HERMAN PHILLIP TEMBO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA AND TAGU JJ
HARARE, 20 October 2014 and 29 January 2015

Criminal Appeal

S.C.Chako, for appellant
E. Nyazamba, for respondent

TAGU J: The appellant was convicted on the same day at two trials as opposed to one trial, by the same Regional Magistrate. He was, however, sentenced in respect of each trial on two separate days.

The circumstances were that on the 2nd of February 2005, the appellant pleaded guilty to, and was duly convicted of, the crime of Theft of a motor vehicle. It being alleged that on the 30th of January 2005, at about 0315 hours, the appellant who was inside a bar at G. V.Z. Leisure Centre, Hwange, went outside to a Toyota Corolla green in colour, bearing registration numbers 528 – 634 Q, which was parked. He used his own keys to start the motor vehicle. When the car was now in motion he was apprehended by the owner with the assistance of members of the public. The motor vehicle valued at Z$ 15 000 000.00 was recovered. The appellant appeared before a Regional Magistrate in case number Byo CRB R 35/05. He was sentenced to 6 years imprisonment of which 2 years imprisonment were suspended for 5 years on the usual condition of future good conduct. He remained with an effective prison term of 4 years imprisonment.

The conviction was in order and it is confirmed.

On the same day, the 2nd February 2005, the appellant appeared before the same Regional Magistrate in case number Byo CRB R36-8/05. He was now jointly tried with two other accomplices. He pleaded guilty to, and was duly convicted, of one count of Robbery,

one count of Armed Robbery, and another count of contravening s 4(2)(b) of the Firearms Act [*Cap 10:09*]. He was remanded to the 9th of February 2005 for mitigation. After giving his mitigation, he was further remanded to the 10th of February 2005 for sentence. On the 10th February 2005 the appellant was sentenced on the Robbery counts as follows -

> "Count 1- 12 years imprisonment. Count 2- 12 years imprisonment. Of the total of 24 years imprisonment 4 years imprisonment were suspended for 5 years on the usual condition of future good conduct. On a charge of contravening the Firearms Act, he was sentenced to the mandatory sentence of 5 years imprisonment."

All in all appellant was sentenced to a total of 29 years imprisonment of which 4 years imprisonment were suspended on the usual condition of future good behaviour. Nothing turns on these convictions and they are confirmed.

The facts upon which the three counts in CRB R 35-8/05 were based were that the appellant, in the company of two accomplices connived to rob the Security Guards who were guarding the Cotton Company Deport at Rushinga Business Centre on the 11th January 2005. The appellant was armed with an axe and his two accomplices were armed with plough shares. Acting in common purpose they assaulted the first guard on his right hand using a plough share, and the second guard on the head using a plough share. They overpowered the security guards and stole one Astra 12 bore shortgun serial number SB 96997 and ran away. The three were then arrested at Hwange G.V.Z. Leisure Centre in possession of the stolen Firearm valued at Z$ 3 000 000.00. The Firearm was thus recovered. They had no permit to possess the said firearm.

On the 15th of January 2005 at about 0730 hours, the appellant and his accomplices were given a lift by the complainant, a woman, at Nyajenje bus stop. They indicated that they wanted to go to Rushinga Turn off. When they arrived at Rushinga Turn off, the three requested to be driven further to the 147 kilometre peg along Harare – Mukumbura Highway. At the 147 kilometre peg the appellant produced the stolen 12 bore shortgun and ordered the complainant to alight from the motor vehicle. A white cloth was forced into her mouth to prevent her from screaming. The appellant drove the vehicle for 200 metres off the main road into the bush. The other accomplices tore the complainant's handbag handle and tied her legs. They also used her shoe laces to tie her. They drove off with her car and the rest of her property valued at Z$ 53 085 000.00. The motor vehicle valued at Z$ 40 000 000.00 was later recovered at Hwange Colliery Town.

The appellant was dissatisfied with the sentence, hence the appeal to this court.

In his grounds of appeal, the appellant attacked the decision of the trial court on the basis that the court misdirected itself by considering appellant's conviction under Byo CRB R 36/05 as aggravatory and at the same time failing to consider the cumulative effect of sentence under CRB R 36/05 and case Byo CRB R 35/05. It was contented that the learned magistrate ought to have ordered the sentence under CRB R 36/05 to run concurrently with the sentence in CRB R 35/05. It was further contented that the trial magistrate misdirected himself by treating the two counts of Robbery in CRB R 36/05 separately for purposes of sentence when in fact the two counts were committed within four days of each other and that the first Robbery was committed with the dominant intention of perpetrating the second Robbery. Furthermore, the two counts were of a similar nature.

The respondent in his initial heads of argument was not entirely opposing the appeal. Mr *Nyazamba* for the respondent submitted that the court a quo apparently misdirected itself when it did not order the sentences imposed on CRB R 36/05 to run concurrently with the sentence imposed on CRB R 35/05. His argument was that while it was accepted that the appellant committed very serious offences, the cumulative effects of failing to order the sentences to run concurrently was that the sentence was unusually long and will result in defeating the cause for deterrence. He referred us to the cases of *S* v *Buka* 1995 (2) ZLR 130 (S) where it was pointed that -

> "A point is reached after which additions to already long prison sentence produce progressively smaller increases in deterrence effect."

