Judgment No. SC 49/03
Crim. Appeal No. 147/99

(1) ROISON MOYO (2) ROBERT MOYO
(3) MEHLULI SITHOLE (4) MANDLA MLUNGISI NGWENYA

v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & CHIWESHE AJA
BULAWAYO, NOVEMBER 25, 2002 & FEBRUARY 3, 2004

E E Marondedze, for the appellants

Ms M Cheda, for the respondent

CHIWESHE AJA: The appellants appeared before the regional magistrate, Bulawayo, charged with one count of armed robbery. They were all convicted on their own pleas of guilty. The regional magistrate then referred the matter to the Attorney-General, as he felt that the gravity of the case required the sentencing jurisdiction of the High Court. The Attorney-General directed, in terms of subpara (1) of para (b) of s 225 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], that the case be transferred to the High Court for sentence. Pursuant to that directive, the appellants appeared before a judge of the High Court. They were each sentenced to eighteen years' imprisonment with labour. In addition the motor vehicle and the three firearms used during the commission of the offence were declared forfeited to the State.

The appellants now appeal against the sentence imposed by the learned judge on the ground that the sentence is so excessive as to induce a sense of shock. Further, and in particular, the appellants submit that the learned judge *a quo* failed to give sufficient weight to the mitigatory features of the case.

It is contended that the appellants were young first offenders aged between twenty-two and thirty-four years at the time and as such should have had a portion of the sentence suspended on conditions of good behaviour. Further, the appellants had offered to pay restitution. They were in a position to do so because two of them said they owned vehicles. It is contended therefore that a further portion of the sentence should have been suspended on condition of restitution. By pleading guilty the appellants had also shown contrition. The learned judge *a quo*, so argued the appellants, failed to give sufficient weight to that fact. If he had, he would have suspended a portion of the sentence on that account. It is further submitted that the learned judge *a quo* erred in not giving sufficient weight to the fact that out of a total value of $1 017 695.00 of the gold and cash stolen only $49 307.99 remained outstanding.

In respect of the first appellant, it is also submitted that because his motor vehicle was forfeited to the State he had, on that account, suffered considerably more than his accomplices.

It is also contended that the learned judge *a quo* erred in over-emphasising the potential danger of life created by the appellants' conduct without giving due regard to the fact that no shots were fired and that none of the victims were

subjected to harm. The appellants also argue that the learned judge *a quo* erred in coming to the conclusion that the appellants' actions were planned and premeditated in the absence of an investigation as to how and why the appellants came to commit the offence.

For these reasons the appellants urge this Court to interfere with the sentence passed in the court *a quo*.

The question of sentence lies primarily at the discretion of the sentencing court. An appeal court can only interfere with the sentence imposed if there is an irregularity or a misdirection. In the case of *Ramushu & Ors v S* SC 25/93 at p 5 it was held:

> "… but in every appeal against sentence save where it is vitiated by irregularity, or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court and that the appellate court should be careful not to erode such discretion. The propriety of a sentence attacked on the ground of being excessive should only be altered if it is viewed as being disturbingly inappropriate."

The respondent has in principle conceded this appeal against sentence. In her heads of argument at p 3 Mrs *Cheda*, for the respondent, states as follows:

> "3. It is respectfully submitted that when considering sentence the trial court or the judge *a quo* misdirected himself in that he did not pay careful regard to the appellants' youthfulness, their pleas of guilty and their offer or their ability to pay restitution to the complainant."

In my view, the concession is properly made, given the circumstances of this case. The learned judge *a quo* emphasised the aggravating features to the exclusion (save for lip service) of the glaring mitigating features of this case. Had he

adopted a balanced view of the issues relevant to sentence, he would have arrived at a sentence that fitted both the offence and the personal circumstances of the accused persons.

There is no doubt that robbery is a serious offence, particularly where it involves the use of firearms. The point made in *S v Madondo* HH-60-89 is pertinent. Robbery usually involves premeditation, criminal resolve and purpose. It requires brazen execution. It is an attack on a human victim with the attendant disregard of that person's right to personal security. It constitutes a forceful dispossession of the victim's property. For the victim it is usually a terrifying and degrading experience. The sentence of the court must reflect the abhorrence with which the courts view this form of criminal behaviour. A prison term is normally imposed for this sort of offence.

