THE STATE
versus
CLEMENT DONGA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 3 AUGUST 2017

Criminal review

MATHONSI J: The accused person is a small time village house breaker who hails from Mpilo Line in Tsholotsho where he has a homestead of his own. Effectively he was involved in three criminal transactions in a space of 10 days between 12 April 2017 and 22 April 2017 involving unlawful entry and theft during which he stole small items of property before being arrested. He was arraigned before a magistrate at Tsholotsho on 25 July 2017 facing three counts of unlawful entry and three counts of theft and pleaded guilty to all the charges.

Upon being convicted, the accused was sentenced to 4 years imprisonment for each set of unlawful entry and theft. This gave him an aggregate of 12 years imprisonment 3 of which were suspended on condition of future good behaviour leaving him with a whopping 9 years effective prison term. Let me repeat what I have said before;

> "While uniformity of sentences may be desirable, that is, imposing uniform sentences in respect of similar offences or those offences of kindred nature, the desire to achieve uniformity should not be allowed to interfere with the free exercise of discretion by the sentencer. The prime consideration in exercising sentencing discretion should be the achievement of a sentence befitting the relevant facts and the circumstances of the accused person. See *S* v *Fazzie and others* 1964 (4) SA 673 (A) 684A; *S* v *Reddy* 1975 (3) SA 757 (A) 759H (both quoted with approval in *S* v *Mugwenhe and Another* 1991 (2) ZLR 66 (S) 69D –E)."

Those remarks are found in the cyclostyled judgment of *S* v *Tadzembwa* HB 85-16.

The facts in counts 1 and 2, which were paired together for purposes of sentence by the trial magistrate, are that on 12 April 2017 the accused had broken into the complainant's bedroom hut at Ndabezinhle Ngwenya's homestead, Mpilo Line Tsholotsho and stolen a 20

watts solar panel, 1.2 volts ecco battery and a pair of shoes all valued at R1000-00. Property valued at R700-00 was recovered meaning that the value of the complainant's prejudice was only R300-00. In counts 3 and 4 which were also paired for purposes of sentence, the accused had, on 21 April 2017 and at Similebukhosi Khumalo's homestead Damlocingo Line Tsholotsho, entered into the complainant's bedroom hut and stolen a white Mobi cellphone, a red Nokia cellphone and a red Walkman radio all valued at $70-00. Property valued at $15-00 was recovered meaning that the value of the complainant's prejudice was $55-00.

In respect of counts 5 and 6 which were also treated as one for sentence the accused entered into the complainant's bedroom hut at David Ncube's homestead, Tankeni Line in Tsholotsho on 22 April 2017 and stole a pair of black tennis shoes, a blue cap, bathing towel and 1kg sunlight surf all valued at $15-00. Property valued at $13-00 was recovered leaving the actual prejudice to the complainant standing at only $2-00. As I have said even in respect of that the accused person was sentenced to 4 years imprisonment.

In arriving at that sentence the trial magistrate stated:

> "In coming up with the imposed sentence as appropriate (*sic*), the court had regard of the following salient factors: Accused, out of his own volition and contrition, pleaded guilt to all the 6 counts that he was prosecuted for. Accused even asked to compensate the complainants (for) their losses. The court noted with credit that much of the property stolen by the accused was recovered. As a married man with one minor child, the court had to be lenient when passing sentence as an appropriate punishment.
> In aggravation, the court took note of the fact that accused had committed a serious offence of unlawful entry with aggravating circumstances. Section 131 (2) of the Code qualifies circumstances under which unlawful entry could be regarded as aggravatory. Accused's behaviour qualified so. He would gain entry into premises known to be dwelt by people. He would do so with the intention to commit another offence which he did in all the cases of unlawful entry. Moreover the accused had had several cases of unlawful entry and theft."