Further, he referred to the case of *S* v *Taruvinga* HH 37/89 where it was held that –

> "it is proper to group some of the counts and then look at the globular sentence make some of the sentences run concurrently in order to achieve an appropriate sentence."

At the hearing of the appeal the court noted the following issues -

(i). that appellant was convicted and sentenced on two separate trials.

(ii). that in each trial appellant was sentenced separately, that is to say, the court imposed a specific sentence for each trial.

(iii). that the second trial was concluded a week after the first trial.

(iv). that there was initially one valid notice of appeal.

The issue for determination, therefore, in our view, was whether it would be proper and competent for a court siezed with a particular trial to pass sentence which must run concurrently with a sentence which it had imposed in an earlier different trial. The court asked both parties to address the court on that point. Both counsels filed supplementary heads of arguments.

In his supplementary heads of argument, Mr *Nyazamba* critically examined the law on the issue, and changed his earlier position. He now opposed the appeal. In principle we agreed with most of his submissions.

Section 343 of the Criminal Procedure and Evidence Act [*Cap 9:07*] reads -

> "(1) when a person is convicted at one trial of two or more different offences or when a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offence or for such last offence, as the case may be as the court is competent to impose.
>
> (2) when sentencing any person to punishments in terms of subsection (1), the court may direct the order in which the sentence shall be served or that such sentence shall run concurrently."

As rightfully observed by Mr *Nyazamba*, there are two situations which can be perceived in this provision:

(i). a situation where a person is convicted at one trial of two or more different offences.

(ii). a situation where a person who is under sentence or undergoing punishment for one offence is convicted of another offence.

In both instances the trial court has discretion to order either:

(a) that the sentences run concurrently; or
(b) the order in which the sentences are to be served.

In casu, the appellant was convicted at two trials as opposed to one trial. The appellant was convicted of the offence in respect of both trials on the same day but the passing of sentence was done on different occasions. In respect of CRB R 35/05, appellant was sentenced on 2 February 2005, at a time when he had already been convicted, but not yet sentenced or under sentence or undergoing punishment for another offence. There would be no reason for the Magistrate to order that particular sentence to run concurrently with a

sentence under CRB R 36-8/ 05 because that 'future' sentence was not in existence. When the Magistrate passed the sentence in CRB 35/05, he automatically became *functus officio* in respect of that particular trial. It is our view, therefore, that the sentence imposed on appellant under CRB R 35/05 can properly stand on its own. It would not have been proper and competent for the trial court to order that sentence to run concurrently with the sentence in CRB 36-8/05. That sentence was not even applicable to the other accomplices. If sentence in CRB R 35/05 had been taken as a previous conviction, the best the court could have done was to further suspend it for a period the court deemed fit. The suspended sentence could not have been brought into effect. In any case the sentence in CRB R 35/05 did not induce a sense of shock. The lower court properly and judiciously exercised its sentencing discretion. The sentence is within the range supported by numerous precedents of this Honourable Court.

When the court *a quo* eventually sentenced the appellant for offences committed under CRB R 36-8/05, in our view, it did not have the requisite discretion to order that sentence to run concurrently with the sentence passed on CRB R 35/05. This is so because the conviction of appellant under CRB R 36-8/05 manifested at the time when the appellant was not under sentence or undergoing punishment. The appellant had already been sentenced. The final conviction and sentence on CRB 36-8/05 has no relationship at all to CRB 35/05.

However, in our view, after considering the cases of *R* v *Bentham & Ors* (1972) 3 ALL ER 271 CA , referred with approval in *Chitiyo* v *The State* 1987 ZLR 235 (SC), cited by Mr *Chako* for the appellant in his supplementary heads of argument, we were persuaded that the trial magistrate misdirected himself. At least the trial magistrate should have treated the first two counts as one for purposes of sentence in respect of CRB R 36-8/05 only. The total sentence of 29 years was excessive. The only way to avoid the undoubtedly long time of imprisonment was to order the sentences to run concurrently, or alternatively treat some as one for purposes of sentence. Counts 1 and 2 are kindred offences and were committed within a very short space of time. There was a need to treat counts 1 and 2 as one for purposes of sentence. However, as regards the charge of contravening section 4(2) of the Firearms Act, this was not a kindred offence. It had to be treated on its own. Moreover, at that time, under the Firearms Act, the penalty provision called for a minimum mandatory sentence of five years. Therefore, there is no justification for this Court to interfere with the sentence in respect of count three.

In the result, the appeal partially succeeds. The sentence imposed by the court *a quo* is set

aside and is substituted with the following-

On CRB R 35/05

"6 years imprisonment of which 2 years imprisonment is suspended for five years on condition the appellant does not within this period commit any offence involving dishonesty for which the appellant is sentenced to a term of imprisonment without an option of a fine. Effective- 4 years imprisonment."

On CRB 36/05

"Count 1 and count 2 are treated as one for purposes of sentence : 12 years imprisonment of which 5 years imprisonment are suspended for 5 years on condition the appellant does not within this period commit any offence involving dishonesty for which the appellant is sentenced to imprisonment without an option of a fine.

Count 3:- 5 years imprisonment."

MANGOTA J agrees ……

Mushangwe And Company, appellant' legal practitioners
Prosecutor –General's Office, respondent's legal practitioners.