FARAI PHIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 10 & 12 January 2023

Criminal Appeal

Appellant, in person
Ms W Badalame, for the State

ZHOU J: This judgment is in respect of two appeals which were consolidated for the purposes of the hearing. The first matter, under CRB MB-CD 1981/22 is an appeal against the sentence imposed upon the appellant following conviction on two counts of unlawful entry in aggravating circumstances. In the first count the appellant was sentenced to 36 months imprisonment of which six months imprisonment was suspended for three years on condition of good behaviour, and a further six months imprisonment was suspended on condition of restitution. In the second count the appellant was sentenced to 36 months imprisonment of which six months imprisonment was suspended for three years on condition of good behaviour, and 3 months imprisonment was suspended on condition of restitution, leaving an effective period of 27 months imprisonment. In respect of this count we noted the miscalculation of the effective sentence which the court *a quo* presented as 30 months instead of 27 months. This anomaly was brought to the attention of the respondent's counsel and the court was invited to exercise its review powers to correct the patent irregularity. The two sentences, *viz* for counts 1 and 2, were ordered to run concurrently. The effective sentence for these two counts must thus be read correctly as 27 months imprisonment.

In CRB MB-CD 1982-3/22 the appellant was convicted of unlawful entry in aggravating circumstances as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 36 months imprisonment of which six months imprisonment

was suspended for three years on condition of good behaviour, and six months imprisonment was suspended on condition of restitution.

Following the condonation order in terms of which the two cases were consolidated, the appellant filed one notice of appeal challenging the sentences on the grounds that the sentences induce a sense of shock owing to harshness, and that the court *a quo* failed to give due weight to the plea of guilty and the fact that the appellant was a first offender. The appellant moved for a wholly suspended sentence or community service in place of the effective sentences of imprisonment.

A sentence induces a sense of shock if it is so excessive as to be out of line with the penalties imposed in similar cases. This court recognizes the established principle that the question of an appropriate sentence is one that is within the discretion of the trial court. The exercise of that discretion will not be interfered with unless it is shown that the discretion was not exercised judicially. The court *a quo* referred to the cases of *S* v *Shayawabaya* HH 615/18 and *S v Doriga* HB 247/17, in order to show that the kind of offence involved *in casu* justified the imposition of a custodial sentence. It further noted that there were good reasons to go beyond the 12 months imprisonment imposed in the two cited cases because the circumstances justified the departure.

In particular, the fact that the offences were committed in aggravating circumstances and the prevalence of the offence weighed heavily against the appellant. We find no misdirection in the reasoning of the court *a quo*. The court made the observation, which has not been challenged, that it dealt with not less than 10 cases involving this kind of offence on a daily basis. Thus the widespread nature of the offence and the fact that it was accompanied by theft justified the sentences imposed. The court *a quo* actually exercised leniency in CRB MB-CD 1981/22 by ordering the two sentences to run concurrently even though the offences were committed on different dates, at different places and in relation to two different complainants. The court also considered the timing of the offences and the use of an instrument, a bolt cutter, which shows careful planning by the appellant.

The second ground of attack is without substance because the reasons for sentence show that the court *a quo* gave due weight to the status of the appellant as a first offender and to the fact that he pleaded guilty. These factors had to be balanced against the other factors of the case.

Equally, in CRB MB-CD 1982-3/22 the court *a quo*, while giving weight to the plea of guilty by the appellant and the fact that he was a first offender, also considered the serious aggravating circumstances of the case. These include the deliberate and careful planning by the appellant as evidenced by the designing and making of an iron bar for use in the commission of the offence, the fact that he damaged the complainant's property during the unlawful entry, and the widespread nature of the offence in the area of jurisdiction of the court.

In light of the reasons given to justify the sentence, this court finds no misdirection. The appeal is therefore without merit.

In the result, **IT IS ORDERED THAT**:

1. The appeal be and is dismissed in its entirety.
2. For the avoidance of doubt the sentences in CRB MB-CD 1981/22 and CRB MB-CD 1982-3/22 are to run consecutively and the appellant shall serve an effective sentence of 51 months imprisonment.

ZHOU J:……..

CHIKOWERO J: Agrees……..…….

National Prosecuting Authority, respondent's legal practitioners