a total effective sentence of 45 years imprisonment. The second appellant was sentenced to three years imprisonment for each of the 18 counts, with some counts running concurrently, leading to a total effective sentence of 48 years imprisonment.

[13] Aggrieved by the decision of the court *a quo* the appellants noted the present appeal based on 10 grounds of appeal which effectively raise the sole issue of whether the court *a quo* erred in exercising its discretion by imposing the sentence of 45 and 48 years imprisonment respectively against the appellants.

SUBMISSIONS BEFORE THIS COURT

[14] The first appellant submitted that the court *a quo's* sentence was severe and induced a sense of shock and that he sought to have it set aside and substituted with a lesser sentence. He

accepted that the Electricity Act imposes a mandatory sentence of ten (10) years for each count that he was convicted of. However, he argued that the court *a quo* failed to apply its sentencing powers properly by failing to determine the counts for which they were charged as being similar counts committed at the same time.

[15] He referred to s 279 A of the Criminal Law (Codification and Reform) Act [*Chapter 9: 23*] and s 343 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to argue that the counts being similar counts and having been committed at almost the same time, could be treated as a single count for sentencing purposes. The first appellant further cited case authorities from the High Court and the Magistrates Courts to show that the courts have been merging similar offences for purposes of sentence. The appellant prayed that the Court reduces his sentence from 45 years and that in doing so it considers that he is a first time offender, he has a family and that if he is to serve his full imprisonment term, he would have effectively lived out his entire lifetime in prison.

[16] The second appellant associated himself with the first appellant's submissions. He added that he is a first-time offender and that he has learnt different trades in prison which will help in rehabilitating him back into society. He further submitted that he appreciated that his sentence was reduced by the court *a quo* but however prayed for a further reduction of the sentence. He thus urged the Court to show leniency towards him and reduce his sentence to 20 years imprisonment.

[17] *Per contra,* counsel for the respondent argued that in an appeal against sentence the appellants must show a misdirection on the part of the court *a quo*. Counsel argued that there was no misdirection which was advanced by the appellants which justified interference by this Court. He argued that the court was very lenient in assessing the

sentence as the offences charged carried mandatory 10 year sentences for each count. Counsel argued that in the absence of any special circumstances advanced by the appellants, they could not benefit from the provisions of s 60(4) of the Electricity Act which provides for payment of a fine or a reduced imprisonment term. Lastly, counsel argued that the offences which the appellants were charged with could not be treated as one count for purposes of sentence as they carry a mandatory sentence. On the case law authorities cited by the first appellant in which courts combined the counts for sentence, counsel's view was that those cases were wrongly decided it being unlawful to do so in mandatory minimum sentences. He thus prayed for the dismissal of the appeal.

ANALYSIS

[18] In sentencing the appellants, the court *a quo* applied a two-prong approach, firstly the court noted that offences for which the appellants were convicted carry a mandatory sentence of ten years for each count as provided in terms of s 60 (2) of the Electricity Act. Thereafter, it was satisfied that the appellants had not advanced any special circumstances which would justify that they be sentenced in terms of s 60(4) of the Electricity Act to a fine or imprisonment not exceeding ten years. Indeed, the record shows that the appellants did not advance any special circumstances justifying that the court depart from the mandatory sentence of ten years, but rather that the appellants raised their personal family circumstances which did not amount to special circumstances. With respect, the task of the court *a quo* should have ended there. Once it found that no special circumstances existed as would warrant the imposition of a sentence other than the mandatory one imposed by statute, the court *a quo's* hands were tied. It was not open to the court *a quo* to tinker with the inevitable mandatory sentence because doing so would defeat the legislative intendment.

[19] The whole essence of legislative intervention in providing for a mandatory minimum sentence is to take away the sentencing discretion of the court. Once taken away, that sentencing discretion cannot be regained by inventing a structuring process of sentencing which side-steps the legislative command. I must mention though that the part of the court *a quo's* judgment on this aspect has not been impugned either by the appellants or the respondent. For that reason, this Court has no basis to interfere with it.

[20] Having said that I proceed to the second leg of the court *a quo's* sentencing approach. The court analyzed the circumstances under which the offences were committed and noted that the appellants had engaged in a spree of criminal activities by moving around Gweru draining transformer oil and selling it to different individuals. The court took note of the fact that the appellants had disadvantaged ZESA by stealing a total of 11 530 litres of oil and causing damage to transformers amounting to $96 750. The court further noted that the appellants were an organized criminal gang which operated under the cover of darkness and meticulously planned the execution of the crimes. Also, their criminal escapades resulted in communities and industries suffering due to non-availability of electricity.

[21] After analyzing the totality of the above considerations, the court found that a sentence based on purely the mandatory sentence of ten years would be "draconian, abnormal and excessive to the extreme and induce an extreme sense of shock". The court then exercised its discretion and arrived at a calculation of three years per count with some counts running concurrently. This was done in the exercise of sentencing discretion which, as already stated, was improper but cannot be upset because, firstly it was favorable to the appellants and, secondly, none of the parties has challenged it.

[22] The law on sentencing powers of courts is well settled in our jurisdiction. MATHONSI JA in *Munakamwe* v *The State* SC 121/23 took occasion to discuss the rationale behind the sentencing powers reposed in courts as follows:

> "Having said that, it must also be stated that the position is settled in our law that sentencing is, first and foremost, pre-eminently the discretion of the trial court. The purpose of discretion is certainly to allow the sentencer to select the sentence which he or she believes to be most appropriate in the individual case having regard to the facts and the circumstances of the offender."

Also, in *S* v *Harington* 1988 (2) ZLR 344 (S) this Court held that:

> "The sentencing process should be a rational and objective process, judicial officers should not allow their emotions to cloud their judgment as to what is a suitable sentence. If they allow themselves to get carried away by their emotions, they may end up exaggerating the seriousness of the offence and impose a disproportionate penalty for the offence"

[23] Sentencing discretion means that the sentencing court has the power to objectively determine the appropriate punishment for a convicted individual within the framework of the law. It allows courts to consider various factors, such as the circumstances of the crime, the offender's history, the impact on the victim, and any mitigating or aggravating factors, when deciding the sentence. Sentencing is therefore shaped by the circumstances of each case and has a core objective of rehabilitating and punishing convicted offenders in a just and proportionate manner, while also taking into considering the retribution of the offender (see *Munakamwe supra*).

[24] Having established that courts enjoy this discretionary power, it must be noted that an appellate court will only interfere with that discretion in limited circumstances where it has been challenged by way of an appeal on grounds laying out the basis for such interference and showing that such discretion was exercised inappropriately. In *Munakamwe* (supra) the Court cited the key remarks made in in *Muhomba* v *The State* SC 57/13 by MALABA DCJ (as he then was) at p 9 as follows:

> "On the question of sentencing, it has been said time and again, that sentencing is a matter for the exercise of discretion by the trial court. The appellate court would not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as a trial court. There has to be evidence of a serious misdirection in the assessment of sentence by the trial court for the appellate court to interfere with the sentence and assess it afresh. The allegation in this case is that the sentence imposed is unduly harsh and induces a sense of shock. In *S* v *Mkombo* HB – 140-10 at p 3 of the cyclostyled judgment it was held that:
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> > 'It is not enough for the appellant to argue that the sentence imposed is too severe because that alone is not misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence. In *S* v *Nhumwa* S – 40 -88 (unreported) at p 5 of the cyclostyled judgment it was stated:
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> > 'It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severe than one that the court would have imposed sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court.'" See also *Leonard Silume* v *The State* HB 12/16.

[25] An appellate court can only interfere with a sentence if it is shown to be grossly unjust or excessively harsh to the point of causing shock. It cannot interfere merely because it disagrees with the sentence or that it believes that a different sentence should have been imposed.

[26] *In casu*, the court *a quo* judiciously assessed the circumstances under which the appellants had committed the offences and the effects thereof. The court proceeded to consider the mandatory sentence which the law prescribed to be imposed for each count committed by the appellants and found that the resultant number of years to be served in prison were draconic and induced a sense of shock. I have already expressed the view that in showing leniency to the appellants the way it did, the court *a quo* went beyond the remit of the law. The appellants have however failed to lay any foundation recognised by law for interfering with the sentences, obviously because they benefitted from the misdirection. The matter is resolved.

[27] The argument advanced by the appellants, before us, that the court misdirected itself by failing to treat the counts as one count for purposes of sentence when the offences had been committed at a similar time and manner, is without merit. The Electricity Act, which regulates the sentencing of the appellants by imposing a mandatory sentence of ten years for each count does not speak of palliating counts.

DISPOSITION

[28] No basis for interference has been set out. The appeal is completely lacking in merit and stands to be dismissed.

[29] In the result, it be and is hereby ordered as follows:

"The appeal be and is hereby dismissed."

MATHONSI JA : I agree

MUSAKWA JA : I agree

National Prosecuting Authority, respondents' legal practitioners