The last statement by the magistrate is far from correct. According to the certificate of previous convictions produced in court, the accused person has only two relevant or useful previous convictions. On 28 November 2012 he was convicted of unlawful entry and theft and sentenced to 24 months imprisonment. On 4 April 2014 he was convicted of unlawful entry and theft and sentenced to 30 months imprisonment part of which was suspended on condition he restituted the sum of $65-00 to the complainant. Those are the only relevant convictions in my

view. On 7 July 2017 he was convicted of unlawful entry and theft for which he was sentenced to 4 years imprisonment of which 12 months imprisonment was suspended for 5 years on condition of future good behaviour. He was obviously still serving the second sentence when the present charges were preferred against him which perhaps explains why the suspended sentence was not brought into effect. Sight must therefore not be lost that when he was being sentenced on 25 July 2017 he had not had an opportunity to demonstrate that he has learnt something from the sentence of 7 July 2017 as he was still in prison. Therefore the relevance of that conviction pales.

It is apparent that the trial magistrate paid lip service to the mitigating factors that he mentioned. Although he stated that the court had to be lenient there is nothing lenient about the sentence that he imposed. In fact he contradicted himself sharply when he stated further;

> "The presiding magistrate had to impose the maximum of his ordinary jurisdiction in each case on sentencing."

The magistrate adopted what was clearly a tariff approach wherein he settled for 4 years imprisonment for small offences. Surely it does not make sense to impose 4 years imprisonment for the prejudice of $2-00 or even that of R300-00 and even that of $55-00. What appears to have influenced the mind of the magistrate and therefore led him astray were the previous convictions. This was a serious misdirection because the accused person had already been penalized for those offences. What the court was doing was to punish him again in respect offences for which he had already been sentenced. That is not the purpose for which previous convictions should be considered in sentencing. A previous conviction may be relevant to indicate disrespect for the law, but still the circumstances of the present offence itself and those of the accused person do not cease to be important merely because of two previous convictions.

In my view the accused person may have committed a series of unlawful entry and theft offences suggesting an affinity to commit the offence during that relevant time. However the sentence of 12 years imprisonment for such small offences is excessive, unreasonable and induces a sense of shock. It arises out of the fact that the magistrate chose to resort to mathematics in sentencing and completely lost sight of what the accused person was being

punished for. He gave undue weight to the factor of previous convictions and ended up with what was clearly a disproportionate sentence which did not fit the offence or the offender.

The point was made by GARWE J (as he then was) in *S* v *Chirwa* HH 79-94 at page 3 of the cyclostyled judgment that:

> "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."

See also *S* v *Sifuya* 2002 (1) ZLR 437 (H).

NDOU J was considering the same point in *S* v *Nyathi* 2003 (1) ZLR 587 (H) at 588 C when he said:

> "This is mathematics in sentencing. In *casu*, although the individual sentences imposed in each count are in noway excessive, their cumulative effect is so excessive as to call for interference."

In the present matter the trial magistrate chose to group the offences according to each completed criminal transaction, which he was entitled to do. However, each individual sentence was excessive as I have already said given the nature of the offences. What is worse is that he did not even palliate the aggregate sentence in order to make it rational. There is therefore a need to interfere with the sentence.

In the result, it is ordered that:

1. The conviction of the accused person in respect of all the 6 counts is hereby confirmed.

2. The sentences are hereby set aside and in their place is substituted the following sentences;

   "(a) Counts 1 and 2 are treated as one for sentence and the accused is sentenced to 12 months imprisonment.

   (b) Counts 3 and 4 are treated as one for sentence and the accused is sentenced to 12 months imprisonment.

(c) Counts 5 and 6 are treated as one for sentence and the accused is sentenced to 8 months imprisonment.

Of the total 32 months imprisonment, 12 months is suspended for 5 years on condition the accused does not, during that period commit any offence involving unlawful entry and theft for which upon conviction he is sentenced to imprisonment without the option of a fine.

Effective sentence: 20 months imprisonment."

Makonese J agrees………………………………………