

THE STATE
versus
PETER MACHIPISA

HIGH COURT OF ZIMBABWE
MAWADZE & MUREMBA JJ
HARARE, 16 March 2016

Criminal Review

MAWADZE J: The accused was convicted on his own plea guilty of 7 counts by the Magistrate sitting at Mbare.

The charges in respect of counts 1, 2 and 7 relate to unlawful entry into premises in aggravating circumstances as defined in s 131 (1) as read with s 131 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The offences in relation to counts 3, 4, 5 and 6 relate to theft as defined in s 113 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The accused was sentenced as follows;

“Count 1- 18 months imprisonment
Count 2 – 12 months imprisonment
Count 3 – 3 months imprisonment
Count 4 – 4 months imprisonment
Count 5 – 6 months imprisonment
Count 6 – 4 months imprisonment
Count 7 – 15 months imprisonment

Total 62 months imprisonment: of which 8 months imprisonment is suspended for 5 years on condition accused does not during that period commit any offence involving unlawful entry into premises and or dishonesty and for which he is sentenced to imprisonment without the option of a fine. 4 months imprisonment is suspended on condition the accused restitutes the complainants in count 1 Christopher Mahachi, in the sum of \$265.70, in count 2 Tendai Gunda in the sum of \$20.00, in count 7 Peter Nyandoro in the sum of \$19.00 through the Clerk of Court Mbare.

The remaining 50 months imprisonment is effective.”

I note in passing that there is no due date given to which the accused was to pay the said restitution. The salient facts of case are as follows;

The 30 year old accused who is a first offender and of no fixed abode went on a spree to commit these offences at different houses in Budiriro 5b in count 1, count 2, count 3, count

4, count 7 and in Budiriro 4 in count 5 and count 6 all in Harare between the period extending November 2015 to 29 February 2016.

In count 1 on 12 February 2016 the accused proceeded to complainant's tuckshop at night where he broke the key and effected entry into the tuckshop. The accused stole groceries valued at US\$267.00 of which only groceries valued at \$1.30 were recovered.

In count 2 on 29 February 2016 at about 0005 hours the accused proceeded to complainant's house where he broke the window pane and stole complainant's power bank valued at \$20 which was recovered.

In count 3 in November 2015 the accused proceeded to complainant's residence at night where he stole a wheel barrow valued at US\$25.00 and sold it. It was recovered.

In count 4 on 14 February 2016 the accused proceeded to complainant's residence at night and stole a wheel barrow valued at \$40 which was recovered.

In count 5 on 28 February 2016 the accused went to complainant's house at night where he stole two batteries from complainant's motor vehicles valued at US\$160 and were both recovered, one with accused and another with another person.

In count 6 on 29 February 2016 the accused went to complainant's residence during the day and stole a wheel barrow which was on the verandah valued at US\$45 and it was recovered.

Lastly in count 7 on 21 February 2016 the accused proceeded to complainant's tuckshop at night and forcefully opened the counter door. The accused stole groceries valued at US\$109.90 of which only groceries valued at US\$90 were recovered.

The total value of the property stolen in all 7 counts is US\$666.90 and only property valued at US\$304.70 was not recovered. The accused therefore derived a benefit to the value of US\$362.20.

The approach by the trial magistrate to treat each count separately for purposes of sentence cannot be faltered at all. This is so on account of the fact that the offences in each count were committed on different dates, at different premises and under different circumstances.

Be that as it may what I find to constitute a misdirection is that each of the sentences taken individually or the total sentence taken collectively is or are manifestly excessive. See *S v Sifuya* 2002 (1) ZLR 437 (H); *S v Chera* 2008 (2) ZLR 58 (H).

There is no doubt that the accused's moral blameworthiness is high as he went on a spree to commit offences outlined above. In light of the numerous counts involved an

effective custodial sentence is called for. However the trial magistrate failed, in my view, to consider the value of the property involved in each count and ended up imposing a manifestly excessive sentence in each count. Consequently the aggregate sentence is clearly unrealistic and induces a sense of shock. The severity of the sentence on each of the counts or on an aggregate sentence is totally disproportionate to the seriousness of each of the offences the accused committed. All in all the accused was sentenced to 62 months for theft of property valued at US\$666.90 of which half of it was recovered. This is clearly out of line with sentences imposed or recommended in similar cases. The sentences imposed by the trial magistrate can therefore not be allowed to stand.

The conviction of the accused in respect of all the 7 counts is in order and is confirmed.

Accordingly the sentence imposed by the trial court is set aside in its entirety and substituted with the following;

“Count 1 – 4 months imprisonment
Count 2 – 2 months imprisonment
Count 3 – 2 months imprisonment
Count 4 – 2 months imprisonment
Count 5 – 3 months imprisonment
Count 6 – 2 months imprisonment
Count 7 – 4 months imprisonment

Total 19 months imprisonment of which 5 months imprisonment are suspended for 5 years on condition the accused does not during that period commit any offence involving unlawful entry into premises and or dishonesty and for which upon conviction the accused is sentenced to a term of imprisonment without the option of a fine. Of the remaining 14 months imprisonment 4 months imprisonment are suspended on condition the accused restitutes the complainant in count 1 Christopher Mahachi in the sum of US\$265.70; the complainant in count 2 Tendai Gunda in the sum of US\$20; and the complainant in count 7 Peter Nyandoro in the sum of US\$19 through the Clerk of Court at Mbare Magistrates Court on or before 31 May 2016. Effective 10 months imprisonment”

The accused should be advised of the altered sentence.

MUREMBA J agrees