DAVID SAINI
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE & BERE JJ
HARARE 23 JUNE 2015 & 25 OCTOBER 2017

**Criminal Appeal**

*L.T. Musekiwa,* for the appellant
*E. Mavuto,* for the respondent

**BERE J:** The appellant was convicted of unlawful entry in aggravating circumstances as defined in section 131 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The appellant was sentenced to 3 years imprisonment of which 1 year imprisonment was suspended on condition of restitution to the complainant.

Initially the appellant was appealing against both conviction and sentence but when this matter was argued counsel for the appellant advised the court that he was abandoning the appeal against conviction and restricting the appellant's appeal to sentence only.

It was contented on behalf of the appellant that the sentence of 3 years imprisonment was outrageous given that the appellant's co-accused was given the benefit of community service. It was further contended on behalf of the appellant that in his reasons for sentence the learned magistrate had over emphasized the seriousness of the offence at the expense of the strong mitigatory factors which are apparent in the record of proceedings. It was clear as observed by the learned magistrate that the appellant was a youthful first offender who had offered an unsolicited plea of guilty.

It has been stated on numerous occasions in this court that a prison term by its very nature is a rigorous sentence and should only be considered where no other sentence could be imposed. I

may add and say that courts must not derive joy and personal satisfaction by sending convicted persons to prison. They need to first engage in a serious and thorough search of their conscience before resorting to imprisonment because such a sentence can have a devastating and often long – lasting negative impact on the convicted person. Where one settles for a prison term one must honestly formulate the conclusion that such a sentence is the only appropriate one in the circumstances and cannot be avoided.

In dealing with an almost similar scenario EBRAHIM JA (as he then was) taking a leaf from VILJOEN AJA in *S* vs *Scheepers* 1977 (2) SA 156 had this to say:

> "Sentences should as far as possible be individualized and imprisonment alone should not be regarded as the only punishment which is appropriate for retributive and deterrent purposes."[1]

Relying on the same authority EBRAHIM JA restated the following:

> "Apart from the fact that…prisons are overcrowded and the upkeep of prisons and the maintenance of prisoners place tremendous economic burden on the State, there are also other disadvantages attaching to imprisonment. The convicted person is removed from society, he is deprived of all responsibility and opportunities of acting independently as a free member of the community, his life is disrupted, manpower is lost and the prisoner comes into contact with elements which are…out of all proportion to that which he possibly deserves. If the same purposes in regard to the nature of the offence and the interests of the public can be attained by means of an alternative punishment to imprisonment, preference should, in the interests of the convicted offender, be given to the alternative punishments…imprisonment is only justified if it is necessary that the offender be removed from society … if the objects striven for by the sentencing authority cannot be attained by any alternative punishment".[2]

When sentence was imposed in this case the learned magistrate had proceeded on the basis that property worth US$2 142,50 had been stolen and that nothing was recovered. However, during submissions on appeal both the appellant and respondent's counsel were agreed that either all or the bulk of the stolen property had been recovered. It was on the basis of such submissions that we postponed this matter to 23rd July 2015 for the correct position to be established by counsel. The state counsel undertook to obtain an affidavit from complainant in this regard. Unfortunately even as I write this judgment the court has not been appraised of the correct position. It is clearly not

[1] *S* v *Mugwenhe and Anor* 1991 (2) ZLR 66 (SC).
[2] *S* vs Scheepers 1977 (2) SA 154 at 155.

competent under such circumstances to even entertain the question of restitution because doing so would be groping in darkness.

There was one other startling revelation that was made during submissions in court – that the complainants and the two accused persons are closely related and that when this offence was committed, the two accused persons were merely trying to assist their brother in ejecting the complainant from the house in question. Again, both counsels undertook to verify the correct position by the 23rd of July 2015. This was not done.

All these highlighted issues put this court at large on the question of sentence. The straight long term period of incarceration imposed by the court *a quo* is certainly not justifiable at all especially if one then takes into account the strong mitigation advanced by the appellant in the court *a quo*.

In the sentence that we intend to impose in this case, the sentence served by the appellant before he was released on bail pending appeal would have to be factored in by the court *a quo* to which we intend to remit the matter for finer details on the sentence.

In the final analysis, the sentence of the court *a quo* is set aside and substituted by the following sentence:

> "The accused is sentenced to 24 months imprisonment, 12 months of which is suspended for 5 years on condition the accused does not within that period commit any offence in which dishonesty is an element for which upon conviction he will be sentenced to a term of imprisonment without the option of a fine. The remaining 12 months imprisonment is suspended on condition the accused person does 420 hours of community service at an institution to be determined by the court *a quo*."

The matter is remitted to the trial magistrate to carry out the enquiry for the placement of the appellant on community service.

Chiweshe J ……. I agree

*Musekiwa & Associates,* appellant's legal practitioners

*National Prosecuting Authority*, respondent's legal practitioners