TENDAI LEANNE MUZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 7 June 2021

Criminal Appeal

Appellant in person
FI Nyahunzvi for the respondent

CHIKOWERO J: This is an appeal against the sentence imposed upon the appellant by the magistrates court pursuant to a conviction on two counts of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The appellant was sentenced to 10 years imprisonment on each count. Of the total 20 years imprisonment 3 years imprisonment was suspended for 5 years on condition the appellant does not during that period commit any offence involving violence and/or dishonesty for which upon conviction the appellant will be sentenced to imprisonment without the option of a fine. This left an effective imprisonment term of 17 years.

There was separation of trials on the appellant's accomplice pleading guilty to both counts. The accomplice was duly convicted and sentenced.

The complainant in count one was employed as a taxi driver. On 16 April 2012 around 1.00 am the complainant was parked at Tiperaris night club in Harare when the appellant and the accomplice pretended to be passengers hiring the former to drive them to Caledonia shops, Hatfield in Harare.

Having agreed on a fee, the appellants then robbed the complainant of the taxi (a Toyota Spacio), US$60, a Nokia 6330 cellphone and a pair of shoes.

The robbery occurred near Sunningdale while the complainant was driving along Seke Road. The accomplice placed a knife on the complainant's neck while the appellant, who was on

the back seat, grabbed the complainant from behind and issued a threat that they would kill their hapless victim if he resisted.

The two stole the property that I have already mentioned. The accomplice took over the steering wheel. They assaulted the complainant and bit him on the ear. The complainant being injured, bled from the eye. Using selotape, they bound him hand and feet. They strapped him with selotape all over the face, leaving only the nostrils free to enable the complainant to continue breathing.

The complainant's face and mouth were covered in blood. On reaching some bushy area, the duo pushed him out of the vehicle. They forced him to ingest some tablets and to drink a sour liquid.

After dumping the complainant in the bush, the appellant and his accomplice then drove off in the former's taxi.

Left alone, the complainant attempted to call for help. He found a stone. He used it to squeeze the selotape, hence freeing himself.

For about two hours he trudged along a residential area, calling for assistance. This was at night. Nobody responded.

Finally, he met a taxi driver near Robert Gabriel Mugabe International Airport. The latter took the complainant to Epworth Police station.

The Toyota Spacio was recovered in Buhera. The duo had sold it to Nyasha Mangezi for US$1 800. Having been worth US$6 200 at the time of the commission of the offence, its value on recovery had decreased to US$6 000. The gear box had cracked, the radio and windows damaged and the wheels replaced. The unrecovered wheels were valued at $1 500.

The stolen cell phone and pair of shoes were valued at $150 and $90 respectively. These items, together with the stolen US$60, were not recovered. Using the same *modus operandi*, the appellant and his accomplice robbed the complainant in count two of his Toyota Raum, US$ 120, a Nokia 1200 cellphone, Samsung and a pair of shoes.

The duo had purported to hire the complainant to drive them from the corner of Jason Moyo and Chinhoyi Streets, in Harare, to Belvedere. On stopping at a certain gate along Blackeway Street, the two took over the complainant's vehicle, cut the seat belt, bound the complainant's legs, strapped selotape over his eyes and dumped him in Hatfield Game Research. Having threatened

him to remain silent since they said they had dumped him in a game park, the two drove off in the Toyota Raum. This was at night. The complainant remained at the scene because he was unfamiliar with the surroundings. At day break, a commuter omnibus crew took him to the police station. He filed a report.

That same night the appellant and his co-accused proceeded to Epworth where they stripped some parts from the vehicle. They hired a Toyota Hiace which towed the shell of the Toyota Raum to the balancing rocks Epworth. There they set the shell on fire.

They sold the lid, bonnet cover and four doors to one Chinengundu, two pistons and the head to one Urayayi, the gear box to Chakanyuka, two drive shafts to Mudengezi, two door glasses and two quarter glasses to Edward Chiwara, one door, one door handle to Tapiwa, the starter and alternator to Zindoga and three door handles and two switches to a certain Maphosa. All these parts were sold, and paid for, in Siyaso Home Industries in Mbare, Harare. The two had hired one Nager to transport the motor vehicle parts from Epworth to Mbare.

The vehicle was worth between US$5 000 and US$ 6000. Only the wheels, doors and gearbox were recovered. These were valued at US$500. The total value unrecovered stood at US$5 500.

In attacking the sentence, the appellant contended that the court overemphasized the seriousness of the offence. We do not agree. These were two counts of robbery committed in aggravating circumstances. Section 126 (2) (a) of the Act provides that the sentence for such an offence is imprisonment for life or any definite period of imprisonment. The court considered the aggravating circumstances as set out in s 126 (3) (a) and (b). The appellant possessed a knife. It is a dangerous weapon. They threatened not just to inflict serious bodily harm on the second complainant but to kill him.

