THE STATE
versus
FELIX MTETWA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 16 January 2015

Criminal Review

TSANGA J: The accused, aged 17, was convicted of 8 counts of unlawful entry into premises as defined in s 131 (1) of the Criminal Law (Codification and Reform Act [*Chapter 9:23*]. In addition he was also convicted of 8 counts of s 113 (1) (a) of the same Act which provision relates to theft. For purposes of sentencing, the counts for both unlawful entry and those for theft were paired alongside into eight counts.

Factually the accused targeted business premises in Chipinge for unlawful entry accompanied by theft. He would access these premises through the roof and ceiling traps. The nature of property stolen varied from items such recharge cards, cell phones to groceries and cash, all depending on premises targeted. The value under each count equally varied from as little as US $42.00 per count to as much as $779.00 on the most serious count. He was thus sentenced as follows:

1. Count 1 & 2 he received 24 months imprisonment with none suspended. (The value of the stolen property amounted to US $600.00)
2. Count 3 & 4, a sentence of 12 months wholly suspended on usual conditions. (The value of goods involved amounted to $42 of which $27 was recovered).
3 Count 5 & 6, a sentence of 12 months wholly suspended on usual conditions. (Goods amounted to $70.00).
4. Count 7 & 8, a sentence of 12 months imprisonment. (Goods amounted to $91.00 in value of which $40.00 was recovered).
5. Count 9 & 10, a sentence of 12 months imprisonment. (Goods amounted to $54.10).

6. Count 11 & 12, a sentence of 24 months of which 6 months were suspended. (Amount of goods involved was $681.00).
7. Count 13 & 14 a sentence of 12 months imprisonment. Goods involved $52.00
8. Count 15 & 16 he received 36 months imprisonment of which 6 months was suspended. (Value of goods was $779.00).

The sum total of years which he is expected to serve effectively amount to 9 years.

The court was indeed faced with an unrelenting offender whom the probation officer had recommended appear in criminal court due to his propensity to commit crimes. While the convictions are proper, the sentence induces a profound sense of shock for one so young. In *S* v *Mavasa* HH -13-10 it was stated that it is wrong to sentence juvenile offenders as if one is dealing with an adult offender. Courts were admonished to be slow to expose a convicted juvenile to the same rigours of punishment that it would impose on an adult.

Although acknowledging his youth in sentencing him, blameworthiness and protection of the community were among the factors taken into account in sentencing the accused.

The fact that two other records for which he had been convicted and sentenced had been in court on the same day as his sentence, put him in less favour with the trial magistrate in sentencing him. He also took into account the fact that the accused had no capacity to pay restitution. The fact that he worked as tout or rank marshal were taken by the magistrate to be indicative of his emancipation and hence the justification for sentencing him as an adult.

The sentence appears to be clearly dictated by the need to protect the public from a perceived delinquent and incorrigible young criminal offender. Yet the risks of incarcerating such a young offender over a lengthy period of time should not be so easily sacrificed at the altar of expediency as our courts have always emphasised. See *S* v *TM* HH 65-03*; S* v *CM* HB 67-03. Each sentence must also suit the offence and the offender. See *S v Nemukuru* HH 102- 09.

Our Constitution adopts the principle that juveniles should be detained for the shortest possible time and only as a last resort- an obligation that is found in international law as exemplified by article 37 (b) of the United Nations Convention on the Rights of the Child to which we are a party. Furthermore, in terms of Article 40(1) the treatment of a child should take into account the child's age and seek to promote reintegration in society.

Section 81 (h) (i) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 provides that a person under 18 has the right **"not to be detained except as a measure of last resort"**. Also, if detained he or she has the right to be detained **for the shortest appropriate period**. (My emphasis)

Giving a 17 year old an effective 9 year sentence runs contrary to the letter and spirit of this Constitutional imperative when it is considered that he had not committed any violent offences such as robbery, murder, or rape. From the point of view of children's rights custodial punishment is regarded as criminally damaging for children due to the criminogenic influences of prison. The Constitution also places emphasis on the best interests of the child being paramount at all times in matters involving children. (See section 81(2). Clearly the magistrate did not fully take into account theses Constitutional provisions which emphasise the duty to respect and protect children's rights in dealing with children under the age of 18.

