STATE
versus
TAWANDA GUMBO

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 14 September, 2011

Criminal Review

MUTEMA J: The accused person, who was 28 years old, was arraigned before a Chivhu provincial magistrate on 13 August, 2010 facing four counts of unlawful entry into premises in contravention of s 131 (1)(a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23]*. He pleaded guilty to all the charges and was sentenced to nine years imprisonment, 3 years of which were suspended for five years on the usual condition of future good conduct, all counts having been taken as one for sentence.

The bare bones of the matter are that the accused, who resides in Epworth, Harare teamed up with two others who reside in Zengeza, Harare and Chivhu respectively on 21 July, 2010 at around 04.00 hours and unlawfully entered four different premises in Chivhu wherefrom they took various household and clothing items all valued at US$410-00. All the property was recovered the same day around 05.30 hours when the accused and an accomplice were arrested whilst in a truck en route to Harare. The two accomplices pleaded not guilty and a separation of trials was ordered.

When the matter found its way before me on automatic review, I queried the severity of the sentence given the facts of the matter especially the guilty plea, recovery of the property, first offence and the miniscule value involved. The trial magistrate, while conceding that the value of the property is miniscule, attempted to defend his sentence in these words:

> "… the court took into account the preplanning involved whereby the accused came all the way from Harare to Chivhu to commit these crimes at night. The four crimes were all committed in one night resulting in aggravatory frequency. Furthermore, people who break into other people's premises are generally dangerous to society."

While I have no quarrel with the sentiments expressed by the trial magistrate, it remains without trammel that the overall sentence of nine years imprisonment in the circumstances induces a sense of shock.

Perhaps the words of BARTLETT J in *S* v *Hwemba* 1999 (1) ZLR 234 (HC) need repetition for clarity and reminder. At p 235 the learned judge had this to say:

> "A sentence of imprisonment is a rigorous and severe form of punishment. … Where imprisonment is the only appropriate sentence a court must impose the minimum effective period to do justice to both the offender and the interests of society."

This basic tenet has also been echoed in several cases. One such is *S* v *Teburo* HH 517-87 at p 2 where GREENLAND J said:

> "Given the limited avenues available to a judicial officer, he can attempt to achieve this by tempering the sentence with mercy and compassion, especially here when the accused is a contrite first offender. Such an approach is more likely to induce a positive response from the accused than a sentence which will simply brutalise him and lead ultimately to the man redefining himself as a criminal and behaving accordingly. Moreover, overlong incarceration is counterproductive. It destroys and contaminates. See *S* v *Khumalo Anor* 1984 (3) SA 327 (A) at 331. The court therefore, ends up contributing to the criminalisation of society.
>
> For the above reasons, it is a better approach for a judicial officer to appeal to the good sense of responsibility residual in the contrite first offender and impose the least punishment which will still achieve the objectives of punishment."

See also the cases of *S* v *Katsaura* 1997 (2) ZLR 102; *S* v *Matiya* HH 180-97 and *S* v *Mangena* HH 28-99.

In *casu* it is beyond caevil that imprisonment was the only appropriate sentence to impose. But was six years the minimum effective period to do justice to both the accused and the interests of society? The answer is definitely in the negative after a careful and honest balancing of the mitigatory factors *vis-à-vis* the aggravatory ones. A minimum effective sentence should have been in the region of three years imprisonment.

In the result, while the accused's conviction is confirmed, the trial magistrate's sentence is set aside and substituted by the following:

All four counts taken as one for sentence:

Four years imprisonment of which one year imprisonment is suspended for five years on condition accused does not, during that period, commit any offence involving

unlawful entry into premises or dishonesty for which upon conviction the accused will be sentenced to imprisonment without the option of a fine.

The trial magistrate is directed to ensure that an amended prison warrant is made out immediately.

MAWADZE J agrees……..