

LYTON CHIKOMBA  
and  
THE STATE

HIGH COURT OF ZIMBABWE  
MUZENDA and WAMAMBO JJ  
MUTARE, 08 September 2021

### **CRIMINAL APPEAL: Reasons for Judgment**

Miss *S. Muzandaka* for the appellant.  
*M. Musarurwa*, for the respondent

WAMAMBO J: Appellant appeared before a Magistrate sitting at Mutasa Magistrates Court facing three counts of Contravening s 131 (1)(a) as read with s 131 (2)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. (Unlawful entry committed in aggravating circumstances). He was arraigned along with two others. Appellant pleaded guilty to all three counts and was duly found guilty and sentenced to 5 years imprisonment of which 2 years imprisonment were suspended on the usual conditions of future good behaviour. A further 1 year imprisonment was suspended on condition of restitution.

Unhappy with the sentence the appellant noted an appeal to this court. The grounds of appeal are couched in the following manner:

- “1. The sentence imposed by the court a quo was manifestly excessive to the extent that it induces a deep sense of shock given the mitigatory factors like plea of guilty and the youthfulness and immaturity of appellant.
2. The learned Magistrate erred in paying lip service to the plea of guilty tendered by the appellant who was also a first offender.
3. The learned Magistrate erred in opting for effective imprisonment when a wholly suspended imprisonment sentence coupled with restitution provision and performance of community service would have met the justice of the case
4. The learned Magistrate erred and misdirected himself when he passed a custodial sentence ignoring the current trends which advocate for non custodial sentence whenever possible. (sic)”

The state is opposed to the appeal.

The state outlined discloses that the three counts were all committed on 27 March 2021 and at the same premises namely World Vision Chikomba B Cooperative.

In the first count appellant in the company of his co-accused forcibly opened a locked door at the aforementioned premises. He thereafter took the property as described in the state outline. The property consists of various quantities of washing soap, Vaseline, biscuits, exercise books and ball pens. The value is given as RTGS \$146 584-25 and value recovered is RTGS \$74 816.

In the second count appellant forced open the door to complainant's premises and stole a television set, a speaker, a printer, a monitor, a control processing unit and a Keyboard valued at RTGS \$56 372 and all this property was recovered.

In count three appellant forced open the door to complainant's premises and stole a printer, a welding machine, an electric motor and compressor valued at RTGS 323 980 and all were recovered. The appellant's age is given as 24.

In the reasons for sentence the trial Magistrate acknowledged and noted the following:

The appellant assisted the court in the quick disposal of the matter and also showed contrition. The appellant's family responsibilities and the reasons for committing the offences were taken into consideration.

Appellant broke into three premises on the same day using the same *modus operandi*. In all three counts appellant forcibly opened locked doors and stole valuable property. The crimes were premeditated considering the times when they were committed which aggravates appellant's moral blameworthiness.

A portion of the sentence was suspended on account of the appellant's unequivocal plea of guilty and the fact that he is a first time offender. Another portion was suspended on condition of restitution as appellant showed a willingness to retribute.

The reasons for sentence reflect that not only did the Trial Magistrate consider the circumstances of the accused in detail but the Magistrate went further to suspend portions of the sentence taking into considerations the facts of plea of guilt, first offender status and willingness to retribute.

The values of the property stolen is indeed high. That some of the property may have been recovered is fortuitous

Community service performance for three counts committed in the dramatic fashion of this case in particular does not appear to be a practical and judicious punishment for the following reasons:

The offences are of a serious nature. They involve forcible entrance and theft.

There was preplanning involved for all three offences to be committed successfully on the same premises.

The value of the property stolen is high.

The fact that appellant continued to commit the same offences a total of three times show a high level of aggressiveness. There could have been a change of heart after the first or second occasion but that did not occur in this case.

That appellant deserved a custodial sentence as given considering the trend of sentencing in cases of a similar nature. Contrary to appellant's counsel's submissions the trend is certainly not for imposition of suspended sentences in offences such as in this case, committed three times in a row on the same night at the same premises by more than one person using force to effect entrance and stealing property of substantial value.

Aware of the principle that sentencing is a trial court's province, we can only interfere in particular circumstances. See *S v Gono 2000 (2) ZLR 63*, *S v De Jager & Another 1965 (2) SA 6 16 AD* and *Tawanda Mukoto v The State HH59/16*

In light of the Trial Magistrate's findings which encompassed the triad that is the appellant's circumstances, the circumstances of the offence and the interests of society, we find that the sentence was proper in the circumstances. The sentence also accords with precedent. See *John Mugova v The State HH692/18*, *S v Winston Shayawabaya HH615/18*. We find in the circumstances that the appeal against sentence is unmeritorious.

To that end we make the following order.

The appeal against sentence be and is hereby dismissed

MUZENDA J Agrees \_\_\_\_\_

*Mugadza, Chinzamba & Partners*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners