GODDY MASHOKO
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 17 & 22 October 2021

Criminal appeal

Appellant in person
R. Chikosha, for the State

CHIKOWERO J: This is an appeal against the judgment of the magistrates court convicting the appellant of nine counts of unlawful entry into premises, eight counts of theft and a single court of stocktheft. The crimes are as defined, respectively, in ss 131(1), 113(1) (a)(b) and 114(2)(a)(i)(ii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The sentence imposed was this:

- Counts 1 and 2: 4 years imprisonment
- Counts 3 and 4: 4 years imprisonment
- Counts 5 and 6: 3 years imprisonment
- Counts 7 and 8: 4 years imprisonment
- Counts 9 and 10: 4 years imprisonment
- Counts 11 and 12: 4 years imprisonment
- Counts 13 and 14: 4 years imprisonment
- Counts 15 and 16: 4 years imprisonment
- Counts 17 and 18: 8 years imprisonment

Of the total thirty-five years imprisonment, 6 years imprisonment was suspended for 5 years on condition the appellant does not within that period commit an offence involving dishonesty for which upon conviction he is sentenced to imprisonment without the option of a fine. A further 3 years imprisonment was suspended on condition the appellant restitutes the complainants as follows: Counts 1 and 2 ZWL204, Counts 3 and 4 ZWL350,

Counts 5 and 6 ZWL20, Counts 9 and 10 ZWL76, Counts 11 and 12 ZWL106, Counts 13 and 14 ZWL102, Counts 15 and 16 ZWL2 160. The restitution was to be paid through the Clerk of Court Gweru Magistrates Court by 4pm on/or before 30 July 2018.

In the event the appellant restituted in full, he would serve twenty-six years.

There is no appeal against the sentence for want of a prayer in the intended notice of appeal against the sentence.

The magistrates' court found that the respondent had proved that on 11 October 2017, 14 November 2017, 18, 19, 24, 25 and 26 January 2018 the appellant had gone on a spree of committing the crimes of unlawful entry into premises, theft and had also committed a single crime of stocktheft. These offences were committed in and at dwelling-houses situate in Mkoba 12, 15, 16 and 17 in Gweru.

The trial magistrate found that there was overwhelming evidence against the appellant. Such evidence included:

- the common cause fact that, in respect of the unlawful entries, all the premises in question had been broken into.
- property had been stolen from those premises.
- most of the property had been recovered.
- The complainants had identified the property
- there was unchallenged evidence from three buyers who purchased some of the stolen property from the appellant.
- Wayne Mukoki's testimony that he was hired by the appellant to transport and keep some of the stolen property (all of which was recovered from Mukoki) was credible.
- The investigating officer gave credible testimony that the appellant led the police to all the crime scenes, freely made indications thereat and also led the process of recovery of the stolen property.
- The appellant's Zimbabwe United Passenger Company employee card was picked up from the crime scene in respect of counts 15 and 16.

- There was credible evidence that appellant was caught red-handed having just committed the unlawful entry in respect of count 17 but while still in possession of the property stolen inside the particular dwelling – house.
- There was acceptable evidence that on arrest the appellant had a black satchel containing implements for unlawfully entering into premises to wit two iron rods, a knife, axe, screw driver and no less than four bunches of different keys.

The magistrates court rejected the appellant's defence as being beyond reasonable doubt false. The appellant denied committing all the offences. He shifted criminal liability to Mukoki and one Pretty Hlanganiso. Those two were found in possession of some of the stolen property. The appellant said they, and not him, should have been in the dock. The former had asked the appellant to secure customers for the property, which turned out to be stolen, for a commission. As for Pretty, the appellant denied that she was his girlfriend. He therefore had nothing to do with the recoveries effected from Pretty's residence.

Both in his heads of argument and in oral submissions, Mr *Chikosha* conceded that the convictions in respect of counts 4, 6, 8, 10, 12, 14 and 18 are bad at law. These all related to the thefts committed inside the premises the appellant unlawfully entered into. We accept counsel's concession that the appellant ought not to have been charged with these seven counts of theft. As it is, there was an improper splitting of charges which in turn led to incompetent convictions. Indeed, the appellant ought to have been charged with eight counts of unlawful entry into premises committed in aggravating circumstances as defined in s 131 (1) (a) as read with s 131 (2) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appeal against conviction succeeds to this extent and the relevant convictions are quashed.

