HH 206/15
CASE CA 14/14
REF: CRB D 414-7/13

MUSTAF LIMU
and
WASHINGTON SOSERA
and
TENDAI CHIFAMBA
and
TENDAI CHARAKUPA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND TAGU JJ
HARARE 13 October 2014

Criminal Appeal

F Murisi, for the appellants
E Makoto, for the respondent

TAGU J : We heard this appeal on 13 October 2014 and dismissed it. The counsel for the appellants has requested reasons for our decision. These are our reasons.

The four appellants pleaded guilty to a charge of Theft as defined in s113 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*]. They were each sentenced to 12 months imprisonment of which 4 months imprisonment were suspended for 5 years on the usual condition of future good behaviour.

The undisputed facts were that the four appellants, acting in common purpose, teamed up at night at 0100 hours and went to a potato field at Gwebi College, Nyabira, Harare. The four appellants started to dig up potatoes using a hoe. They were seen by two security guards who had been employed to patrol and guard the potato field. They were apprehended after they had already filled 5 x 50 kilogrammes bags with potatoes weighing two hundred and fifty kilogrammes. The potatoes valued at $ 225-00 were recovered.

Aggrieved with the sentence they lodged this appeal through their legal practitioners Murisi and Associates.

The appellants attacked the lower court's decision on the following grounds-

"1. The Court *a quo* erred in imposing a sentence that is too excessive and severe in the circumstances of this case so as to induce a sense of shock.
2. The Court *a quo* erred in over-emphasising the aggravating factors of the case and giving less and insignificant weight to the mitigating factors of the case.
3. The Court erred in coming to the conclusion that the stolen potatoes were not meant for personal consumption and inferring that they were for sale in the absence of an enquiry, and it further erred in using that factor to aggravate the case.
4. The Court erred in being over swayed by the call for deterrence and ignoring the persons of the appellants.
5. The Court erred in failing to abide by the current sentencing trend that tends to focus on reformation of the offender.
6. The Court erred in holding that this was a case deserving of a custodial sentence. The Court thus erred in failing to consider and impose either a fine or community service as options despite a clarion call for such an approach.
7. The Court erred in failing to give effect to the ages of the Appellants which factor called for different sentences.
8. The sentence imposed is not in line with other decide cases that fall on similar factors."

The appeal was opposed by the respondent.

At the hearing of the appeal only the first appellant had filed his heads of argument. Mr *F. Murisi* who had earlier filed notice and grounds of appeal on behalf of all the appellants told the court that he only had instructions to represent the first appellant.

The record showed that Messrs Murisi and Associates were served with a notice of hearing by the Registrar on 13 August 2014 at 12.15 hours. The second, the third and the fourth appellants were duly advised to file their heads of arguments before the hearing. The notice was served through their chosen attorneys Messrs Mapanga & Partners.

In terms of Rule 37 (5) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules 1979, where a party fails to file his/ her heads of argument in terms of the rules of this Honourable Court, the appeal is deemed abandoned and dismissed. Rule 37 (5) says-

> "If the Registrar does not receive heads of argument from the appellant's legal practitioner within the period prescribed in subrule (2), the appeal shall be regarded as abandoned and shall be deemed to have been dismissed".

The second, the third and the fourth appellants failed to file their heads of argument. The appeal by the second, the third and the fourth appellant is hereby dismissed for want of prosecution.

The court heard arguments on behalf of the first appellant only.

It is trite that an appeal court will only interfere with the sentence of a lower court where sentencing discretion has been improperly exercised and the resultant sentence is manifestly excessive as to induce a sense of shock. (*S* v *Mundowa* 1998 (2) ZLR 392 (H); *S* v *Dullabh* 1994 (2) ZLR 129 (H)).

In coming with an appropriate sentence the court is expected to balance an accused's personal circumstances against societal interests and the crime itself. (*S* v *Shariwa* 2003 (2) ZLR 314 (H); *S* v *Katsaura* 1997 (2) ZLR 102 (H)).

In *casu*, the offence was committed in the middle of the night, and such offences committed at such a time are difficult to detect and guard against. It is fortuitous that the complainant had employed guards. This lends credence to the court *a quo's* view that offences of this nature were prevalent in the area. The court had to take judicial notice of the number of case appearing before it of a similar nature. If the offence were not prevalent, the complainant would not have gone out of his way to employ guards at night. The offence involved premeditation. This was an organised theft by a group of people. We were not convinced that the potatoes were for consumption only. The appellant on page 10 of the record explained to the trial magistrate that he wanted "cash and eat" (sic). To get cash means he was going to sell them. Had the guards not pounced on the appellant and his accomplices one wonders how much they were to steal? They were four but had filled 5 bags already.

We are of the same view as stated by the counsel for the respondent that theft from farms or of farm implements and produce is viewed seriously. (*S* v *Chitofu* 1997 (1) ZLR 468 (H)). The court a quo cannot be faulted since it properly considered factors that are taken into account in sentencing. The sentence in our view does not induce a sense of shock.

In the result, the appeal is dismissed.

CHATUKUTA J agrees……..

Murisi and Associates, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners.