WELLINGTON CHAMUNORWA CHENDAMBUYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHITAPI JJ
HARARE, 18 July 2023

Criminal Appeal

Appellant in person
K Kunaka, for the respondent

CHITAPI J: The applicant aged 23 years together with a co-accused Wiriranai Gora aged 22 years appeared before the Regional Magistrate, S Jenya at Gokwe Magistrates Court on 23 May, 2019 charged with 28 counts of commission of various offences and were each found guilty of having committed eleven (11) of the counts and not guilty of having committed seventeen (17) of the counts consequent upon a withdrawal after plea on the said counts. The appellant and his co-accused were on each of the eleven (11) counts sentenced to 4 years imprisonment the sum total of the combined person terms was 44 years. From the total of the 44 years imprisonment a total of 7 years imprisonment was suspended on usual condition of future good behaviour leaving a total effective sentence of 37 years imprisonment.

For completeness of record, the ten counts on which the appellant and his accomplice were convicted were counts 02; 08; 09; 13' 14; 15; 16; 17; 18; 19 and 22 in detail. The details of the counts were as follows as copied from the summary jurisdiction/charge sheet.

> "COUNT 02
>
> Aggravated unlawful entry into premises as defined in section 131(1)(a) as read with Section 131(2) (l) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]
>
> In that on 26th day of July 2016 and at house number 46 Poinsentia Avenue, Masasa Kwekwe both Wellington Chamunorwa Chendambuya and Wiriranai Gora or one or more of them intentionally and without permission or authority from Loice Chikono the lawful occupier of the premises concerned, or without other lawful authority entered the said premises by means of using an unknown object to force open a locked kitchen union lock key and gained entry and whilst inside the said premises, both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them took property capable of being stolen namely one 32 inch Samsung

Plasma television serial numbers LGHN384DC07457, one microwave serial numbers MEW01/3M/XFA8284308618-169, one pellet gun and a Rasal hobbs electrical iron knowing or realizing that Loice Chikono was entitled to own possess or control the property and intending to deprive Loice Chikono permanently if her ownership, possession or control of the property and realizing that they might so deprive Loice Chikono thereof.

"COUNT 08

AGGRAVATED UNLAWFUL ENTRY INTO PREMISES AS DEFINED IN SECTION 131(1)(A) AS READ WITH SECTION 131(2) (e) OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]

In that on 5th day of October 2016 and at number 3 Herbert Chitepo Road New Town Kwekwe, both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them intentionally and without permission or authori9ty from Tonderai Nyama the lawful occupier of the premises concerned, or without other lawful authority entered the said premises by means opening a closed but not locked door and gained entry and whilst inside the said premises, both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them took property capable of being stolen namely one HTC cell phone and Honda Fit car keys knowing that Tonderai Nyama was entitled to own, possess or control the property and intending to deprive Tonderai Nyama permanently of his ownership, possession or control of the property or realizing that they might so deprive Tonderai Nyama thereof."

"COUNT 09:

THEFT AS DEFINED IN SECTION 113(1) OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]

In that on 5th day of October 2016 and at number 3 Herbert Chitepo Road New Town Kwekwe both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them took property capable of being stolen namely one Honda Fit registration number ADW 8961, LG4 cell phone and cash $941.00 knowing that Tonderai Nyama was entitled to own, possess or control the property, or realizing that there was a real risk of possibility that Tonderai Nyama might be so entitled and intending to deprive Tonderai Nyama permanently of his ownership, possession or control, or realizing that there was a real risk or possibility that they might so deprive Tonderai Nyama of his ownership possession or control."

"COUNT 13:

UNLAWFUL ENTRY INTO PREMISES AS DEFINED IN SECTION 131(1) OF TH ECRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]

In that on 9th day OF December 2016 and at number 15 Gardenia Crescent, Masasa Kwekwe, both Wellingtom Chamunorwa Chienda Gora or one or more of them intentionally and without permission or authority from Nyasha Chinjeke the lawful occupier of the premises concerned, or without other lawful authority entered the premises, that is to say both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them used an unknown object to force open a locked door and gained entry into the house of Nyasha Chinjeke.

COUNT 14:

ROBBERY AS DEFINED IN SECTION 16 OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]

-

In that on 9th day of December 2016 and at number 15 Gardenia Crescent, Masasa Kwekwe, both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them unlawfully and intentionally used violence against Nyasha Chinjeke in order to steal Nyasha Chinjeke's one Huawei cell phone, one Nokia 1200 cell phone , Toyota D4D car keys and cash $420.00.

COUNT 15:

ROBBERY AS DEFINED IN SECTION 126 OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]

In that on 9th day of December 2016 and at number 15 Gardenia Crescent, Masasa Kwekwe, both Welling Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them unlawfully and intentionally used violence against Leeroy Samungu in order to steal Leeroy Samungu;s one Nokia Lumia 521 cell phone.

COUNT 16:

THEFT AS DEFINED IN SCTION 113 (1) OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]

In that on 9th of December 2016 and at number 15 Gardenia Crescent, Masasa Kwekwe, both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them took property capable of being stolen namely one Nokia Lumia 520 cell phone, two pairs men's shoes one pair men's trouser, one wallet and cash $47.00 knowing that Simbarashe Munyeki was entitled to own, possess or control the property or realizing that there was a risk or possibility that Simbarashe Munyeki might be so entitled and intending to deprive Simbarashe Munyeki permanently of his ownership, possession, control or realizing that there was a real risk or possibility that they might so deprive Simbarashe Munyeki of his ownership possession or control.

COUNT 17

THEFT AS DEFINED IN SCTION 113 (1) OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]

In that on 9th of December 2016 and at number 15 Gardenia Crescent,Masasa Kwekwe, both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them took property capable of being stolen namely one Toyota D4D motor vehicle registration number ABG 7050 knowing that Nyasha Chinjeke was entitled to own, possess or control the property or realizing that there was a real risk or possibility that Nyasha Chinjeke might be so entitled and intending to deprive Nyasha Chinjeke permanently of his ownership, possession or control, or realizing that there was a real risk or possibility that they might so deprive Nyasha Chinjeke of his ownership possession or control.

COUNT 18

UNLAWFUL ENTRY INTO PREMISES AS DEFINED IN SECTION 131(1) OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23]*

In that on 25th day of December 2016 and at house number 1224/17 Mbizo Kwekwe both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them

-

intentionally and without permission or authority from John Mapamba the lawful occupier of the premises concerned, or without other lawful authority entered the premises, that is to say both Wellington Chamunorwa Chiendambuya andWiriranai Gora or one or more of them used an unknown object to break the window and cut burglar bars and gained entry into the house of John Mapamba through the window.

COUNT 19

ROBBERY AS DEFINED IN SECTION 126 OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*]

In that on 25th day of December 2016 and at house number 1224/17 Mbizo Kwekwe both Wellington Chamunorwa Chiendambuya and Wiriranai Gora or one or more of them unlawfully and intentionally used violence against John Mapamba in order to steal John Mapamba's one Samsung tablet cell phone, Samsung Galaxy cell phone, few groceries and cash $ 300.00

The appellant did not timeously note an appeal but did so following the granting by CHAREWA J of his application reference CON 341/19 for condonation of late noting of appeal and extension of time to note appeal by order dated 17 December 2019. The order did not specify whether the appellant was allowed to appeal against conviction, sentence or both. The order had to be interrupted in favour of the appellant as having been an open order allowing him to note appeal against both conviction and sentence.

The appellant noted an appeal against both conviction and sentence on 3 January 2020. The grounds of appeal were couched as follows:

"Grounds of Appeal ……..

AD CONVICTION

1. CONFIRMED WARNED AND CAUTIONED STATEMENTS:
   The court *a quo* gravely erred in convicting the appellant on this document on which its existence and production the law in evidence production vigorously protest and contends.
2. Indications statements: the court *a quo* also gravely erred by convicting on these documents which also both at law and at fact their existence and evidence production the law vigorously protest against their existence and admission as evidence against the appellant
3. Confessions: the court *a quo* gravely erred by convicting on the alleged confessions which at law at fact there was no any evidential material in whatever manner or form ie (to say the real documents to prove and corroborate the claimed confessions which the state adduced orally fluid.
4. The law calls and demand that if the accused contend and puts it in issue that he never made any confirmed warned and caution statements, any indications or confessions, a trial within a trial should be conducted in regard to the evidence in question only. The trial court therefore gravely erred not to conduct a trial within a trial on these documents and they (documents0 be produced during that trial within a trial for cross examination purposes, in this matter this was not done.
   AD SENTENCE

-

Though appellant contends the conviction, he is not admitting to any sentence as he will argue and contends as follows:

(i) The improper splitting of charges on counts 8 and 9 which were supposed to be treated as 1
(ii) Improper splitting of charges on counts 13, 14, 15 16 and 17 which were supposed to be treated as 1.

Therefore law calls to treat counts committed on a single intend continuous transaction, same transaction and on a dominant evidence test as 1 see in the cases of:

John Zacharia v *The State* 2002 (1) ZLR P17 and a present appeal matter of *M Richard* v *The State* HH 369/19 can 254/16 CRB R 45/09 before JJ HUNGWE and JJ MUSHORE on the 16th and 29 of May 2019.

The above law was employed for a reasonable sentencing

(iii) There is no evidence to suggest a conviction and sentence should have been sustained and handed before the appellant on counts 2, 18 and 19 an acquittal was also appropriate.

Wherefore appellant prays for an acquittal and discharge by the appeal court.

Signed by : Wellington Chamunorwa Chiendambuya
Chikurubi Maximum Prison
Greendale
Harare"

On 12 October 2020 the appellant filed a notice of amendment to the grounds of appeal. The State counsel Mrs *Kunaka* in her heads of argument noted that the suggested amended grounds themselves were neither precise and nor concise. Counsel however adopted a holistic approach and submitted that it was in the interests of justice and finality to have the appeal determined on the basis of synthesizing what the appellant complained to be the wrongs allegedly committed by the court *a quo*.

The appellants' amended notice of appeal was allowed by the court.

It reads as follows:

"AN AMENDMEN TO A NOTICE OF APPEAL RULE NO 6 OF THE (MAGISTRATES COURTS) CRIMINAL APPEAL RULES 1979.

1. Be pleased to take notice that, the applicant do hereby notes an application for an amendment of notice of appeal
2. Further take notice that: the grounds of appeal herein and the record of proceedings already filed the CA number 2/2020 shall be relied upon in determining this application.
3. It is respectfully submitted that: the applicant I his initial notice of appeal he submitted, come to learnt that his grounds of appeal were shallow after he received legal advice, hence the reason why an addendum to them.

-

> Wherefore applicant prays before this Honourable Court that an amendment to his notice of appeal be admitted by this Honourable Court in terms of the draft order annexed hereto.
>
> Dated this 22nd of September 2020
>
> Prepared by Wellington
> Wellington c Chiendambuya
> c/o Chikurubi Maximum Prison"

In relation to conviction, respondent's counsel correctly summarized that the appellant was attacking the admissibility by the court *a quo* of the confirmed warned and cautioned statements and statements be made when making indications, the indications themselves and confessions. In the fourth ground of appeal, the appellant as again correctly noted by the respondent's counsel faulted the court *a quo* for not conducting a trial within a trial before admitting the documents complained of in evidence.

In relation to the challenge that a trial within a trial ought to have preceded the admission of the inculpating documents, the regional magistrate in his response to the grounds of appeal that "a trial within a trial was done before evidence of confessions, admissions, indications etc could be accepted by the court". Further and as correctly submitted by respondents' counsel, the record shows that there was held a protracted trial within a trial as shown upon a perusal of pp 75 to 202 of the record. The trial within a trial followed a challenge by the appellant to the production of the documents whose admission he seeks to impugn. Six witnesses gave evidence for the prosecution in the trial within a trial. The appellant cross examined each of them. The appellant in turn testified. The regional magistrate prepared a judgment disposing of the trial within a trial as evidenced on pp 203-211 of the record. The operative part of the judgment read as follows:

> "As a result this court will declare that the accused were not duressed (sic) and in the main trial evidence of indications, confessions and admissions will be accepted."

In the course of trial, the following warned and cautioned statements were produced. The first was exhibit 3 made by the appellant on 15 May 2017. It related to count 2 wherein the appellant and his accomplice were convicted of unlawful entry in aggravating circumstances into house number 46 Poisentia Road Msasa Park, Kwekwe on 26 July 2016. In that statement, the appellant admitted to unlawfully entering the premises issuing an iron bar to break the door to the house open. The next warned and cautioned statement was produced as exhibit 5. It related to count 1. The appellant was acquitted on this count. The next warned and cautioned statement was produced as exhibit 6. The warned and cautioned statement

exhibit 1 is a duplication of exhibit 3. Exhibit 6 does not add value to the case and there ought not to have been a duplicated production of the warned and cautioned statement