We turn to determine the propriety of the convictions in respect of the counts of unlawful entry into premises (counts 1, 3, 5, 7, 9, 11, 13 and 17). We conduct the same exercise in respect of the conviction on theft (count 15) and stock theft (count 16). This we do in light of the grounds of appeal.

The appellant complains that the trial court did not advise him of his right to legal representation as enshrined in s 70 of the Constitution of Zimbabwe Act, 2013. Indeed, the record does not disclose that the appellant was advised of his right to choose a legal practitioner and, at his expense, to be represented by that legal practitioner. Further, the record is silent on whether

the magistrates court advised the appellant that he had a right to be represented by a legal practitioner assigned by the state and at state expense, if substantial injustice would otherwise result were he to self-act. The view that we take is that the appellant's complaint is not a ground of appeal. This is so because it does not allege that the magistrate's decision to convict him on the remaining counts was wrong.

The third ground of appeal is invalid. That ground reads:

> "The court a quo erred in convicting appellant where there was no proof beyond any reasonable doubt. The appellant's defence was not sufficiently disproved, that is to say his defence remained probable at the end of the state's case."

The above statements are two sides of the same coin. This is not a ground of appeal at all. The appellant is directly attacking the verdict when what he should have done is to attack the findings of fact or law, or both, leading to that verdict. The respondent neither objected to its inclusion in the notice of appeal nor asked us to strike it out. All we do at this stage is to ignore it for purposes of determining the appeal. As already indicated, the ground is invalid.

It was never an issue at trial that forensic evidence was necessary to enable the court to render a decision. It cannot be an issue at appeal stage, that is to say, there ought to have been evidence of the appellant's fingerprints and footprints at the various crime scenes for the convictions to be safe. The same goes for the contention that DNA evidence ought to have been placed before the court. The appellant would have done well, instead of raising this, as the third ground of appeal, to focus, in his notice of appeal, on specific findings on which the convictions are predicated.

We see no merit in the fifth ground of appeal. The complainants identified the recovered property as theirs. Where such property had serial numbers, such numbers were given. Where the property did not have the same the complainants described the property in a manner that satisfied the court that the property belonged to them. In any event, save for one sewing machine and one television set, the appellant has not raised a ground of appeal seeking to impugn the magistrates court's finding that the contested sewing machine and television set belonged to the complainant in count number 4. The fifth ground of appeal is misplaced.

Finally, the appellant contends that the evidence of indications ought to have been excluded. He says that the indications were not conducted in accordance with rules and procedures

provided by the statutes. He never averred, in his defence outline, that he did not freely and voluntarily make the indications at the crime scenes. At the trial, he was content to let the investigating officer off the hook, so to speak, with the answer that the reason why there were no indication forms signed by the appellant was due to lack of the relevant stationery. The complainants in the counts of unlawful entry into premises testified that the appellant freely and voluntarily made the indications. The appellant never challenged this testimony. It was only when the appellant was being cross examined that he claimed, for the first time, that he did not freely and voluntarily make the indications. He never gave any details on why he was making that allegation, albeit so late in the trial. The magistrate correctly accepted the evidence of indications. In any event, even without those indications, there remains overwhelming evidence anchoring the convictions. We have already set out that evidence, and the findings made by the trial court on the basis of such testimony. Most of the evidence was common cause. The pertinent findings of fact have not been taken on appeal. The appeal against the convictions on the remaining counts (eight counts of unlawful entry into premises, one count each of theft and stock theft) cannot succeed on the single ground that the court below ought to have excluded the evidence of indications. An appeal is decided on the totality of the evidence on record. The totality of the evidence is such that the convictions on the remaining counts was inevitable.

Since we have quashed the convictions in respect of counts 2, 4, 6, 8, 10, 12, 14 and 18 it becomes necessary, using our powers of review, to consider whether the sentence is still in accordance with real and substantial justice. The magistrate had imposed a sentence for each "pair" of crimes upon convicting the appellant for unlawful entry into premises and theft.

Mr *Chikosha* submitted that we should not interfere with the sentence. He says it still meets the justice of the case. It is true that the appellant's moral blameworthiness is high. He went on a spree of committing the offences in question. He entered dwelling-houses. He carried weapons in the form of an axe, a screw driver, two iron rods and a knife. He damaged the complainants' doors in effecting the entries. He struck mostly during daytime, when most of the occupants would be busy elsewhere. The offences were premeditated and executed in a manner which would make detection difficult. The appellant was mobile. Mukoki's vehicle was used as a get-away car. In short, this was unlawful entry into premises committed in aggravating

circumstances. What we have said by way of aggravation also applies to the counts of theft and stock theft. All these offences are serious and prevalent.

However, most of the stolen property was recovered. The charge of stock theft (count 16) reflects 240 Bosch chickens as having been stolen by the appellant. Nothing was recovered. But the complainant did not give their value. The magistrate treated this count and count 15 (theft of ZWL200 worth of metal bars and poles) as one for sentence and imposed 4 years imprisonment a portion of which was suspended on condition of payment of restitution of ZWL2 160.00. This was irregular. No evidence was adduced speaking to prejudice in the sum of ZWL2160. We have already quashed the convictions in respect of eight counts. We think these factors should reflect on the sentence. In these circumstances, we take the view that the cumulative effect of the sentence is now so excessive as to call for interference. See *S* v *Sawyer* 1999(2) ZLR 390 (H), *S* v *Nyathi* 2003 (1) ZLR 587 (H).

We set aside the sentence imposed *a quo* and sentence the appellant afresh.

In the result, the following order shall issue:

1. The appeal against conviction partially succeeds. The convictions on counts 2, 4, 6, 8, 10, 12, 14 and 18 be and are quashed.
2. Save for correcting the charges to read "unlawful entry into premises as defined in s 131(1) as read with s 131(2)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]" the appeal against conviction in respect of counts 1, 3, 5, 7, 9, 11, 13 and 17 be and is dismissed.
3. The appeal against conviction in respect of counts 15 and 16 be and is dismissed.
4. The sentence imposed *a quo* in respect of counts 1, 3, 5, 7, 9, 11, 13, 15-16 and 17 is set aside.
5. The accused is sentenced as follows:
   (a) Count 1: 3 years imprisonment of which 4 months imprisonment is suspended on condition the accused pays restitution to the complainant in the sum of ZWL264 through the Clerk of Court, Gweru Magistrates Court by 31 December 2021.
   (b) Count 3: 3 years imprisonment of which 4 months imprisonment is suspended on condition the accused pays restitution to the complainant in the sum of |ZWL350 through the Clerk of Court, Gweru Magistrates Court by 31 December 2021.

(c) Count 5: 3 years imprisonment.

(d) Count 7: 3 years imprisonment.

(e) Count 9: 3 years imprisonment of which 2 months imprisonment is suspended on condition the accused restitutes the complainant in the sum of ZWL76 through the Clerk of Court, Gweru Magistrates Court by 31 December 2021.

(f) Count 11`: 3 years imprisonment of which 4 months imprisonment is suspended on condition the accused pays restitution to the complainant in the sum of ZWL106 through the Clerk of Court Gweru by before 31 December 2021.

(g) Count 13: 3 years imprisonment of which 4 months imprisonment is suspended on condition the accused pays restitution to the complainant in the sum of ZWL102 through the Clerk of Court Gweru by 31 December 2021.

(h) Count 13: 2 years imprisonment of which 6 months imprisonment is suspended on condition the accused pays restitution to the complainant in the sum of ZWL200 through the Clerk of Court, Magistrates Court Gweru by 31 December 2021.

(i) Count 16: 12 months imprisonment.

(j) Count 17: 3 years imprisonment

(k) The sentence in count 7 shall run concurrently with the sentence in count 5.

For the avoidance of doubt, if the appellant does not pay the restitution at all, he shall serve a total of eighteen years imprisonment.

However, if he pays the restitution in full, a total of sixteen months imprisonment shall be deducted from the eighteen years imprisonment.

The Registrar of the High Court has issued the amended prison warrant.

ZHOU J agrees …….

National Prosecuting Authority, respondent's legal practitioners