JONATHAN MACHADO
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 29 May & 5 June 2023

**Criminal Appeal**

Appellant in person
Ms *F Kachidza*, for the respondents

ZHOU J: This is an appeal against the sentence imposed by the Magistrates Court upon the appellant following conviction on five counts of unlawful entry in aggravating circumstances as defined in s 131(2)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant was sentenced as follows:

- **Count 1:** 60 months imprisonment of which 12 months imprisonment was suspended for 5 years on condition of good behaviour. A further 6 months imprisonment was suspended on condition of restitution. Effective: 42 months imprisonment.
- **Count 2:** 60 months imprisonment of which 12 months imprisonment was suspended for 5 years on condition of good behaviour. Of the remaining 48 months imprisonment, 12 months imprisonment was on condition of restitution. Effective: 36 months imprisonment.
- **Count 3:** 60 months imprisonment of which 12 months imprisonment was suspended for 5 years on condition of good behaviour. A further 9 months imprisonment was suspended on condition of restitution. Effective: 39 months imprisonment.
- **Count 4:** 60 months imprisonment of which 12 months imprisonment was suspended for 5 years on condition of good behaviour. Of the remaining 48

months imprisonment, 10 months imprisonment was suspended on condition of restitution. Effective: 38 months imprisonment.

- **Count 5:** 60 months imprisonment of which 12 months imprisonment was suspended for 5 years on condition of good behaviour. A further 7 months imprisonment was suspended on condition of restitution. Effective: 41 months imprisonment.

The total effective period of imprisonment is therefore, 196 months which is slightly over 16 years, if the appellant renders restitution. If he fails to restitute the effective sentence would be 240 months or 20 years imprisonment.

In assessing the sentence to impose the court *a quo* considered the mitigating factors including that he pleaded guilty and is a family man with a wife and one child to look after. These were weighed against the evidently serious aggravating circumstances, which include that the appellant is a repeat offender who had recently served a prison term of 3 years for a similar offence. He committed the five counts soon after his release from prison. The court *a quo* also considered the fact that several counts were involved and, that appellant damaged the victims' property (doors) in gaining access into the premises, and further went on to commit the other serious offence of theft in all the counts.

The appellant has invited this court to interfere with the sentence on the ground that the overall sentence is manifestly harsh and excessive as to induce a sense of shock. A sentence is manifestly excessive if it is disproportionate to the offences committed when regard is had to the circumstances of the case or if it is unduly severe when juxtaposed against the penalties imposed in comparable cases or if it flies in the face of established legal principles. Such a sentence has the effect of instilling revulsion or emotional distress or trauma in both the affected person and other reasonable persons when they reflect upon it in light of the circumstances of the case, hence the use of the expression that it "induces a sense of shock". See *S* v *Mavhundura* 2002(1) 598(H) at 600B-D; *S* v *Sidat* 1997(1) ZLR 487(S) at 491D. In other words, the mere fact that a sentence is harsh is not a good ground for interfering with it. It must be disturbingly harsh, *S* v *Ramushu* SC 25-93. The position of the law is that the assessment of an appropriate sentence falls within the discretion of the trial court. The appellate court interferes only if it is shown that the discretion was not judicially exercised, *S* v *Matanhire & Ors* HH 18-02 at p 3.

There is no exhaustive list of factors that would evidence an improper exercise of a judicial discretion. Such factors include a failure to apply the relevant principles, application of irrelevant considerations, yielding to the influence of an ulterior or improper motive, failure to apply mind, bad faith, acting arbitrarily or capriciously or vindictively, bias, irrationality and gross unreasonableness in the sentence or the reasons therefor. See *S* v *Mavhudura* (*supra*) at 600E-F; *S* v *Dullabh* 1994(2) ZLR 129(H) at 133A-D; *S* v *Narker & Anor* 1975(1) SA 583.

Some of these factors overlap.

The instant case involved multiple counts. In the case of *S* v *Chirwa* HH 79-94 at p 3, GARWE J (as he then was) said:

> "The position is now fairly well settled that in cases involving multiple counts, the correct approach to sentence is either to take all counts as one for the 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 offence is properly reflected. The court would 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); *S* v *Nyathi* 2003(10 ZLR 587(H).

*In casu*, the court *a quo* adopted the second approach but failed to consider the impact of the aggregate sentence.

The effective globular sentence of 196 months or 240 months is disturbingly severe in the circumstances of this case. Ms *Kachidza* for the respondent made the correct and commendable concession that the failure by the court *a quo* to order sentences in some counts to run concurrently with others constituted a misdirection which justifies interference with the sentence. The purpose of the interference would be to mitigate the undue severity of the effective portion of the sentence without diluting the understandable concerns of the court *a quo* about the aggravating features of this case. See *S* v *Chera & Anor*.

The just approach in this case would be to order that the sentence in count 5 runs concurrently with that in count 1, the two counts having been committed during the same year and within a space of about 5 months. The effective sentence to be served for these counts would therefore be 42 months imprisonment. Count 4 should run concurrently with count 3, resulting in an effective sentence to be served of 39 months imprisonment. These counts were

committed within a period of about 4 months apart and during the same year. Count 2 can stand alone, thereby enjoining the appellant to serve the imposed sentence of 36 months imprisonment. Thus, the aggregate effective period of imprisonment to be served by the appellant would be 117 months if he renders restitution as ordered by the court *a quo*.

In the result, **IT IS ORDERED THAT:**

1. The appeal against sentence partially succeeds to the following extent:
   (a) The effective sentence of 41 months imprisonment in count 5 shall run concurrently with the effective sentence of 42 months imprisonment in count 1.
   (b) The effective sentence of 36 months imprisonment in count 2 shall remain effective and run consecutively with the effective sentence of 42 months imprisonment for counts 1 and 5.
   (c) The sentence of 38 months imprisonment in count 4 shall run concurrently with the 39 months imprisonment for count 3 and is to be served consecutively with the sentences in count 2 and in counts 1 and 5.
2. For the avoidance of doubt, the appellant shall serve an effective sentence of one hundred and seventeen (117) months imprisonment.

CHIKOWERO J, agrees ……..

*National Prosecuting Authority*, respondent's legal practitioners