

BRIAN ANDRIS
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 5 & 15 September 2022

CRIMINAL APPEAL

Appellant in person
C. Muchemwa, for the respondent

ZHOU J: This is an appeal against the sentence imposed upon the appellant following his conviction on three counts of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], one count of attempted robbery as defined in s 189 (I) (a) and (b) as read with s 126 of the same Act, one count of attempted rape as defined in s 65 as read with s 189 of the same Act, and one count of theft as defined in s 113 of the Act. For the three robbery counts and the one count of attempted rape the appellant was sentenced to 5 years imprisonment on each count to make a total of 20 years . He was sentenced to 2 years imprisonment on the theft case and to 3 years imprisonment on the attempted robbery case. From the total of 25 years imprisonment 5 years was suspended for a period of 5 years on condition that during that period the appellant does not commit any offence of which dishonesty or theft using threats of violence is an element, and for which he is sentenced to imprisonment without the option of a fine. Of the remaining 20 years the Court *a quo* suspended 2 years on condition of restitution to the named complainant.

Sentencing is a matter within the discretion of the trial court. The appellate court does not lightly interfere with the exercise of a discretion unless it is shown that it was not exercised judicially. In this case this court has noted that there was no improper exercise of the discretion in relation to the total sentences passed before suspension. Those are accordingly upheld. However, there were irregularities or anomalies in the manner in which the conditions for suspension of the sentence were articulated which resulted in an effective sentence which is unduly excessive and induces a sense of shock. The error was to suspend a period of 5 years from the total imprisonment period on the basis that the appellant would not commit any

offence of which dishonest or theft using threats of violence were elements. The two elements are independent and are not essentials of all of the six counts which appellant was convicted of. Use or threat of violence is an element of robbery and attempted robbery but not of attempted rape and theft. Likewise dishonesty is an element of theft but not of the other offences which the appellant was convicted of. There was need to separate the offences for the purpose of imposing the appropriate sentences. As noted earlier on, the error resulted in unduly harsh sentences. This court believes that an effective sentence within the region of 15 years would meet the justice of the case save for counts 1,2 and 5 which have been taken as one for sentence. The decision of the court *a quo* on the total period of imprisonment cannot be impeached when regard is had to all the circumstances of the case, particularly the fact that the appellant is a repeat offender with two previous convictions.

In the result, IT IS ORDERED THAT :

1. The appeal is partially allowed to the following extent:
 - (a) Counts 1, 2 and 5 are to be taken as one for the purpose of sentence and appellant is sentenced to 12 years imprisonment, of which 2 years imprisonment is suspended for 5 years on condition that during that period the appellant does not commit an offence involving the use or threats of violence to take the property of another for which he is sentenced to imprisonment without the option of a fine or community service. A further 2 years imprisonment is suspended on condition of restitution of the sum of US \$ 150 to the complainants through the clerk of court, Murewa Magistrates Court. This leaves an effective sentence of 8 years imprisonments on these counts.
 - (b) In respect of count 3, appellant is sentenced to 5 years imprisonment of which one (1) year imprisonment is suspended for 5 years on condition that during that period the appellant does not commit any offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine or to community service.
 - (c) In respect of count 4 , the appellant is sentenced to 2 years imprisonment of which 6 months imprisonment is suspended for 5 years on condition that during that period the appellant does not commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine or to community service. A further 6 months imprisonment is suspended on condition that he restitutes the sum of UD 4 726 to the complainant through the clerk of court, Murewa Magistrates Court.

(d) In respect of count 6, the appellant is sentenced to 3 years imprisonment of which one (1) year imprisonment is suspended for 5 years on condition that during that period the appellant does not commit any offence involving the use or threat of violence to take the property of another for which upon conviction he is sentenced to imprisonment without the option of a fine or to community service.

Effective period of imprisonment is 15 years.

(e) For the avoidance of doubt the restitution shall be paid on or before 31 October 2022.

CHIKOWERO J agrees.....

National Prosecuting Authority, respondent's legal practitioners.