TIMOTHY KAMBUDZI
and
THE STATE

HIGHCOURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE; 22 & 25 November 2022

Criminal Appeal

E Mavuto, for the appellant
S Banda, for the respondent

CHIKOWERO J:

1. This is an appeal against the judgment of the magistrates Court in terms of which the appellant was convicted of three counts of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant was sentenced to 12 years imprisonment per count. Of the total 36 years imprisonment 6 years imprisonment was suspended for 5 years on the usual conditions of good behaviour and a further 3 years imprisonment was suspended on condition the appellant paid restitution. Thus, the effective sentence was 27 years imprisonment. The appeal is against both the conviction and sentence on all three counts.
2. The respondent opposed the appeal.
3. James Nyashanu (Nyashanu) who was the second accused person, was similarly convicted and sentenced.
4. In light of appellant's defence that he had innocently purchased the three complainants' property, and gone on to sell part of it because he was in the business of buying and selling electrical gadgets, we have to decide whether the conviction on all three counts is unreasonable. Further, and in respect of the third count, what falls for determination is whether the trial court correctly accepted the identification evidence placing the appellant at the scene of crime.

5. Counts one and two were committed in Vainona, Harare, on 22 August 2012 and 14 September 2012 respectively. The third count was committed on 12 October 2012 in Borrowdale.
6. We are satisfied that the trial court correctly rejected the appellant's defence. In his defence outline, the appellant's position was vague in so far as he said he had purchased the three complainants' property from "one James." No further details of that seller were revealed at that stage, giving the impression that the appellant did not know the full identity of the seller. It was only towards the conclusion of the protracted trial, starting with his cross-examination of Detective Assistant Inspector Nemaisa, that the appellant revealed that the "James" that he was referring to was the then second accused person. Further, Saul Mupfuwa, called by the prosecution, was found to be a credible witness. He testified that in purchasing a laptop from the appellant in August 2012, and another in October of the same year the appellant had said he had purchased these in Johannesburg, South Africa. He never mentioned that he had bought these from one James. We see no reason why we should interfere with the trial court's assessment of Mupfuwa as a credible witness. In any event, the appellant did not dispute that he sold the two laptops, stolen from two of the three complainants during separate robberies, to Mupfuwa. This means that Mupfuwa could not be protecting himself from prosecution by falsely testifying that the appellant had said he had bought the two laptops from Johannesburg in South Africa rather than from James.
7. We highlight that count three was committed by three adult males among whom were Nyashanu and the appellant. Using a tracking device to locate the exact location of the complainant's stolen I phone, the police arrested Nyashanu in rural Seke, Chitungwiza. They recovered various goods belonging to the complainant, stashed in Nyashanu's room. Nyashanu led the police to the third member of the gang, one Isaac Paul Chimombe, in Zengeza 3, Chitungwiza. On beholding his partner in crime in the company of the police, Chimombe fled but was shot on the leg and arrested whereupon he in turn led the police to his sister's house where his share of complainant's stolen property was recovered.

8. The appellant was arrested on 16 October 2012, in Damofalls, Ruwa, at the instance of Nyashanu whereupon two laptops, an I phone, its charger, a sunglass bag and a Hellenic school bag, all belonging to the third complainant, were recovered from him. This was a mere four days after the robbery in count three. Accordingly, the appellant, just like Nyashanu and Chimombe, was in recent possession of property stolen in the course of a three member gang robbery. The stolen Hellenic school bag and school hat, also recovered from the appellant, were not electrical gadgets. This belied his defence that he was in the business of buying and selling electrical gadgets.
9. That is not all. At the identification parade conducted on 15 October 2012, Nyashanu was positively identified by the third complainant and spouse as one of the robbers. At the identification parade held on 16 October 2012, the appellant was positively identified by the complainant's spouse.
10. We do not uphold Mr Mavuto's argument that the appellant was a victim of mistaken identity. The evidence of the witness who identified him is so detailed to the extent of spelling out what the three robbers did inside her residence, in particular the appellant, what clothing he was clad in, that there was light in the room and that the robbers spent about thirty minutes under her roof. We are satisfied that she had ample opportunity to identify the appellant. See *S* v *Mutters and Anor* S66/89; *S* v *Makoni & Ors* S 67/89.
11. The reliability of the identification evidence is bolstered by other evidence. This comes in the form of the admitted possession by the appellant of the property stolen in the course of the robbery.
12. We agree with the trial court that it was no coincidence that the appellant was found in possession of property belonging to three complainants, stolen in the course of three different robberies on three different occasions. When one factors in the identification evidence in count three, how the evidence against Nyashanu also links the appellant, the prevarication and patent falsity of his defence, there was no way that the appellant was going to escape conviction on all the counts.
13. The appeal against conviction does not turn on all the other grounds set out in the notice of appeal. There is no need to traverse them.

14. The learned magistrate did not over-emphasise the moral blameworthiness of the appellant at the expense of his personal circumstances. A long custodial sentence was still merited even after a portion thereof had been suspended on condition the appellant paid restitution. The total sentence was not so excessive as to require the trial court to order the sentences on the individual counts to run concurrently. The sentence does not shock us.
15. Mr Mavuto conceded that there is nothing wrong with the individual sentences. We agree. This in our view means that the court judicially exercised its discretion in assessing the sentence on each count.
16. All three counts were robberies committed in aggravating circumstances. In count one, the five robbers, among whom the appellant was numbered, were armed with dangerous weapons in the form of an axe, a bolt-cutter and iron bars. They cut their way into the complainant's residence, which was unlawful entry into premises, wherein they threatened the scared female complainant and her friend before making off with two I phones, a canon camera, a laptop and US$2500. The total value stolen was US$6620 of which US$1900 worth was recovered.
17. In count two, the three robbers, wielding an axe, bolt-cutter and a rake, again cut their way into the complainant's house. They felled him with the rake. They struck his second born son on the head. Oozing blood, the boy, his elder brother and their parents were tied up, locked up in one bedroom whereupon the appellant and his accomplices ransacked the house. They stole two laptops, a power station machine, battery charger, jewellery, a pair of sunglasses, suitcase, winter jacket, an Isuzu twin cab and US$ 1 000. The total value stolen was US$15 000 of which US$12 000 worth was recovered.
18. As for count three, the appellant and his two accomplices also used a bolt cutter to cut the burglar bars. They were also armed with an axe, shovel and a wooden pick handle. Inside the house, they woke up the complainant and his spouse whom they threatened them with death before binding the victims' hands using electric cables. They stole various amounts in foreign currency and goods inclusive of an Isuzu twin cab. The total value stolen was US$38 960 of which US$ 37 554 was recovered.

19. The trial court considered the appellant's status as a first offender, his age, that he was married, his family responsibilities and that some of the stolen property was recovered. In aggravation, it took into account how he committed three robberies in August, September and October 2012 in the same area using the same *modus operandi*. It considered the value of the property stolen. It observed that the appellant had turned robbery into a career considering that in three consecutive months he and the others had resorted to that crime to earn a living. It noted that the complainants were traumatized, family members injured and that the former lost their property acquired through hard honest work. Consequently, there was need to protect society by deterring the appellant and those of his ilk by incarcerating the appellant for a long time.
20. The lawmaker in s 126(2)(a) of the Criminal Law Code has given a clear indication that the courts must deal sternly with those convicted of robbery committed in aggravating circumstances, hence the penalty range of imprisonment for life or any other definite period of imprisonment. There is no provision for a fine.
21. Even before the codification and reform of our criminal law the need has always been there to impose deterrent sentences on robbers in order to send out the correct message to the society. Hence in *S* v *Madondo* 1989 (1) ZLR 300 (H) the court said:

> "Robbery is an inherently serious offence. It usually involves premeditation, criminal resolve and purpose, brazen execution, an attack on a human victim with an attendant disregard of that person's right to personal security and forceful dispossession of whatever property the victim has. It is also a terrifying and degrading experience. The victim is injured in his person and his property. The robber acts with contempt and callousness. It is therefore proper to regard robbery as a particularly reprehensible form of criminal behaviour. That attitude should be reflected in the sentence."

22. The circumstances of this matter demonstrate an assault by the appellant and his accomplices on the fundamental human rights and freedoms of the complainants and their families. Those rights and freedoms are provided for in Chapter 4 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013. They are the right to life, to personal liberty; to human dignity; to personal security; freedom from torture or cruel, inhuman or degrading treatment or punishment; the right to equal protection and benefit of the law; the right to privacy and the right to acquire, hold and dispose of property. These

fundamental human rights and freedoms are entrenched, respectively, in ss 48, 49, 51, 52, 53, 56, 57 and 71(2) of the Constitution. This goes to show the seriousness of the matter.

23. To have ordered the sentences on the three counts to run concurrently would, in our view, in the circumstances, have been to condone and encourage the appellant and likeminded individuals to go on a robbery spree comforted by the subtle message that if convicted and sentenced the courts would effectively overlook some of the counts by ordering concurrent running of sentences. The total sentence is not so severe as to warrant that we order the individual sentences to run concurrently.
24. The entire appeal is without merit.
25. In the result, the appeal against both the convictions and sentences be and is dismissed.

CHIKOWERO J:……

ZHOU J:……..
I agree

Maposa and Ndomene Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners