CALVIN NCUBE

AND

LAST SIWELA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J AND CHEDA AJ
BULAWAYO 24 SEPTEMBER 2012 AND 1 NOVEMBER 2012

Mr. *K. Ngwenya* for the 1st appellant
Mr *S Mguni* for the 2nd appellant
Mr *T Hove* for the respondent

Criminal Appeal

CHEDA J: This is an appeal against sentence

Appellants were aged 23 and 22 years respectively at the time of the offence. They were charged with unlawful entry, (formally house breaking). They pleaded guilty to this charge and were each sentenced to 20 months imprisonment of which 6 months imprisonment was suspended for 5 years.

They now appeal against the said sentence. The brief facts of the matter are that on the 20th February 2011 at about 0020 hours the two appellants left their houses in Emganwini Townships and respectively proceeded to Saurcetown, Bulawayo, where they unlawfully gained entry by breaking a French Door after jumping over the Durawall. The complainant who was asleep was awakened by the disturbance of these intruders. She reacted by telephoning the police who attended to the scene and subsequently arrested the appellants.

It is their arguments through their legal practitioner that there has been a misdirection on the part of the learned trial magistrate who according to them failed to give sufficient weight to mitigatory features of their case. They argued that appellants are first offenders who

pleaded guilty and are young first offenders, therefore, the trial court should have been lenient with them.

In addition, that this offence provides for an option of a fine. Respondent though, through *Mr Hove* on the other hand has argued that in as much as the above factors are true, the aggravating features far much outweigh the mitigatory ones.

Appellants travelled all the way from Nkulumane and Emganwini where they reside to Saurcetown during the night. Upon arrival they smashed a French Door in order to gain entry. The crime was committed in aggravating circumstances which justifies an imposition of a short prison term.

It has been argued that traditionally these courts attach a lot of weight to a plea of guilty, see *S v Buka* 1995 (2) ZLR 130(SC). While this indeed is settled law, however, I do not understand this to say that in all cases a plea of guilty should be regarded as a must to an extent of preventing an accused from serving an otherwise deserving imprisonment. The above authority emphasised the need for the courts to always be alive to this factor in determining suitable sentences, a discretion which is always the domain of the trial courts. In my opinion to treat all pleas of guilty as a certain excuse for a non-prison term will be stretching an otherwise noble mitigatory feature too far. A plea of guilty where a suspect has been caught in the act, *flagrante delicto* the said plea of guilty cannot obviously be said to be a favour to the court. A plea of guilty will assist a suspect where his guilt would only have been established after a strainous effort by other means not where he had no alternative, but, to honour up by admitting his guilt.

The fact that appellants are first offenders is indeed a fact which can not be ignored, but, this does not automatically entitle them to a non-custodial sentence. The treatment of first offenders to an extent of passing a non-custodial sentence is not automatic, but, depends on the seriousness of the offence and the circumstances which surround the commission of the offence. This, to me, is not one of them. Appellants travelled during the night and broke a French Door to gain entry, this to me is an indication of a careful planning on their part. They pounced in the middle of the night and traumatised their victims by their nocturnal visits. This kind of burglary must no doubt psychologically tortured the occupants of this house.

In as much as it is admitted that they are indeed on the younger side of life, but it should not be forgotten that they are already family men. Young people who indulge in activities which by and large are unlawfully associated with adulthood can not be heard to complain when they are treated as adults.

I find that the trial magistrate approached this case having taken into account all the relevant mitigatory features of this case and arrived at a fair sentence. The appeal court is very slow in interfering with a sentencing discretion of a trial court merely on the grounds that it might have passed a sentence somewhat different from that imposed by the court *a quo*. If the sentence complies with the relevant principles even if it is severe than the sentence which the trial court would have imposed sitting as a court of first instance, the appeal court will not interfere with that sentencing discretion, see *S v Nhumwa* SC 40/88. However, the appeal court will interfere with the sentence imposed by the court *a quo* if it is manifestly excessive so as to induce a sense of shock or it is vitiated by irregularity or misdirection; see *S v Ramushu* SC 25/93. Infact it has to be so out of step of the category of such offences to an extent that no reasonable court would have passed it.

Sentencing always remains the province of a trial court. There is no misdirection in this matter.

The appeal is dismissed.

Messrs Mabhikwa Hikwa and Nyathi, 1st appellant's legal practitioners
Messrs Hwalima, Moyo and Associates, 2nd appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners

Cheda J.....

Cheda AJ agrees .....