INNOCENT CHARLES MANYAWU
and
BRIAN MANYAWU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA & TAGU JJ
HARARE, 20 October and 17 November 2014

Criminal Appeal

Ms D Machaya, for the appellants
E Mavuto, for the respondent

TAGU J: On 8 February 2012 the two appellants and 4 others were convicted, on their own plea of guilty, of the crime of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. They were sentenced as follows:-

> "Accused 1, 2, 3, 4 and 6 is sentenced to 8 years imprisonment. Accused 5 is sentenced to 2 years wholly suspended for a period of 5 years on condition during that period he should not commit an offence involving an element of dishonesty and or violence. Of the 8 years passed on accused 1, 2, 3, 4 and 6, 1 year is suspended on condition each accused restitutes complainant $ 465.00 through clerk of court Harare on or before 31st August 2012. The gadget used to break the premises is forfeited to the state."

The two appellants now appeal to this court against the sentence imposed by the court *a quo*.

The facts are that the two appellants ganged up with four other accomplices and drove from Harare to Norton for the sole purpose of robbing diesel from Econet boosters. With a common purpose, the six were armed with a knife and a wrench - pipe spanner. They threatened to harm the security guard at Econet Base Station at Norton 1 Primary School.

They tied him with a black cloth before robbing him of his Samsung cell phone. They then broke the rails securing the Base Station and gained access. They further cut the fuel pipe-link between the tank and the generator using wrench- pipe spanner and diesel started oozing out. They were disturbed before they loaded their containers with diesel and they drove away at high speed. They caused a loss through damage and seepage valued at $1 845-00 and only a cell phone valued at $25-00 was recovered upon their arrest.

Ms *D Machaya* for the appellants submitted, among other things, that the court *a quo* erred by ordering restitution when the property was only damaged and a cell phone valued at $ 25-00 was recovered. She said, further, that the court failed to justify the figure of $465-00. She further argued that the lower court erred by treating the two appellants as repeat offenders who committed similar offences previously when in fact they are first offenders. She prayed that the sentence be set aside and substituted with community service or a lighter sentence of 2 years.

Mr E *Mavuto* for the respondent supported the sentence. He, however, submitted that 2 years be suspended on condition of good behaviour. He submitted further that the court *a quo* misdirected itself by ordering restitution when the cell phone was recovered. In support of the sentence Mr *Mavuto* referred us to the cases of *S* v *Ramushu* SC 23/ 93 and *S* v *Nherera* HH 38/06 where the Honourable Justice BHUNU said:-

> "Magistrates should not hesitate to mete out stiff penalties where they are warranted. They must take a cue from the superior courts which have taken a serious view of offences of this nature. In S v Mudondo HH 60/90 the High Courts indicated that for robbery where little or no violence is used, a sentence in the region of 4 to 5 years imprisonment is appropriate."

In his reasons for sentence the lower court said:-

> "in assessing sentence I have taken note of what each accused said in mitigation. Although each accused is being treated as a first offender accused 1, 3, 4, 5 and 6 committed a similar offence on 25 January 2012 in the same area. The offence was committed on 30th January 2012. Each accused pleaded guilty thereby not wasting the court's time. Only property valued at $ 25, 00 was recovered out of $1 845.00
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> However, in aggravation robbery is a serious offence. Complainants were left traumatised after being tied and robbed. The accused damaged property valued at $ 1 820.00 and had to flee after being intercepted. There is need to deter them as they appear to groom themselves into this crime of robbing

> unsuspecting persons. If accused, except for accused 5, can be kept away from circulation among people, the better".

In *casu*, we considered the oral and written submissions by both counsels. We are of the view that the appellants indeed committed a very serious offence. There was a great degree of premeditation. The appellants teamed up with others and drove in a motor vehicle to Norton from Harare for the sole purpose of committing a robbery. It was fortuitous that their efforts were foiled before they loaded the oozing diesel into their containers. Their conduct deserves nothing else but an effective custodial sentence. Community service is not applicable since it is only reserved for minor offences. However, we have perused the record of proceedings. The appellants and their accomplices are first offenders. The magistrate misdirected himself by saying they are repeat offenders. It is not clear whether the court was taking judicial notice that they committed a similar offence on 25 January 2012 or not, because the record clearly says they are first offenders. There are no certificates of previous convictions in the record. Further to that, it is not clear how a figure of compensation in the sum of $465-00 was arrived at given that the damage stood at $ 1820-00 after the recovery of the cell phone valued at $25-00. On average the amount of compensation should be $ 304-00 after dividing $ 1 820-00 by the number of the offenders who stand convicted of the crime.
Having found some misdirection we are at large to impose an appropriate sentence. However, despite the above misdirection we are of the view that a sentence in the region of 8 years is called for, given the seriousness of the offence and the degree of preplanning involved.

In the result, the sentence imposed by the court *a quo* in respect of the appellants is set aside and the following sentence is substituted:-

> "8 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not within this period commit any offence involving dishonesty and/ or violence for which on conviction accused is sentenced to imprisonment without an option of a fine. A further 1 year imprisonment is suspended on condition each accused pays compensation in an amount of $ 304-00 through the Clerk of Court Harare on or before 31 August 2012."

MANGOTA J agrees……..

Machaya & Associates, appellants' legal practitioners
Prosecutor-General's Office, respondent's legal practitioners.