Exhibit 7 was again a warned and cautioned statement made by the appellant on 12 May 2017. It related to counts 18 and 19. In count 18 the appellant was charged with contravening s 131(1) of the Criminal Law Codification and Reform Act, with the offence of unlawful entry into house number 1242/17 Mbizo Kwekwe committed on 25 December, 2016. It was alleged that the appellant and an accomplice used an unknown object to break the window and cut burglar bars to effect entry into the house. In count 19, the appellant was then charged with the offence of robbery as defined in s 126 of the same enactment, it being alleged that having unlawfully gained entry into the same premises described in count 18, the appellant and his accomplice used force and violence on the occupant of the house, one John Mapamba to force his submission whereafter the appellant and his accomplice stole property of John Mupamba comprising a Samsung tablet cellphone Samsung galaxy cell phone, some grocery items and $300 cash. The appellant admitted the charges.

Another warned and cautioned statement inadvertently marked exhibit 7 was produced. It was made by the appellant on 12 May 2017. It related to counts 5, 6 and 7. The appellant was acquitted on these counts after the prosecutor had withdrawn the charges after plea.

In summation thereof, in relation to the evidence of warned and cautioned statements, firstly they were confirmed before a magistrate. The produced statements as far as the conviction of the appellants was concerned were the ones produced as exhibit 3 which related to count 2, exhibit 7 which related to count 18 and 19. The learned magistrate properly conducted a trial within a trial on the counts and further properly took the statements as evidence against the appellant. It was to the appellant's credit that in the course of making his submissions, he conceded that he could not advance his appeal against the eleven convictions. The appellant persisted with his appeal against sentence. The court noted that the appeal against conviction had been abandoned by the appellant.

In relation to sentence Miss *Kunaka* the respondent's counsel commendably conceded in her heads of argument that the learned magistrate misdirected himself by treating all the counts on which the appellant was convicted individually in circumstances where some counts could have been treated as one for purposes of sentence, the charges having arisen from essentially one course of conduct by the appellant. Counsel referred to the judgments of this court and the Supreme Court in *S* v *Zachariah* 2002 (1) ZLR 43 (H), *R* v *Peterson* 1970 RLR, *S* v *Jambani* 1982(ZLR 213; *S* v *Thanton* 1985 (1) (S) ZLR 228(S) and *S* v *Matumba* 1989 (2)

ZLR (S). These judgments relate to the subject of splitting of charges and its resulting in not just a duplication of convictions but also a duplication of sentence. In this regard, counsel correctly conceded that counts 13, 14, 15 and 16 arose from one course of conduct amounting to unlawful entry committed in aggravating circumstances. Counsel conceded in relation to counts 18 and 19 that the two were similarly split and should have been treated as one for purposes of punishment. The court agreed with counsel in her argument on the splitting of sentences.

In addition to counsel's submission, a consideration of the reasons for sentence shows that they were scanty. The learned magistrate appeared incensed with the crime of robbery and commenced his reasons for sentence by stating as follows:

> "Robbers are among the worst criminals that the society does not want among them. Robbery is the worst crime among all offences of dishonesty. The court is noting that serial robbers like you can commit the following offences, theft, robbery, rape, murder, offences of violence etc…."

The learned magistrate went on to describe generally the *modus of operandi* of how robbers attack their victims especially if there was a confrontation because the robbers would be trying to find an escape route. The example of Benedict Moyo was given as having involved a fight back between the complainant and the appellant. No further details were given nor the count separately related to distinguish it for the seriousness of its circumstances compared to others. The learned magistrate went on to berate robbers for committing robberies as victims ended up injured, killed or even raped. The learned magistrate then stated that although he considered that the appellant and his co-accused were family men and first offenders, there was more aggravation than mitigation in the case and that cases of robbery were on the increase.

There can be no doubt that the learned magistrate perfunctorily and cursorily dealt with the issue of sentence. It was necessary to consider the circumstances of each count since each count represented a separate act and separate charge. The counts should each be ventilated albeit the sentence can then still take some or all of the charges as one for purposes of punishment.

