SEAN ANDILE DLAMINI
and
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU and CHIKOWERO JJ
Harare, 3 and 24 March 2025

Criminal Appeal

T Muzana, for the appellant
T Mapfiwa, for the respondent

CHIKOWERO J:

INTRODUCTION

[1] This is an appeal against the whole judgment of the Magistrates Court sitting at Harare convicting the appellant of 13 counts of robbery committed in aggravating circumstances as defined in s126 of the Criminal Law (Codification and Reform) Act [*Chapter* 9:23] (the Criminal Law Code). The appellant was sentenced to a total 52 years imprisonment of which 8 years were suspended on the usual conditions of good behavior. A further six years imprisonment was suspended on condition of payment of restitution to leave an effective imprisonment term of 38 years in the event that restitution were paid in full.

FACTUAL BACKGROUND

[2] During the night of 24 July 2020 a gang of about 15 robbers descended upon a certain house in Harare. They were armed to the teeth. The lethal weapons consisted of a shot gun, pistols, a hammer and iron bars. They concealed their identities by adorning face masks and balaclavas. They were mobile. The motor vehicles consisted of a small car and a silver Toyota Fortuner Registration Number ACC 7829

[3] They assaulted the head of the household, fell him and bound him hands and legs with shoe laces. This was in the full view of his spouse and children. They ransacked the house. They were looking for valuables. They made off with property which included television sets, cellphones and cash. All in all such property was valued at about five thousand United States dollars. Apart from

testifying to the commission of the offence itself, which was not disputed, the complainant was unable to identify the robbers. This was count number one.

[4] Still under cover of darkness, the gang drove to the Borrowdale Trauma Centre in Harare. This was now in the early hours of 25 July 2020. They unleashed violence on 12 persons at that hospital. In the words of Doctor Solenki Virek, who watched the robberies in real time on the closed Circuit Television screen at his residence, the robberies were like a "cinema of Western gangsters." Among other things, a pregnant women was kicked on the stomach. Doctor Solenki (the doctor in charge of Borrowdale Trauma Center) raced to the crime scene. He appeared in time to encounter the robbers driving off the scene, laden with property stolen thereat as well as that unlawfully acquired in count one. A chase ensued. The occupants of the small car made good their escape. He side- swiped the Toyota Fortuner so that it would crush. Indeed, the Toyota Fortuner crushed into a ditch. The robbers bolted out of what was meant to be their getaway car. The doctor was amazed to observe human beings running as fast as the robbers did. They all escaped. The robberies at the Trauma Centre were charged as counts two to thirteen. Property worth about US$50 000 was the subject of these counts.

PROCEEDINGS IN THE LOWER COURT

[5] Ten persons were jointly charged with the thirteen counts of robbery. Out of this number, one, who had been admitted to bail, absconded during the trial. His trial was separated from that of the others. Another became mentally ill to the extent that he became unfit to stand trial. His trial was also separated from that of the others. Some were discharged at the close of the case for the prosecution. Three, namely Mussa Taj Abdul, Charles Lundu and the appellant were convicted as charged on all the thirteen counts. They received similar sentences. Abdul and Lundu are not before us

[6] Although none of the eye witnesses identified him at the crime scenes, the appellant was convicted because the lower court believed the testimony of a State witness called Nigel Makomo. This witness operated a car rental business under the style Okay Travel and Tours. He testified that he let the Toyota Fortuner in question to the appellant on 23 July 2020 around 1533hours. It was common cause that he knew the appellant well. The latter had a history of hiring motor vehicles from Okay Travel and Tours. He was a known client of Makomo. There was no bad blood between Makomo and the appellant. Makomo gave detailed evidence describing the circumstances of his interaction with the appellant on 23 July 2020. Those circumstances spoke to

how the appellant hired the Toyota Fortuner in question. Initially the appellant had hired an Isuzu motor vehicle. He returned it, indicating that it was unsuitable for the intended purpose. According to Makomo, the appellant said he needed to travel to his mine in Shamva. The witness said he released the Toyota Fortuner to the appellant at Total Showground area in Harare.

[7] The appellant's defence, which was a denial of having hired the Toyota Fortuner from Makomo, on 23 July 2020, was found to be false. It was common cause that the Toyota Fortuner was used in the commission of the thirteen robberies, the first of which occurred the very next day after the car was let to the appellant by Makono. The appellants defence that he had nothing to do with this motor vehicle and hence nothing to do with the robberies, as we have said, was rejected by the lower court.

DID THE APPELLANT PARTICIPATE IN THE COMMISSION OF THE THIRTEEN ROBBERIES?

[8] As regards the correctness or otherwise of the lower court's decision to convict the appellant, the sole issue which confronts us is whether that court erred in finding that Makomo was a credible witness.

[9] Before answering that question, we record that the law on the role of an appellate court, seized with an appeal challenging factual findings of a lower court predicated on credibility, is settled.

[10] In *SV Mlambo* 1994(2) ZLR 410 (S) GUBBAY CJ, writing for the court, said at 413:

> "The assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by the appellate court unless satisfied that it defies reason and common sense."

[11] In *Zinwa* v *Mwoyounotsva* SC 465/13 ZIYAMBI JA said:

> "An appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion, or that the court had taken leave of its senses, or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it: or that the decision was clearly wrong."

See also *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (s) at 670 SC-E, *Barrows* v *Chimphonda* 1999(1) *ZLR* 58(S) at 62G- & 63A *and Chitukutuku and Ors* v *the Prosecutor General and others* SC 103/24 at 25.

[12] Makomo did not testify on his interaction with the appellant in a vacuum. He did not pluck the appellant's name out of the air. The witness was a business person. He ran a car rental. The

appellant had a history of hiring motor vehicles from the witness. He could not have mistaken some other client for the appellant or vice versa. His evidence was detailed. The appellant had initially hired an Isuzu. The appellant returned it to Makomo with the explanation that it was unsuitable for the former's Shamva mine trip. This explained why Makono let and delivered the fateful Toyota Fortuner to the appellant instead. The lower court reasoned that there was no bad blood between the appellant and the witness. Out of all his customers, said the lower court, no reason was proffered by the appellant why Makomo would be so malicious as to lie that he had let the Toyota Fortuner to the appellant. It must not be forgotten that, to Makomo, the appellant was actually a hen that lay the golden eggs. There is nothing on record to suggest that Makomo did anything more than simply stating the facts as they were.

[13] The witness also testified that he was shocked to receive word that the Toyota Fortuner which he thought was in Shamva was actually in Borrowdale, and had been used in the commission of robberies. He rushed to Borrowdale where he beheld the crushed and abandoned vehicle. It was now at the Police Station. Makomo's evidence was so detailed to the extent that he told the lower court that he called the appellant to obtain an account of what had transpired. The appellant was no longer reachable on the phone. This could only but speak to a guilty mind on the part of the appellant.

[14] It is true that the copy of the lease rental agreement between the appellant and the witness ought not to have been admitted into evidence. It was not certified. It was not an original. The witness explained that he availed the originals to the appellant and the police. That the prosecution did not, a quo, produce the original car rental lease agreement did not detract from the quality and sufficiency of the evidence of Makomo. The prosecution produced, with the consent of the appellant, the registration book of the Toyota Fortuner. The appellant produced, also by consent, the warned and cautioned statement of Makomo. That statement mirrors the testimony of Makomo. It was only normal that the police, in investigating the robberies, would question Makomo because the Toyota Fortuner had been in his custody before the commission of the offences. The record also bears a material piece of evidence which the lower court did not advert to. However, in the circumstances, that does not militate against the correctness of the conviction. If anything it gives us comfort in the correctness of the conviction. That piece of evidence is this. Raymond Yekeye's statement was produced by consent. It forms part of the evidence adduced by the prosecution. The statement reads in material part:

"3. On Thursday 23 July 2020 around1300hrs, I was driving to Bulawayo when I got a call from Nigel Makono of Okey Travel Tours requesting to hire my vehicle, a silver Toyota Fortuner Registration Number ACC 7829.

4. I advised Nigel Makomo that I was out of town and therefore it would be difficult to assist but he highlighted that his client urgently needed the vehicle so we could do sign all the necessary papers upon my return.

5. I then asked him to get hold of my son, Tareraishe Yekeye so that he could be given the vehicle which process was done and the vehicle was handed over to Nigel Makomo with an understanding that all the paper work would be signed upon my return.

6. On 24 July 2020, I called Nigel Makomo to check on the vehicle and get clarity on how many more days would his clients be requiring the vehicle. Nigel Makomo advised me that the vehicle would be returned either on Sunday or Monday and he would keep me posted on any changes

7. On Saturday morning 25 July 2020 around 0700hrs, I got several messages on social media showing videos of my vehicle being involved in an armed robbery at the Trauma Centre in Borrowdale, Harare

8. I immediately called Nigel Makomo enquiring about the whereabouts of my vehicle and he advised me that as far as he was aware, the vehicle was supposed to be in Mazowe or Shamva. He then requested time to call his clients to check on the vehicle status.

9. Nigel Makomo then called me back and advised that his client's numbers were not going through. I then advised him that I had seen social media message with my vehicle being used in an armed robbery and shared the messages with him.

10. Nigel Makomo then advised me that he was proceeding to Borrowdale police station to report the incident. He checked with Borrowdale police station and he confirmed that the message I had told him was correct and the vehicle was at Borrowdale Police Station"

[15] Much was made by Mr *Muzana* of the alterations made by Makomo on the car rental agreement. The witness told the lower court that those were corrections made by him in the presence of the appellant. That explanation is not something out of this world. In any event, Mr *Muzana* was resting his submissions on an exhibit which he argued was wrongly admitted into evidence. Indeed, the exhibit was wrongly admitted into evidence. With that, there is no further need for us to discuss the contents of an exhibit which irregularly stands on the record.

[16] Besides denying hiring the Toyota Fortuner (and hence any connection with the thirteen robberies) not once did the appellant indicate where he was at the time those offences were being committed.

[17] There is no evidence on record tending to suggest that Makomo was a suspect witness. He was not an accomplice. Sound reasons were tendered for accepting his evidence. There is nothing grossly unreasonable in the findings made on acceptance of Makomo's evidence. A reasonable tribunal faced with the same facts would have arrived at the same conclusion as the lower court did. That court did not take leave of its senses. There is no substance in the contention that its decision was clearly wrong.

[18] The appeal against the conviction of the appellant can only but fail.

THE APPEAL AGAINST THE SENTENCE

[19] The appeal against the sentence likewise stands to be dismissed.

[20] Sentencing discretion reposes in the trial court

[21] In *S* v *Ramushu and Ors* S 25/93 GUBBAY CJ firmly stated:

> "But in every appeal against sentence, save where it is vitiated by irregularity or misdirection the guiding principle to be applied is that sentence is preeminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate."

[22] The appellant was sentenced on 2 February 2024. The Criminal Procedure (Sentencing Guidelines) Regulations, 2023 (the Sentencing Guidelines) were applied in assessing an appropriate sentence.

[23] The Statutory penalty for a robbery committed in aggravating circumstances is imprisonment for life or any definite period of imprisonment. This the lower court was mindful of in sentencing the appellant.

[24] The presumptive penalty for a robbery committed in aggravating circumstances is 20 years imprisonment.

