

THE STATE
versus
GEORGE NKOMO

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 9 JULY 2015

Criminal Review

MAKONESE J: The 32 year old accused appeared before a magistrate at Shurugwi on 25 March 2015. He was charged and convicted on a charge of robbery as defined in section 126 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The allegations against the accused were that he used threats of immediate violence against Cephass Ngorima, who had lawful custody thereto and stole 10 kgs of gold ore with the intention to permanently deprive the complainant of ownership and control of the gold ore. The value of the gold ore was pegged at US\$240 and nothing was recovered. The accused was convicted on his own plea of guilty and sentenced to 12 months imprisonment of which 3 months imprisonment was suspended for 5 years on the usual conditions of good behavior. A further 6 months imprisonment was suspended on condition accused completed 210 hours of community service. The remaining 3 months was suspended on condition of restitution. The facts surrounding this offence are aptly summarized in the state outline which is in the following terms:

- “1. The complainant in this case is Cephass Ngorima a male adult residing at 1214 Sebungu Extension, Shurugwi and is employed at Makuriwa Gold Mine, Shurugwi.
2. The accused person is George Nkomo a male adult residing at house number 180 Makusha, Shurugwi and is not employed.
3. On the 23rd March 2015 at about 1900 hours the accused person in the company of the other two accused persons who are still at large, proceeded to the complainant’s house where they produced machetes and knobkerries and threatened the complainant and his workmates to surrender some gold ores.

4. When the complainants and his workmates ran away and hid in a nearby bush abandoning the gold ores at their work place, the accused person then took the complainant's gold ore amounting to 10kgs and went away.
5. On the 24th March 2015 at around 1300 hours, the complainant met the accused person and positively identified him, arrested him and brought him to ZRP Shurugwi Charge Office.
6. The value of the stolen gold ore is US\$240 and is not yet recovered.
7. The accused person acted unlawfully.”

In her reasons for sentence, the learned magistrate reasoned as follows:-

“--- However robbery is a serious offence, which needs to be curbed by imposing deterrent sentences. You robbed the gold ore worth \$240 and nothing was recovered. Instilled fear to the complainant thereby inducing them to surrender/relinquish control over the property. You did not assault the complainants. It seems too harsh to incarcerate the offender. You are a first offender who showed contrition and remorse. You are a repentant offender who served the court's time. Community service coupled with restitution suffices.”

I addressed a query on the sentence to the trial magistrate, whose response is in the following terms:-

“I had taken into consideration what accused said in mitigation that he was a first offender and has acted in peer pressure. He showed contrition and remorse and was ready to compensate the complainant of the loss suffered. I considered him as a repentant offender. He cannot be regarded as a hardened offender who should be kept off the streets.

I apologise sincerely for the error noted. I had not put into consideration the aggravational part of the offence that the accused was armed with dangerous weapons (i.e) machete and knobkerrie.

May corrective measures be taken to rectify the anomaly.”

What concerns me is that the learned magistrate's comments are not supported by the record. There is nothing on the record to show that accused acted as he did due to peer pressure. The charge sheet and state outline indicate that the accused committed a violent crime of

robbery. His conduct reveals a high degree of moral blameworthiness. It is only fortuitous that the complainant escaped without sustaining any injury. If the complainant had not fled into the bush with his workmates he could have been harmed. The fact that complainant did not sustain any injury should therefore not count in accused's favour. By its very nature robbery traumatises the victim physically and emotionally. The fear induced into the complainant allowed the accused to remove the gold ore which he converted to his own use. The accused's behavior was reprehensible and a custodial sentence was appropriate. The aggravating circumstances far outweigh the mitigating features of the case. The only mitigating factors in this case are that accused was a first offender who pleaded guilty and served the court's time. See the case of *State v Themba Mpopu* HB 24/2001.

In my view, community service was wholly inappropriate in all the circumstances of the case. Robbery invariably attracts a custodial sentence. The violence displayed by the accused in this nature is of a serious nature. He armed himself with machetes and knobkerries. He inspired fear into the complainant. He successfully robbed the complainant of gold ore. I, therefore am unable to certify the proceedings as being in accordance with real and substantial justice.