THE STATE
versus
AUSTIN THOM

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 20 JULY 2017

REVIEW JUDGMENT

DUBE J: The accused person appeared before a Harare Magistrate together with a co-accused facing a charge of attempted murder as defined in s 189 (1) (a) (b) as read with s 47 (1) (a) (b) of the Criminal Law (Codification and Reform Act, [*Chapter 9:23*] and another of robbery as defined in s 126 (1) (a) (b) of the said code. The two accused pleaded not guilty and his co-accused was acquitted at the close of the trial. The accused was convicted and sentenced to 6 years imprisonment for the attempted murder charge and 10 years imprisonment for the robbery charge, bringing the total to 16 years imprisonment. Of the total 16 years imprisonment, 3 years imprisonment was suspended for 5 years on specified conditions. A Nokia 1202 stolen in the course of the robbery was returned to the complainant.

An outline of the facts of this matter is apposite. On 19 March 2017 the accused together with his co accused hatched a plan to rob the complainant. They teamed up with other unknown persons and went to 90 Harare Drive Greystone Park where they scaled the precast wall and entered the premises. Whilst inside the premises, the complainant's dogs started barking. The complainant who had been watching television went outside the house to investigate. Whilst outside, she was confronted by the intruders. One of the accused persons grabbed the complainant by the neck whilst the other stabbed her two times with a sharp object on the left side of the head and on the left shoulder. One accused assaulted the complainant with a metal pipe and ordered her to remain silent. She was punched on the face resulting in her spectacles breaking. They persons dragged the complainant into the house where they ransacked the house for cash and valuables, took her safe keys, opened it and

took her diamond and gold coated rings, a box containing ear dress rings, necklace ,cash amounting to $100.00, a hunting knife, Nokia 2012 cell phone . They forcibly removed two gold rings, a wrist watch from her left hand.

What has exercised my mind is the manner in which accused were charged. There was an improper splitting of charges. Improper splitting of charges occurs when an accused is charged with two or more offences arising out of the same set of facts or one transaction in circumstances when the entire conduct of an accused constitutes one offence. Where facts disclose two or more charges, the state has an election over which charge to prefer. If the prosecution prefers all charges disclosed by the facts, this will result in an improper splitting of charges which is prejudicial to an offender. The responsibility to determine which charges to prefer lies on the state which is *dominus litis* in all prosecutions. In *S* v *Brereton,* 1970 (2) R.L.R. 272 (A.D.) the court remarked a follows with regard the rule,

> 'In such cases, where the accused, in pursuance of the dominant intention, commits a number of offences, the proper thing to do is to charge him with only that offence which was his dominant purpose.'

The prosecution will be required to decide which charge to prefer and is guided by a determination of the intention and dominant purpose of the accused. The state should not prefer all the charges against an offender simply because the facts disclose the commission of all the offences.

The rule against improper splitting has its origins in the case of *R* v *Marinus* (1887) SC 349. As far back as 1887 South African courts had raised the dangers of duplication of convictions. In *Gordon* v *R* 1909 EDC 254 (at 268 – 269) the court held as follows,

> "In our South African practice there is a tendency against what is known as the splitting up of charges, where the transaction is considered to be one and the same offence. The decisions on this point are doubtless not consistent with one another.… It is difficult, if not impossible, in view of the decided cases, to lay down a hard-and-fast rule, which will apply with justness in every instance that has already been adjudicated upon, or which may in future arise for decision."

The headnote in *S v Jambani* 1982 (2) ZLR 213 (HC) aptly summarises the rule and reads as follows:

> "It frequently occurs, during the course of criminal conduct, that several offences are committed. To charge the accused with all those offences, however, may well result in prejudice to him, since the whole of the criminal conduct imputed to him in substance only constitutes one offence. In such a situation, the correct course is to charge the accused with that offence which was his dominant purpose. This does not mean that the test of 'dominant purpose' is the only one to be applied; in some situations it may still be appropriate to charge the accused with more than one offence."

The rule against splitting of charges was also discussed in *S* v *Sabawu* 1999 (2) ZLR 314 (H), *S* v *Jambani* 1982 (1) ZLR 213 (HC) *Sv Julius Sisar Mupatsi* HH I73/11, *S* v *Mutawarira* 1973 (1) RLR 292 at 296C,

In *S* v *Zakaria* HH 17/02 the court recognised two tests to be applied in a case where the facts disclose one or more criminal acts. The tests devised are the "single intent" or "continuous transaction'' test and the "same evidence" or "dominant intent" test. The two tests are used to determine whether there has been improper splitting of charges. Under the single intent test or continuous transaction test, the consideration is whether the different offences were committed with a single intent and were part of a continuous transaction.

The enquiry under the same evidence test is whether the essential elements of the offence are different and whether the same evidence is required to be used to prove both offences. See *R* v *Sero Mele* 1928 TPD 364, *R* v *Johannes.* In *R* v *Peterson & Ors* 1970 (1) RLR 49 at 51G-I, See *S* v *Zakaria (supra).* The consideration over which test to apply depends on the circumstances of each case. See *R* v *van der Merwe* 1921 TPD 1.