[25] The lower court was further guided by the range of sentences imposed in cases of robbery committed in aggravating circumstances and upheld on appeal to this court. See *Kambudzi* v *State* HH 111/23*, S* v *Dube HH* 11/23 and *S* v *Makamba* HH 523/23.

[26] It was careful to avoid the injustice inherent in the imposition of multiple sentences arising out of one criminal transaction. See *S* v *Moyo* HB 9/11.

[27] It considered the mitigating factors noting in particular that no lives were lost during the robberies and that moderate injuries were sustained by some of the victims.

[28] The Court carefully weighed the mitigation against the aggravation. Having done that it correctly found that the latter outweighed the former. The 15-member gang, of which the appellant was part, was armed with a shot gun, pistol, hammers and metal bars. Each of these is a lethal weapon. That the offences were committed by a huge motorized gang in the dead of night and in the early hours of the morning is evidence of meticulous planning, premeditation and expert execution. The victims were particularly vulnerable during those hours. A home, which is supposed to be a sanctuary, was targeted. So was a hospital, of all places. The marauding gang,

equalling the size of a football team, invaded the victims' premises and forcefully stripped them of their property. Valuable property was stolen some of which was not recovered. In count one, the head of the family, who is supposed to protect everybody under his roof, was assaulted, bound and rendered helpless all in the presence of his spouse and children. Victim impact statements were produced. They spoke to the trauma and financial loss that befell the victims. The appellant did not commit one but an astonishing thirteen counts of robbery in aggravating circumstances in the space of one night. The robberies were committed in movie style. The victims were viciously assaulted, including a pregnant woman. The latter was kicked on the stomach, posing a danger to the young life that she carried. Some of the victims suffered moderate injuries. Considering that the gang was armed to the teeth, worse would no doubt have befallen the victims had they resisted. Doors and a safe were vandalized.

[29] Despite all this, the lower court did not get carried away in its task of assessing an appropriate sentence. Since the complainants in counts 5, 6 and 7 were robbed when they were in one room at Trauma Centre in Borrowdale, the lower court treated those counts as one for the purposes of sentence. It imposed a sentence of seven years imprisonment. At the same centre, the complainants in counts 9,10,11,12 and 13 were also robbed while they were in the same room. The court also treated those counts, as one for the purposes of sentence, settling for seven years imprisonment. The rest of the counts, where this characteristic was absent, saw the court imposing separate sentences. This explains why the court imposed a sentence of seven years imprisonment on the appellant on each of the relevant counts, namely counts 2, 3, 4 and 8. For count 1, the sentence imposed was 10 years imprisonment.

[30] From the total of 52 years imprisonment, the court suspended as much as 8 years on the usual conditions of good behaviour. It is not every day that an offender has the good fortune of having such a large portion of a custodial sentence suspended on the conditions of future good behaviour. That was not all. The appellant benefitted immensely from the fact that a whole 6 years imprisonment was suspended on condition of restitution in the sum of US $ 3 486-61.

[31] It is true that the lower court did not mention, in assessing sentence, that it considered that the appellant had endured 3 years of incarceration prior to being sentenced. Even if we accept that as a misdirection, we must still be satisfied that it resulted in a gross miscarriage of justice. Put differently, we must be persuaded that the sentence imposed on the appellant was disturbingly inappropriate. We do not hold such a view. It will be noted that the appellant, who was part of a

highly mobile gang of 15 robbers wielding an array of lethal weapons committed 13 robberies in aggravating circumstances in the space of one night. In the event that restitution is paid in full, the appellant will only serve an effective sentence of 38 years imprisonment. It must not be forgotten that the presumptive sentence for a single count of robbery committed in aggravating circumstances is 20 years imprisonment.

[32] The appeal against the sentence is without merit.

ORDER

[33] The appeal be and is dismissed in its entirety.

CHIKOWERO J: .....

ZHOU J: .....

I agree

Tapera Muzana and partners, appellant's legal practitioners

The National Prosecuting Authority, respondents' legal practitioners.