Both the appellants and the respondent agree that it was appropriate to send the appellants to prison. It is the duration of the prison term that they quarrel with and not without foundation. I agree that the sentence is excessive and out of line with decided cases.

In *Ramushu & Ors v S supra* a gang of youths used an unloaded AK rifle to hold up a jeweller and robbed him of emeralds valued between $160 000.00 and $200 000.00. The youths were aged between eighteen and nineteen. It was held that the offence had been premeditated and planned and that the youths had full appreciation of the consequences of their actions. It was further held that a period of imprisonment was called for despite the youthfulness of the accused persons. The

sentence was twelve years' imprisonment of which five were suspended on conditions of good behaviour and two on condition of restitution. The total effective sentence was therefore five years' imprisonment. It was further held that ordinarily in a case where a firearm is used and a substantial sum is involved a sentence in the region of fifteen years' imprisonment would be called for.

In *Gorogodo v S* 1988 (2) ZLR 378 (S) at 382H-383A, GUBBAY J (as he then was) stated that:

> "What is to be guarded against is such an excessive devotion to the cause of deterrence as may so obscure other relevant considerations as to lead to a punishment which is disparate to the offender's desserts. I cannot conceive of any principle which can justify, in my view, for the sake of deterrence and public indignation, the imposition of a sentence grossly in excess of what, having regard to the degree of the offender's moral reprehensibility, would be a fair and just punishment."

In *Skenjana v S* 1985 (3) SA 51 (A) at 541 NICHOLAS JA had this to say:

> "My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns; a point is reached after which additions to the length of the sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of twenty years over one say of fifteen years may not be significant."

In *S v Hwemba* 1999 (1) ZLR 234 it was held that a sentence of imprisonment is in itself a rigorous and severe form of punishment and that where it is merited the court must impose the minimum effective period to do justice to both the offender and the interests of justice.

In *Moyo & Anor v S* 1977 (1) RLR (A) a twenty-year old appellant, who was a first offender, had pleaded guilty to fifteen counts of armed robbery and was sentenced to an effective twelve years' imprisonment, whilst his thirty-two year old accomplice, who had a previous armed robbery conviction, was sentenced to an effective sixteen years' imprisonment.

In *S v Dumani* HB-64-83 an effective sentence of twelve years' imprisonment for three counts of armed robbery was found appropriate.

In *S v Mharadze* SC 49/83 a policeman convicted of armed robbery was sentenced to seven years' imprisonment.

In *S v Sidat* 1997 (1) ZLR 487 (S) it was stated thus:

> "A plea of guilty must be recognised for what it is – a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them is something which will be rewarded. Otherwise, again, why plead guilty?".

This Court has time and again enjoined judicial officers not to pay lip service to the mitigatory features of the cases they deal with, more so where the accused person is a youthful first offender who has pleaded guilty and has shown contrition. These mitigatory features are all present in this appeal. In addition, the appellants co-operated with the police during the investigations leading to the recovery of almost all the stolen property. One of them offered to pay restitution to the complainant. The others had valuable property and savings. They were clearly in a position to make restitution. Being unrepresented, the learned judge *a quo*

should have ascertained from the appellants the extent to which each was able to restitute and taken this into account for purposes of sentence.

In the premises, I am of the view that the court *a quo* failed to give sufficient weight to the mitigatory features of this case. If it had done so, it would have imposed a sentence appropriate to the circumstances of this case and in line with decided cases. Its failure to do so constitutes a misdirection warranting interference by this Court.

In my view, an effective sentence in the region of ten years' imprisonment would have met the justice of this case.

Accordingly, the appeal against sentence is allowed and the sentence imposed by the trial court is hereby set aside and in its place substituted the following –

"Each appellant be and is hereby sentenced to ten years' imprisonment."

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

Sibusiso Ndlovu, appellants' legal practitioners