The objective of the tests is to ensure that an accused does not suffer any prejudice when there has been a duplication of charges. When applying this test one should ensure that the accused does not suffer any prejudice as a result of improper splitting. Where there has been an improper splitting of charges, the result is that charges are duplicated resulting in a duplication of convictions and sentences. Improper splitting of charges has become a constitutional issue. Improper splitting of charges has grave consequences on an offender as he is made to answer to and defend two charges instead of one. The effect of improper splitting of charges is that an offender's constitutional right to a fair trial are infringed. Subjection of an offender to two charges instead of one in a trial cannot by any imagination be said to be fair. The outcome is that an accused is subjected to unnecessarily more criminal charges than is necessary and on conviction is punished twice for the same conduct. Every accused has a right to have a trial that is handled fairly in accordance with real and substantial justice. Prosecutors need to be more careful in framing charges.

In *S* v *Moloto* 1980 (3) SA 1081 (B) the court held that an improper splitting of charges can be cured by treating the convictions as one for purposes of sentence. In *S v Makazela* 1965 (3) SA 675 the court held that,

> "in some cases even if there has been a technical splitting of charges, the mischief of this can be met by the expedient treating of all the counts as one for the purposes of sentence, and the prejudice the accused may suffer may thereby be avoided."

The approach the courts have taken where there has been an improper splitting of charges resulting in duplication of convictions is to set aside all the duplicated charges leaving one which involves the dominant intention of the accused. It has been held that where there has been an improper splitting of charges resulting in the conviction of an accused, the court may treat all charges as one for purposes of sentence. Thus court may decide to let both offences stand but proceed and treat the offences as one for purposes of sentencing. This is a course open to a court on review or appeal . In this way the danger of an accused suffering any further prejudice is eliminated. If the improper splitting is realised before charges are put to the accused, the proper course to take is for the prosecution to withdraw the duplicated charges. In addition to its role as a trier of fact, the role of the court in a criminal prosecution is to moderate proceedings. It cannot adopt a *laissez faire* attitude. It is the duty of the trial court to ensure that correct and competent charges are preferred by the state. Courts should be more careful and avoid duplication of convictions. The court is required to scrutinise the charges preferred by the state to ensure that they are proper and comply with the requirements of the law. The court just accepted the charges without giving much thought to them. Where a court realizes that charges have been improperly split, the court is expected the query the charges with the prosecution. Where the accused is legally represented , the defence is expected to except to the charges.

A case which is almost on all fours with the facts of the present case is that of S v *Benjamin* 1980 (1) SA 376 (A). In that case two accused were charged with attempted murder and robbery in aggravating circumstances. The trial court convicted them of both offences and sentenced them separately for the two offences. The court on appeal held that there had been improper splitting of charges as the accused were convicted twice of the same act of assault. The court set aside the conviction on the attempted murder charge. See also *S* v *Cain* 1959 (3) SA 376 (A).

Coming to the facts of the present case, when the accused and his colleagues entered the complainant's premises, their dominant intention was to rob the complainant. The acts charged were committed with a single intent that is to rob. The evidence of the robbery charge is inter-related with that for the attempted murder charge resulting in improper splitting and duplication of convictions. The evidence to support the robbery charge is equally applicable to the attempted murder charge. The accused stands convicted twice for one act of assault.

Where two separate charges are preferred arising from the same set of facts and the same evidence can be used to support both charges and the accused is shown to have committed the offences with a single intent and the acts that constitute the two offences are necessary to carry out the intent, then an accused ought to be charged for one offence. The reason for this is that the two acts constitute one transaction. In a case where the evidence relied on to prove one charge is the same evidence necessary to prove another charge, the offences are essentially the same.

Having found that there has been improper splitting of charges, one of the charges ought to be dropped. The convictions are prejudicial to the accused. The determination of which charge should stand is to be guided by the dominant intention of the accused. Since the dominant intent of the accused was to rob, the robbery charge is the one to stand. The attempted murder conviction is set aside. The robbery conviction is upheld.

Coming to sentence, the offence was committed in aggravating circumstances as there was infliction of serious bodily injury on the complainant. In this respect see s 126 (3) of the Code. Since the trial court had suspended part of the sentence on condition of future good behaviour, whilst the sentence it imposed was proper, part of it will be suspended accordingly. Therefore sentence imposed on the accused for robbery is hereby set aside and substituted with the following-

> "Accused is sentenced to 10 years imprisonment of which 2 years' imprisonment is suspended for 5 years on condition that during that period the accused will not commit any offence involving violence or assault on the person of another or dishonesty for which he will be convicted and sentenced to a term of imprisonment without the option of a fine. The complainant to collect the Nokia 1202. The weapons produced in court as exhibits are ordered forfeited and are to be destroyed."

DUBE J …….

MUSAKWA J agrees…….