Further, counsel for the respondent, Miss *Kunaka* again properly conceded that even if the learned magistrate had not split the charges, 44 years imprisonment with 7 years suspended for good behaviour was too severe as to induce a sense of shock in the circumstances of the cases. A sentence beyond 25 years reaches the outer limit and may be said to be akin to

imprisonment for life. Counsel suggested a reduction of sentence in para 15 of the heads of argument as follows:

> "15. It has already been conceded that there was a misdirection in the conviction for counts 13, 14, 15 and 16 ought to have been one count. The same applies to count 18 and 19. It is the respondent's considered view that the appeals court interferes with the total sentence that was imposed by the court *a quo* by treating counts 1, 14 15 and 16 as one count and counts 18 and 19 as another thereby sentencing (sic) the 13, 14, 15 and 16 to 4 years imprisonment and count 18 and 19 to 4 years imprisonment."

Counsel then suggested that if the count takes into account of counts 13, 14, 15 and 16 and counts 18 and 19 respectively as one for purposes of sentence, there would be seven groupings, the imposition of four years imprisonment per group would attract a total sentence of 28 years from which seven years imprisonment would then be suspended on conditions of future good behaviour leaving a total effective sentence of 21 years imprisonment.

Being at large on the question of sentence because of the misdirection of the learned magistrate, the court agreed that the sentence imposed by the leaned magistrate was too excessive as to warrant interference. The appellant and his co-accused were aged 23 and 22 years respectively and relatively youthful offenders who deserved a second chance to reintegrate into society and be useful to themselves, their families and society. The learned magistrate's retort that society does not want to see robbers is correct but needed qualifying. It is better expressed as that whilst society does not countenance robbers in as much as society does not tolerate any crime, society nonetheless expects courts to adequately punish accused persons convicted of serious offences like robbery and unlawful entry into premises since the crimes violate the inalienable constitutionally protected right to personal security and the right to privacy. In doing so, the court is required to take into account the triad, of the offence, the offender and interests of society.

The offences committed by the appellant and his co-accused occurred over a period of six months from July to December 2016. The offences were localized within the Kwekwe suburban area. The appellant and his co-accused had adopted the unlawful entry into premises as a way of survival. They had become some kind of serial robbers and for that reason, the court considers the repeat of the offences by the appellant as an aggravating circumstance. Society expects its members to lead honest lives and to respect the rights of others.

In reducing the sentences imposed the court has considered the circumstances of each individual case. An effective sentence in the region of fifteen years imprisonment would meet the justice of the case. The court will therefore employ the approach suggested by counsel for the respondent, save that the sentence of four years per grouping will be reduced to three years.

-

The suspended sentence of seven years imprisonment will be reduced to six years imprisonment. In the same vein, the court was advised that the appellant's co- accused Wiriranai Gora had not appealed against the judgment and sentence imposed on him. His circumstances are the same as those of the appellant. Even though the co-accused did not appeal it is in the interests of justice that he is accorded the same benefit of sentence reduction as with the appellant. The court is empowered under s 29(4) of the High Court Act [*Chapter 9:06*] to review criminal proceedings which are not in accordance with real and substantial justice notwithstanding the absence of an application by the accused and will review the proceedings no matter how those proceedings have come to the attention of a justice of the High Court or the court. See *Jane Linda Rose* v *State* HH 71-12; *S* v *Brian Katiyo* HH 80/18.

It is therefore ordered as follows:

1. The appeal against conviction having been abandoned is dismissed.
2. The appeal against sentence succeeds and the sentence imposed by the court on the appellant in case number CRB GKR 57 – 58 *a quo* is set aside and in its place the following sentence is imposed:
   (a) Counts 13, 14, 15 and 16 taken as one for sentence 3 years imprisonment
   (b) Counts 18 and 19 taken as one for sentence - 3 years imprisonment
   (c) Count 2 -3 years imprisonment
   (d) Count 8 -3 years imprisonment
   (e) Count 9 - 3 years imprisonment
   (f) Count 17 - 3 years imprisonment
   (g) Count 22 -3 years imprisonment
3. Of the total sentence of 21 years imprisonment 6 years imprisonment is suspended for 5 years on condition that within that period the accused does not commit any offence involving an element of dishonesty for which he is convicted and sentenced to a term of imprisonment without the option of a fine. Effective sentence is 15 years imprisonment.
4. For the avoidance of doubt, the sentence imposed on the co-accused of the appellant Wiriranai Gora is set aside and substituted with the same sentence imposed on the appellant.

-

CHITAPI J:……

ZHOU J:……..……..Agrees

National Prosecuting Authority, respondent's legal practitioners

-