

THE STATE
versus
TENDAI METHIAS CHIVERO

CRB 949/17

THE STATE
versus
WASHINGTON MARUNZE

CRB 777/17

HIGH COURT OF ZIMBABWE
MUSAKWA & MWAYERA JJ
HARARE, 14 July 2017

Review Judgment

MWAYERA J: The two matters were brought before me for review. I decided to dispose of both matters in one review minute as both records were presided over by the same magistrate. Further in both records the accused were convicted of unlawful entry and theft. Both records reflect effective imprisonment terms. The issues that arise in respect of both records are the same.

In the first matter Tendai Methias Chivero was convicted on his on plea of guilty to 9 counts of unlawful entry into premises in aggravatory circumstances as defined in s 131 (2) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In the first count on 10 May 2016, the accused proceeded to Yvonne Tivatye's residence at night. Upon arrival the accused forced open the bedroom window and fished out a Gtel cellphone valued at \$504 dollars which was not recovered. In respect of the second count the accused broke a kitchen door to Patience Muzhewe's house and gained entry. Whilst inside the accused stole a Gtel cellphone, jean trousers, cash \$3 270-00 and Samsung phone. The value of the property being \$5 200.00 and only \$200-00 was recovered. On 10 October 2016 at night the accused broke a window to the 3rd complainant Tafadzwa Tafirenyika's house .

The accused stole a laptop, groceries and cash \$120. The total value of property stolen is \$260-00 of which \$100-00 was recovered.

In respect of the 4th count the accused opened closed door to the complainant Rumbadzai Nyamutowa's place and gained entry. Therein the accused stole a Gtel cellphone and \$5-00 total value stolen being \$45-00 of which nothing was recovered.

In December 2016 the accused approached the 5th complainant Gedion Majoni's house and forced open the door to gain entry. The accused stole a Gtel cellphone and \$10-00 total value \$50-00 of which \$100-00 was recovered.

In respect of the 6th count the accused again forced entry into the complainant Rebecca Nyanga's house. The accused was caught in the act by the complainant who screamed. The accused fled with an HTC cellphone, Vodacom tablet cellphone, mobicell candy cellphone, passport and 3 hand bags. Total value stolen is \$800-00 of which \$500-00 was recovered.

On 13 February around 0300 hours the 7th complainant Edwin Zvinongosa proceeded to bath living his property intact. The accused opened door and stole a Samsung galaxy IMEI phone and \$20-00. The total value stolen is \$120-00 of which \$100-00 was received.

On the 8th count the accused opened the closed door to complainant Beauty Zvomuya's house at the time that the complainant was bathing. The accused then stolen Samsung cellphones, hand bag and \$20-00 cash. The total value stolen is \$315 of which \$300-00 was recovered. Finally on the 9th count on 16 March 2017 the accused forced open the bedroom door to Daima Gomeka's house and gained entry when inside the accused stole Vodacom table cellphone, bank cards, hand bag and cash \$200 dollars total value \$414-00 of which nothing was recovered.

The accused pleaded guilty to all the 9 counts. Some of the property was recovered by the police through leads from the accused. For all 9 counts the total value of the property stolen as a result of unlawful entry and theft is about \$7 505-00 and value of recovered property is about \$1 804. The accused was sentenced to 2 years for each count and the total effective sentence for the 9 counts of the unlawful entry and theft is 18 years imprisonment.

The accused is a first offender who pleaded guilty to the charges. He is a 33 year old married man with family responsibilities.

The second accused Washington Murenze was convicted of 7 counts of unlawful entry into premises in aggravatory circumstances as defined in s 131 (2) (e) of the Criminal Law (Codification and Reform) Act. The accused was convicted after a protracted trial as he denied the allegations. It is apparent from the State papers that between January 2017 and March 2017 on specified dates the accused on 7 occasions forcefully gained entry into the complainants' houses and stole various property ranging from cellphones, laptops, hand bags, blankets, radio and speakers, solar battery and inventor, pots and plates. The total value of the property stolen in the 7 counts is about \$1 588-00 of which \$635-00 was recovered. The

accused was sentenced to 2 years imprisonment for each count giving an effective prison term of 14 years imprisonment for all the 7 counts of unlawful entry and theft.