Some effort was however made, bearing in mind that the referral of the matter to be treated in criminal court was on the strength of a probation officer's observations. Where a juvenile commits an offence the procedural safeguard of roping in the assistance of those with the requisite expertise in dealing with juveniles in order for the court to make an informed decision is one that should be taken seriously by both the probation officer and the magistrate. The report details a life foot printed by loss at an early age. The accused's mother died when he was two years old in 1999. While indeed a probation officer's report was sought and availed, an unexplained detail in the report is the custody of the accused in the hands of his uncle, one Mr Cosmos Mtetwa said to be currently 27 years old, which would mean that as the custodian he was 12 years old and a child himself when he was left with the responsibility of taking care of the accused. Even the other mentioned custodian in the report who is said to have stayed with him when he started his habit of running away from home, is only two years older than the said Cosmos. These facts suggest an upbringing at an early age in what appears to be essentially child headed households. If, as the report suggests, poor family ties and lack of proper supervision are what predisposed the accused to anti-social behaviour it was certainly misplaced on the part of the magistrate to impose a heavy imprisonment sentence as a correctional measure. This is clearly a case where the proportionality of the sentence should have been guided by the circumstances that fuelled the behaviour. In *S* v *Mahove* it was stated that it is an act of dishonesty to tell an accused person

that the court has considered their personal mitigatory features when in fact no such features have been considered. With a nine year sentence, a substantial part of his youthful life stands to be spent in prison.

Sentencing him as an adult offender lacks justification when the factors surrounding his home environment are taken into account if we are to go by what is contained in the probation officers report. There was no evidence that he had ever been referred to a juvenile institution or of a history of prior intervention appropriate to juveniles. Rather than rushing to impose adult punishment in the form of a lengthy prison sentence that may merely accentuate his path to becoming a hardened criminal, it seems to me at 17, he could have been given a chance by being referred to an appropriate juvenile institution for rehabilitation. It is the responsibility of the state and its officials who come into contact with cases of need to reduce chances of recidivism by thoroughly examining the range of possible interventions. It is also the responsibility of all officials involved both judicial and non-judicial to be thorough in their assessments so as to give each accused child a real chance at being justly treated.

The Probation Officer's report had indicated that he be tried as an adult and therefore impliedly the provisions of s 351 and 352 of the Criminal Procedure and Evidence Act [Chapter:9:07] which allows such juveniles to appear before a children's court and also to be placed in a training institute or reform school were not regarded as options. Regarding the rehabilitation of the juvenile, the probation officer's report made the following observations:

> "This is one of the few cases in Chipinge that has left residents with fear and shock and one would wonder what has befallen our children. Felix committed a series of offences that we greatly condemn and corrective measure should be taken swiftly……..**It is against this background that we call for a combined effort so as to rehabilitate the juvenile**…." (My emphasis)

Articulation and clarity of the meaning of this 'combined effort' in reforming the juvenile as suggested in the probation officer's report is a call that the court ought to have paid heed to. This is more so in light of the fact that the benefit of treating him as a child had been excluded. Reference to a 'combined effort' would appear to suggest that what the probation officer had in mind was one that would bring in a variety of players including the community. A wider multi-disciplinary approach to crafting a solution was what was favoured. Yet this angle was not pursued.

Although the primary duty of the courts is indeed to apply the law, failure to pay heed to wider dialogue is a cautionary example of the often made criticism that law tends to

exclude other disciplines as irrelevant, preferring to see issues from the narrow prism of state law in particular. It is important that courts presented with an opportunity to understand and craft solutions on critical issues affecting juveniles from a broader perspective, seize the opportunity to do so. It is a crucial way of ensuring that courts are not out of touch with reality in the solutions they impose. It also ensures that the sentences that they pass are at least from a holistic and informed perspective. A prison sentence of nine years is not the 'combined effort' the probation officer had in mind in rehabilitating the juvenile. It is a sentence that effectively removes the accused from society by locking him up and throwing away the keys for a very long time.

I confirm the convictions in all 16 counts. However, on sentencing, I am of the view that this is indeed one of those cases where multiple counts are involved that are closely connected in nature to justify treating them together for sentencing as a way of ensuring that the cumulative effect is not too harsh. Although the general practice is to sentence each count separately with the option of some sentences running concurrently, where there is justification the counts can be treated together. (See *S* v *Nyathi* HB 60-03*).* In this case, doing so would be in line with the spirit of s 81(1) (i) of the Constitution, aimed at minimising custodial punishment for children.

In view of the circumstances of the case and the counts involved, the sentence for all counts is altered as follows:

> 3 years imprisonment for all counts, of which 1 year is suspended for five years on condition the accused does not during that time commit any offence involving unlawful entry for which he is sentenced to a term of imprisonment without the option of a fine.

The altered sentence should be brought to the attention of the accused.

MUREMBA J: agrees …….