STATE

Versus

SHEPHARD MPOFU

And

LOVEMORE NYABATE

And

MENGEZI MPOFU

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 12 NOVEMBER 2021

Criminal Review

KABASA J: The 3 accused pleaded guilty to robbery as defined in section 126 (1) (a) of the Criminal Law Code. They were duly convicted.

The facts are that on 1st November 2021 near Academy ground in New Luveve the 3 pounced on the 15 year old complainant. Accused 2 assaulted the complainant with an open hand and took his Mobicel R4 cell phone, accused 3 threatened to hit the complainant with a brick and took his ear pod, whilst accused 1 took the complainant's bucket hat. The cell phone and bucket hat were recovered but the cellphone cover was not. The total value taken was ZWD 13 095 and US$20 worth was not recovered.

Accused 1 is a 29 year old first offender, not married and has no children. He is unemployed and had no savings nor assets. Accused 2 is an 18 year old first offender, not married, not in school and is employed at a mine. He had no

savings nor assets. Accused 3 is a 15 year old first offender and is in Form 3. He had no money on his person, no savings and no assets.

The learned Magistrate considered these mitigatory factors and in aggravation considered the seriousness of the offence, the fact that the accused benefited from the unrecovered property and pointed out that the accuseds' conduct was not to be condoned.

Accused 1 and 2 were then sentenced to 18 months imprisonment, 3 months of which were suspended for 5 years on the usual conditions, 12 months on condition each performs Community Service and the remaining 3 months on condition each one pays US$10 restitution.

Accused 3 due to his age had the passing of sentence postponed for 5 years.

Nothing turns on the conviction. It is the sentence that I have issues with. Robbery is a serious and reprehensible offence. It traumatises the victim and in this case the victim was only 15. He was attacked by 3 people qualifying this as a gang robbery. The trauma the complainant suffered cannot be under-estimated.

First offenders who commit serious crimes must not expect to be treated with leniency. It is not trite that first offenders are entitled to a suspension of a prison term or not to be sent to prison (*S* v *Moyana* 1980 ZLR 460).

The accuseds managed to take what the complainant had, so it is not so much the value of what was taken that makes the offence serious but the manner in which the property as taken.

> "It is the harm which an accused inflicts by his wrong doing which, in the main, is the measure of his moral blameworthiness. In the case of theft the harm will often be commensurate with the value of the goods stolen." (*S* v *Wood* 1973 (2) RLR 11).

In this case the manner in which the property was taken and the emotional trauma undoubtedly caused to the 15 year old complainant is the measure of the accused's moral blameworthiness.

Youthfulness should not be allowed to obscure the seriousness of the offence. Where the offence committed is serious courts should not shrink from sending youthful first offenders to jail (*S* v *Mupasa* AD 93/87, *S* v *SM* HH 280-80, *S* v *Nigel Fanuel Mapfuma* HB 41-90).

In *S* v *Madondo* HH 60-80 GREENLAND J held that where little or no violence is used, a sentence in the region of 4-5 years imprisonment with part suspended is appropriate in robbery cases. (See also *S* v *Chikanga* HB 110-92).

Community Service ought to be considered in deserving cases. Cases of robbery are not, in my view, the type of cases deserving of Community Service, unless there are good reasons for that. There were no such good reasons in this case.

If society loses confidence in Community Service, this noble alternative to imprisonment will lose its efficacy. People who commit robbery ought not to benefit from Community Service. The fact that the sentence imposed is within the Community Service threshold does not, without more, justify the imposition of Community Service. Not every case in which the penalty is within the Community Service threshold deserves such.

Community Service could have been considered for the 15 year old juvenile, with hours appropriately reduced in recognition of the fact that he is a student who will have to perform the Community Service during week-ends (*S* v *Sithole and Anor* HH 101-03).

An appropriate sentence for the 29 year old would have been 3 years with part suspended and the 18 year old 2 years with part suspended, only because of his youthfulness.

The sentences imposed are in my view inappropriate and not in accordance with real and substantial justice.

Judicial officers ought to properly apply their minds to the issue of sentencing and impose penalties that fit the criminal as well as the crime, be fair to the state and to the accused and be blended with a measure of mercy. (*S* v *Sparks and Anor* 1972 (3) SA 396, *S* v *Byron Chamunorwa* HH 160-93).

With that said I am unable to certify that these proceedings are in accordance with real and substantial justice and accordingly withhold my certificate.