

STATE
versus
JOHANIS MUKWENA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 17 January 2019

Criminal review

MAFUSIRE J:

- [1] An integral part of the adjudication process is the exercise of discretion. It is done judiciously. Whim, caprice, impulse, irrationality, excitability, emotion, and all the other negative urges or passions of that nature have no role. There are many instances when the court is called upon to exercise its discretion. But it is mostly in sentencing, in criminal matters, that that function is so pronounced. Ordinarily the doctrine of *stare decisis* ensures that like cases are treated alike. In appropriate situations, a precedent set in one case should be followed in all other subsequent cases of a similar nature. But this is only to a degree. Every case is judged in accordance with the peculiarities of its own facts and circumstances. And strictly speaking, there are no two cases that are exactly alike. That is why in sentencing, for example, penalties may differ from case to case despite the similarities on the face of them. It is because of the subtle differences that may exist between seemingly similar cases and the exercise of judicial discretion by the trial court. Because of that, the appeal court or review judge, exercises the greatest of restraint before interfering with the decision of the lower court. There are times when the appeal court or review judge feels that he could have imposed a different penalty from that of the trial court, but nevertheless refrains from interfering because of the realisation that the lower court is reposed with the power to exercise its own discretion. Only in instances where the exercise of that discretion by the lower court was not judicious would the appeal court or review judge interfere. This particular case is a good example of an injudicious exercise of discretion.
- [2] It was an ordinary case of unlawful entry and theft. The accused was 21 years old. He “broke into” the complainant’s residence. He did not “break in” in the sense of using

force to break down any barrier. He simply pushed open the door and walked in. It was unlocked. That was count 1: “Unlawful entry into premises”, as defined by s 131(1) of the Criminal Law (Codification and Reform) Act, *Cap 9:13* (“*the Code*”).

- [3] Inside the complainant’s residence the accused stole 5 kilogrammes of mealie meal, a pack of potatoes, a t-shirt and a pair of shorts. The total value of all the items stolen was \$53. The short was recovered. It was worth \$10. Thus, \$43 was the actual value of the prejudice to the complainant. That was count 2 of the charge: “Theft”, as defined in s 113(1) of the Code.
- [4] The accused pleaded guilty to both counts. He was duly convicted. The conviction is proper. It is hereby confirmed.
- [5] On sentence, the trial court took both counts as one. The accused was sentenced to 16 months imprisonment. 4 months were suspended for 5 years on the usual condition of good behaviour. A further 2 months were suspended on condition the accused paid the complainant \$40 restitution. (It should have been \$43.) That left him with an effective 10 months imprisonment.
- [6] An effective 10 months imprisonment for unlawful entry into premises and theft of items to the value of \$53 seemed unduly excessive. Ordinarily offenders in similar circumstances escape with community service. So the record attracted my attention. I sought to find out what it is that had led the trial court to be so harsh. What could have been the peculiar circumstances of the case? I found nothing other than plain misdirection by the court. Below are the details.
- [7] The accused was a first offender. The trial court made no mention of this. He was married and had one child. The trial court said nothing about this either. He was a pushcart operator earning \$60 per month on average. His savings or assets amounted to just \$15 and 5 goats. Asked why he stole, he said he had no money. Asked where he had put the items that he had stolen, he said he had used/consumed them, but that he was willing to pay compensation.
- [8] By all accounts the accused was a poor man. He stole the food items to eat. The clothes he wore them. It was the pair of shorts that gave him away. He was putting them on when he was arrested. He had just been 8 months in the business of cart pushing.

- [9] Poverty does not justify crime. If you are poor and you steal to feed or clothe yourself you are offending. The law will convict you. It will judge you. It will punish you. But your sentence should fit you and your crime. That is where judicial discretion comes in. That partly explains why one sentence in one case may differ from the other in another case seemingly of a similar nature.
- [10] It was clear the accused did not steal out of greed or malice. He stole out of need. The problem is that the trial court took no account at all of any of his personal circumstances. Not in the least did it comment on them. So there is no telling to what extent its sentence was influenced, if at all it was, by the fact that the accused was a first offender; that he had several mouths to feed; that he had pleaded guilty and saved time, and, above all, that he had shown contrition by offering to pay the complainant compensation. That was part of the misdirection by the court *a quo*.
- [11] The other and more serious misdirection by the court *a quo* is what it took into account in arriving at the sentence. Without commenting on the personal circumstances of the accused, the trial court went straight to express what should amount to its personal prejudices or whims. It said:
- “The offence of unlawful entry is a threat to the security of home owners. Burglars are dangerous criminals. For unlawful entry even first offenders can be sent to imprisonment. It’s an offence which takes so much courage to commit. The complainant lost \$40-00 worth of goods. It was only out of good fortune that he lost less. But this does not take away the fact that accused must be sent to jail.”
- [12] The next bit of the court’s judgment is rather shocking. The accused was sent to prison because the court thought the approaching festive season would be so tempting for him as to re-offend. It said:
- “The approach of [the] festive season is a time where most homes will be left unattended. During the festive season the accused must be away from the neighbourhood. The court simply feels imprisonment is the most appropriate sentence.”
- [13] There is no principle like that. It was wrong for the court to allow itself to be influenced by such a consideration, especially given that neither had there been any evidence of such placed before it, nor of the prosecutor having made such a submission.
- [14] Ordinarily, community service is to be considered in appropriate cases where the court imposes an effective prison term of 24 months or less. The court *a quo* did consider it.

But it ruled against it for reasons alien to precedence. The court thought community service is for immature juvenile offenders only. It said:

“I would have considered community service had the accused been 18 – 19 yrs old. At the age of 21 the accused could not be said to be immature.”

That was wrong. Community Service is not determined by the age of the offender. Courts should follow precedence.

[15] In conclusion, the court went back to its favourite theme of the approaching festive season. It said:

“The court has also taken note of the prevalence of the offence in this district. Deterrence is called for. Accused must be removed from society during this festive so that homes and homeowners’ property are safe; the accused may repeat offend during this festive season which is a tempting period for burglars.”

[16] The wrongness of such an approach sticks out. There is no need to belabour the point. It is hoped the court *a quo* learns something from this. Its sentence in this matter has to be quashed. Even the sixteen months was excessive to begin with. Admittedly, count 1 (unlawful entry into premises) was committed in aggravating circumstances in the sense that the accused entered a dwelling house¹ and that he committed some other crime, theft². The Code prescribes a sentence of a fine not exceeding level thirteen (\$3 000), or not exceeding twice the value of any property stolen, destroyed or damaged by the accused (in this case, \$43), whichever is the greater; or imprisonment for a period not exceeding 15 years, or both.

[17] For count 2 (theft), the prescribed penalty is a fine not exceeding level 14 (\$5 000), or twice the value of the property stolen, whichever is the greater, or imprisonment for a period not exceeding 25 years³. However, the court is empowered to suspend the whole or any part of the sentence of imprisonment on condition that the accused restores the property stolen by him or pays the complainant compensation.

[18] In its discretion, the court *a quo* treated the two counts as one for the purposes of sentence. It could properly do that. Admittedly, the top ends of the prescribed penalties for both of these offences are very heavy. But that is to cater for all the possible ranges

¹ Section 131(1)(a) of the Code, as read with subsection (2)(a)

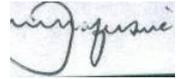
² Section 131(1)(a) of the Code, as read with subsection (2)(e)

³ Section 113(1) of the Code

of unlawful entry and theft. Prison should not have entered the court's mind. One cardinal principle of sentencing is to keep first offenders out of jail where possible, especially youthful ones such as the accused was. And as pointed out above, the court had the discretion to suspend the whole of the sentence for theft on condition of restitution. Furthermore, where a statute allows the payment of a fine for an offence should be the starting point for the court.

- [19] Having combined the two counts for the purposes of sentence, and given the value involved, and given all the other mitigating circumstances such as the accused's age; his family responsibilities; the fact that he pleaded guilty; that he was a first offender and the contrition that he showed, the appropriate sentence should have been no more than 6 months imprisonment, with 3 suspended on condition of good behaviour, 2 suspended on condition of restitution and the remaining 1 month converted to community service.
- [20] Up to the time of this judgment the accused had already served a month of his sentence. He should be entitled to his immediate release. In the circumstances it is hereby ordered and directed as follows:
- i/ The conviction of the accused is hereby confirmed.
 - ii/ The sentence of the court *a quo* is hereby quashed and substituted with 6 months imprisonment, of which 3 months imprisonment is suspended for 5 years on condition that within that period, the accused is not convicted of an offence involving unlawful entry into premises, or dishonesty for which upon conviction he is sentenced to a term of imprisonment without the option of a fine. A further 2 months imprisonment is suspended on condition that the accused pays the complainant restitution in the sum of \$43 within 30 days of the date of this judgment. iii/ Having already served one month of the prison sentence the accused is entitled to his immediate release.
 - iv/ The court *a quo* is hereby directed to summon the accused and put into effect the aforesaid altered sentence.

17 January 2019

A handwritten signature in black ink, appearing to read "Mawadze J", written over a horizontal line.

Hon Mawadze J: I agree _____