Despite having been met with no resistance, the appellant and his accomplice proceeded to seriously injure the first complainant. They also drugged him, bound both complainants and dumped them in secluded places overnight, exposed to the vagaries of the weather.

The complainants were clearly tortured. They were traumatised. The trial court did not overemphasize the seriousness of the offences. The Legislature has already set the tone, in the penal provision, on how society abhors this offence.

Accordingly, the first ground of appeal, being without merit, is dismissed.

The second ground of appeal impugns the sentence imposed on the basis that the court did not give reasons for the sentence. This is not correct. The trial court gave detailed reasons for the sentence. Resultantly, this ground of appeal is likewise dismissed.

The third ground of appeal reads as follows:

> "3 The court *a quo* misdirected itself when it failed to directly implicated or identify the appellant as the one who had committed the offences but it was well after the appellant had been arrested meaning to say it is the police that led to the identification of the applicant. It was therefore a fact worth recognition in passing sentence"

The appellant did not appeal against the conviction. He cannot therefore attack the conviction through the back door and employ that strategy as a ground of appeal against the sentence. The third ground of appeal, not being a ground of appeal against sentence, is thus invalid and is struck off from the notice of appeal.

The court placed sufficient weight to the mitigatory factors. Of particular importance was that the appellant was a youthful first offender. The sentencer, citing *S* v *Mpofu* 1985 (1) ZLR 265 (S) noted that imprisonment is a severe punishment which must only be imposed as a last resort. The sentence imposed falls well below the maximum provided by the lawmaker. In addition, three years imprisonment was suspended for five years on the usual condition of future good behaviour. The suspension was on account of the appellant's status as a first offender. There is, in the circumstances, no merit in the fourth ground of appeal. It is dismissed.

Treating the two counts as one for purposes of sentence is discretionary. Ordering sentences on the two counts to run concurrently is also discretionary. Having settled for individual sentences which the court considered to meet the justice of the case, it cannot be an injudicious exercise of discretion that the trial court did not order the sentence on count two to run concurrently with that on count one. Similarly, it was a judicious exercise of discretion for the trial court not to treat the two counts as one for the purpose of sentence. The offences were committed on different dates. The complainants were different. Two sets of property were involved with the vehicle in count two having been reduced to ashes after it had been stripped of parts. In these circumstances, the mere fact that the appellant was being sentenced for robbery in respect of both counts was no bar to the trial court approaching the issue of sentence in the manner that it did. The discretion reposed in that court. There is no basis for us to interfere. In the result, the fifth ground of appeal is dismissed.

The appellant complains that the sentence leans heavily in favour of the interests of society and that his interests were accorded insufficient weight. This is the sixth ground of appeal. It is closely related to the seventh ground of appeal. Therein, the appellant attacks the sentence on the basis that it is manifestly harsh and excessive as to induce a sense of shock. In addition to the factors of aggravation that we have already adverted to the trial court also considered the following:

- The two Toyota motor vehicles were being used as commercial vehicles. Both were taken off the road, damaged and one of them burnt to destroy evidence of the commission of the offence.
- Since they were used as taxis, the income derived therefrom was used to sustain the complainants' families. The complainants lost sources of livelihood. Not only that, the appellant sold parts removed from the vehicles for a song.
- The appellant benefitted from the offence. Together with his accomplice, they sold the one vehicle for US$1 800. They sold the parts of the other vehicle. The appellant and his accomplice were paid. They used the cash proceeds of the crimes.
- Offences of robbery against taxi drivers are on the increase. The perpetrators take advantage of the vulnerability of the drivers, particularly at night. They pounce on the unsuspecting drivers.

S v *Ramushu and others* SC 25/93 involved a gang who robbed a jewellery shop and fled in a get-away car with jewellery worth $160 000. The gang brandished an unloaded AK rifle. The complainant, unware of this fact, was terrified and submitted to the taking. The court observed that jewellers were vulnerable and needed special protection from the courts. Mr Nyahunzvi argued that the same should apply to taxi drivers. We agree.

The court carefully balanced the mitigatory and aggravatory factors. It concluded that the latter far outweighed the former, hence the need to impose an exemplary sentence. These two counts reflects a lot of planning and careful execution of the offences. This is "commercial" robbery, so to speak. The sentence imposed does not shock us. It was fully justified. There is no merit in the sixth and seventh grounds of appeal.

The appeal has no merit and it is dismissed.

ZHOU J agrees……..

The National Prosecuting Authority, respondent's legal practitioners