In respect of the *Washington Murunze's* case the trial magistrate's reasons for sentence are as follows:

"I have considered that you are married. However, you have a record of dishonesty on this case you went on a spate of breakings and nothing was recovered. You need to be visited with deterrent penalties."

These reasons were given after brief mitigation recorded as follows: "aged 29, married with 4 children. I am self-employed. I have no savings." The same style was adopted in the matter of Tendai Methias Chivero brief mitigation on personal circumstances and brief reasons for sentence culminating in the accused being reminded he is a danger to society and thus has to be removed from out of circulation. Whereas it is appreciated that the trial court is vested with sentencing discretion, such discretion has to be properly and judiciously exercised. It is accepted the accused, on the respective records committed serious crimes on more than one count. It can be deduced going by the number of counts the two accused at different times and different places had set their minds to earn a living through criminal activities. Unlawful entry and theft is an offence of chance where the perpetrator can get away with property of very high value or get away with property of minimal value. The fact remains unlawful entry and theft is a serious offence which calls for deterrent sentence. Whereas the value of the property stolen is not central on considering an appropriate sentence it is one of the factors which ought to be considered cumulatively with the manner of commission of the offence, and the nature of property stolen. Whether or not some or all of the property was recovered, the circumstances surrounding the commission of the offence, the ability or otherwise of the perpetrator to compensate the complainant, the personal circumstances of the perpetrator and the interest of justice. There is need for the trial court to consider all these factors cumulatively and seek to strike a balance between the interest of justice on the one side while matching the severity of the offence to the offender, at the same time blending justice with mercy as is expected in a progressive democracy. Central to the exercise of sentencing discretion is the fact that the overall punishment should not be aimed at breaking the offender but rehabilitating same.

A reading of the record of proceedings shows that the trial court paid cursory attention to all these factors with a result of coming up with unduly harsh sentences which induce a sense of shock. In respect of Tendai Methias Chivero he pleaded guilty, to all the 9 counts. Other than just mere mention that he is a first offender who pleaded guilty, the sentence does

not reflect credit accorded for the plea and remorse shown by the plea of guilty. No portion of the imprisonment term of 18 years was suspended on conditions of good behaviour and or restitution. The reasons for sentence are devoid of any reasons why a portion of the sentence was not suspended given the plea of guilty and that accused is a first offender. It is trite that when a court decides not to suspend a portion of a sentence reasons for such decision must be given. See *S v Muhove* 2009 (2) ZLR 19. Further in the circumstances of both accused, one fails to understand why the trial magistrate failed to treat all counts as one for sentence or group counts with a view to palliate the effective sentence. In respect of Washington Marunze the sentence was after a protracted trial unlike in the matter of *The State v Tendai Methias Chivero* but the sentencing approach was the same 2 years imprisonment for each count regardless of circumstances. The accused Washington Marunze was said to have a record of dishonesty in reasons for sentence but such previous conviction was not attached to the record. Even for a repeat offender 14years for the 7 counts of unlawful entry and theft in the circumstances was unduly harsh. It was further recorded in reasons for sentence that no property was recovered in respect of all the counts but the State papers show otherwise. Even if minimal value was recovered it would not be accurate to say no property was recovered. The overall sentence was too harsh as to violate the proper exercise of sentencing discretion. This court has emphasised the need to properly exercise the sentencing discretion in a bid to come up with a sentence that matches the offence and offender while at the same time satisfying the societal interest of ensuring that justice is done.

In the cases of *S v Trute* HB 47/91.

S v Chikoko AD 1541/75

S v Chirora and Others HH 170/90 for example, the sentences imposed by the trial court were altered on review to 12 months despite the accused having been convicted of breaking in and stealing from commercial premises.

I am unable to confirm the sentences imposed by the trial magistrate as the sentences are not in accordance with real and substantial justice.

The sentences are accordingly set aside and substituted as follows:

S v Tendai Methias Chivero

All counts as one for sentence: 5 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving unlawful entry and dishonesty to which he is sentenced to imprisonment without the option of a fine.

S v Washington Marunze All counts as one for sentence: 5 years imprisonment of which 1 years is suspended for 5 years on condition the accused does not within that period commit any offence involving unlawful entry and or theft for which he is sentenced to imprisonment without the option of a fine.

MUSAKWA J agrees