

TAWANDA MOYOUNOZIVA
and
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 12 & 15 September 2022

Criminal Appeal

Appellant in person
L Chitanda, for the respondent

CHIKOWERO J:

1. On 16 January 2016 the appellant and one Nomore Hakutangwi pleaded guilty to and were convicted of twenty-four counts of theft and thirteen counts of unlawful entry into premises as defined in ss 113 and 131 of the Criminal Law Code respectively.
2. The offences were committed on many given dates between 30 June 2013 and 23 September 2015.
3. The court *a quo* divided the offences into three groups for the purposes of sentence. It treated the offences in each group as one for the purposes of sentence.
4. Offences committed around the same period were grouped together.
5. Accordingly, the appellant was sentenced as follows:
 1. counts 1-5:2 years imprisonment
 2. counts 6-10:3 years imprisonment
 3. counts 11-37:15 years imprisonment

Of the total 20 years imprisonment 3 years imprisonment was suspended for 5 years on condition the appellant did not commit “any offence involving unlawful entry and dishonesty and for which upon conviction accused will be sentenced to imprisonment without the option of a fine.” A further 2 years imprisonment was suspended on condition the appellant paid restitution to twenty complainants.

6. A similar sentence was imposed on the co-accused.
7. The concession by Ms Chitanda, for the respondent, is well-founded.
8. The sentence imposed is irregular in that different offences were treated as one for the purpose of sentence. In this regard, the conviction on count 4 was of theft while those for counts 1-3 and 5 were for unlawful entry into premises. Yet all five counts were treated as one for the purpose of sentence.
9. The same observation applies to count 10.
10. Counts 14-16, 20-23, 26,28,30,33 and 34 pertained to unlawful entry into premises. The rest of the counts in the same group were theft charges, with the subject of the charges in counts 18 and 24 being a motor vehicle apiece. The motor vehicles were recovered.
11. The learned magistrate fell into error in sentencing on the basis that the appellant had been convicted of thirteen counts of unlawful entry into premises committed in aggravating circumstances when the conviction was for unlawful entry into premises. The appellant was neither charged nor convicted of the former, which is a more serious offence and carries a heavier sentence.
12. We agree also that insufficient regard was had to the fact that most of the property was recovered and that the appellant pleaded guilty.
13. We pause to record that the irregularity of treating different offences as one of the purposes of sentence led to the commission of yet another irregularity. It is this. The condition on which the first portion of the sentence was suspended is without meaning and, in the event that the appellant commits either unlawful entry or any offence of which dishonesty is an element before the five years envisaged *a quo* run out it would not be possible for a future sentencing court to consider bringing the suspended sentence into operation. This is so because of the use of the word “and” in the couching of the condition. In fact, there is no offence that fits into the condition of suspension, as described *a quo*. Further, unlawful entry into premises and unlawful entry into premises committed in aggravating circumstances are offences on their own. We do not think that it is competent to suspend any portion of a sentence, as was done, on condition that the appellant does not commit any offence “involving unlawful entry.” We are not aware of the existence of any offence

so contemplated by the underlined word except unlawful entry into premises and unlawful, entry into premises committed in aggravating circumstances.

14. In light of all these irregularities, misdirections and errors we accept the invitation to allow the appeal, to set aside the sentence and to sentence the appellant afresh.

15. In the result, we order as follows:

1. The appeal against the sentence be and is allowed.
2. The sentence imposed on the appellant, Tawanda Moyounoziva, under CRB RSPP 134-5/16 be and is set aside and the following substituted:

“The first accused is sentenced as follows:

Counts 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 17, 18, 19, 21, 24, 25, 27, 29, 31, 32, 35, 36 and 37 as one for sentence: 10 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition that the first accused does not within a period of 5 years commit any offence involving dishonesty for which upon conviction the accused will be sentenced to a term of imprisonment without the option of either a fine or community service.

A further 2 years imprisonment is suspended on condition the first accused pays restitution through the clerk of court Rusape Magistrates Court on or before 31 November 2022 to in United States dollars to:

Count 1 (Offard Kanjanda) : \$22-50

Count 5 (Timothy K Makumbirofa) : \$5-00

Count 6 (Tafadzwa Chokururama) : \$12-50

Count 7 (Shadreck Chingombe) : \$675

Count 9 (Sharmaine Marange) : \$250

Count 25 (Tafadzwa Timothy Nyakutya) : \$15

Count 31 (Magora Kavanga) : \$12-50

Count 32 (Miriro Mupfuti) : \$7-50

Count 36 (Moreblessing Bore) : \$50

Counts 4, 10, 14, 15, 16, 20, 21, 22, 23, 26, 28, 30, 33 and 34 as one for sentence: 5 years imprisonment of which 12 months imprisonment is suspended for 5 years on condition that the first accused does not within a period of 5 years commit the

offence of unlawful entry into premises or unlawful entry into premises committed in aggravating circumstances and for which upon conviction the first accused will be sentenced to a term of imprisonment without the option of either a fine or community service.

A further 12 months imprisonment is suspended on condition that the first accused pays restitution through the clerk of court Rusape Magistrates Court on or before 30 November 2022 in United States dollars to:

- Count 4 (Jeremiah Sharara) :\$32
- Count 10 (Happiness Dzedze) :\$20
- Count 14 (Pindai Chihota) :\$59-50
- Count 15 (Rufaro Bukuta) :\$10-50
- Count 16 (Fungai Saunyama) :\$27-50
- Count 22 (Rumbidzai Madondo) :\$40
- Count 23 (Ester Pasi) :\$79
- Count 26 (Sam Uteye) :\$12-50
- Count 28 (Cephas Makuto) :\$14
- Count 30 (Liberty Rupfutso) :\$103
- Count 34 (Lizzy Thomas) :\$20

3. On review:

- the sentence imposed on accused two, Nomore Hakutangwi, under CRB RSPP 134-5/16 be and is set aside and
- in place thereof the same sentence as that imposed on the first accused on appeal be and is substituted

CHIKOWERO J:.....

ZHOU J: Agrees.....