JETHRO MTHOKOZISI GUMEDE

AND

NEHEMIAH MOYO

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND MATHONSI JJ
BULAWAYO 23 MAY 2011 AND 30 JUNE 2011

Mrs D. Phulu for appellants
Mr K. Ndlovu for respondent

Judgment

CHEDA J: This is an appeal against sentence.

Appellants were charged with 8 counts of armed robbery and 1 count of attempted murder. The allegations are that between 2 March 2004 and 18 May 2004 they committed the said offences in Bulawayo suburbs using a pistol. Their activities resulted in the complainants losing various items of property in the process. Both appellants pleaded not guilty to the charges. At the conclusion of the trial the court a quo convicted and made the following findings:

Both appellants:	Count 9 was withdrawn before plea
1st appellant	Counts 1, 2, 5, and 8, he was discharged at the close of the state case.
2nd appellant	Counts 5, he was discharged at the close of the state case.
1st appellant	Counts 3, 4, 6, and 7 was convicted
2nd appellant	Counts 3, 4, and 7 was convicted but was acquitted in count 8.

On count 3, each appellant was sentenced to 12 years imprisonment.

Count 4- 12 years imprisonment

Count 7- 8 years imprisonment

Total: 32 years of which 6 years imprisonment was suspended on the usual conditions of good behaviour.

Count 6 – 1st appellant 6 years imprisonment which totals 30 years imprisonment.

2nd appellant's total sentence is 24 years imprisonment.

It is appellant's argument that the sentence imposed by the court *a quo* induces a sense of shock. They further argued that the court a quo did not exercise its discretion judiciously which resulted in it passing excessive sentences on them.

Mrs Phulu, for the appellants referred the court to the case of *S v Chitiyo* 1987 (1) ZLR 235 wherein, DUMBATSHENA, C. J. at 240B stated:

> "A sentence of 50 years imprisonment with labour is in my judgment objectionable, not because it is unjust or undeserved, but because it seems to me inhumane to keep a young man of 23 years of age in prison for that long."

The respondent on the other hand has argued that the trial court's discretion in general should not be interfered with for the mere reason that another court would have passed a different sentence except where it has not been judiciously exercised. This, infact, is the correct legal position.

In casu appellants have relied on the remarks by DUMBUTSHENA CJ (supra). This, in my opinion was the correct legal position before the passing of the Criminal Law (Codification and Reform Act No. 23/2004 [Chapter 9:23] of which section 126(2) and (3) reads:

> "126 (2) A person convicted of robbery shall be liable:-
> (a) to imprisonment for life or any shorter period, if the crime was committed in aggravating circumstances as provided in subsection (3); or
> (b) in any other case-
> (i) to a fine not exceeding level fourteen or not exceeding twice the value of the property that forms the subject of the charge, whichever is the greater; or
> (ii) to imprisonment for a period not exceeding fifty years;
> or both:
> Provided that a court may suspend the whole or any part of a sentence of imprisonment imposed for robbery on condition that the convicted person

> restores any property stolen by him or her to the person deprived of it or compensates such person for its loss."

This section underlines the seriousness of the offence as viewed by the Legislature hence the authority to impose a life imprisonment where robbery is committed under aggravating circumstances. For that reason the case of *Chitiyo* supra is distinguishable.

Appellants embarked on a spree of robberies, wherein within two days they had committed 5 armed robberies using a pistol and in count 6 a police officer was shot on both legs. The terror which gripped Bulawayo and its environs during that period was there for anyone to see and feel. Such orgy of violence cannot by any stretch of imagination be played down or sacrificed on the altar of the usual and ordinary mitigatory features which are now a mantra to every convicted person. Appellants committed robbery, not only once, but, on many occasions leaving their victims in the state of shock. For them to say that the sentences imposed on them is severe to an extent of inducing a sense of shock is to attempt to reverse the genuine and deep shock they left on their victims. They ought to have known that sailing too close to the wind would ultimately result in their yatchts being blown off and therefore, they can not be heard to complain of their failure of captaincy of the said yatcht.

I am of the opinion that the court *a quo* exercised its discretion judiciously. All I can add is that the trauma and anxiety experienced by the victims under appellants' siege can not be down played to an extent of interfering with the sentences imposed. Appellants despite their ages had no respect for other people's dignity, freedom and property. They surely deserve to be removed from society to hopefully teach them a lesson and warn those of like mind of the dim view these courts take in these matter.

For the above reason the convictions are confirmed.

Appeal against sentence is accordingly dismissed.

Mathonsi J agrees.....

Lazarus and Sarif, appellants' legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners