THE STATE versus WALTER MUFEMA	CRB No. R1063/14	[Case 1]
THE STATE versus CALLINGTON CHAVHUNDUKA	CRB No. R771/14	[Case 2]
THE STATE versus TAFADZWA RUZVIDZO	CRB No. BNR449/14	[Case 3]
THE STATE versus CLAUDIOS BAUNDI	CRB No. BNR457/14	[Case 4]

HIGH COURT OF ZIMBABWE
MAFUSIRE & TSANGA JJ
HARARE, 27 April 2015

Criminal Reviews

MAFUSIRE J: The above four cases came up separately on automatic review in terms of s 57 of the Magistrates' Court Act, [*Cap 7:10*]. Except for Case 3 (*S* v *Tafadzwa Ruzvidzo*), all of them were cases of rape by juvenile male offenders upon female minors or infants. Case 3 was one of aggravated indecent assault. I decided to deal with all of them in one judgment. The essential element is the same. It is about the constitutionality of corporal punishment.

All accused persons were first offenders. In Case 1 (*S* v *Walter Mufema*) the accused was 16 years old. His victim was 4. The accused pleaded guilty. He was sentenced to 3 strokes with a rattan cane.

In Case 2 (*S* v *Callington Chavhunduka*) the accused was 16 years old. The complainant was 13. He was charged with rape, in contravention of s 65 of the Criminal Law (Codification and Reform) Act, *Cap 9:23*, ("***the Code***"). He denied the charge. A full trial ensued. The court found no evidence of rape. Sexual intercourse had been consensual. So the

accused was found guilty of contravention of s 70 of the Code, i.e. having sexual intercourse with a young person. He was sentenced to 4 strokes.

In Case 3 the accused was 14 years old. His victim was 3. He indecently assaulted the complainant by inserting a stick into her vagina. She was injured. He denied the charge. Nonetheless he was convicted of aggravated indecent assault as defined in s 66(1)(a) of the Code. The sentence was 4 strokes.

In Case 4 (*S* v *Claudios Baundi*) the accused was 15 years old. The complainant was 4. The accused pleaded guilty. He was sentenced to 3 strokes.

In Case 1 the sentence was passed in January 2014. In all others sentencing was in December 2014. There is no telling from the record whether or not the sentences have already been carried into execution. But in all likelihood they have. Section 110 of the Prison Regulations, 1956[1], requires that a sentence of corporal punishment be carried out as soon as possible after it has been awarded. This, of course, is after all the formalities, like confirmation or appeals, have been exhausted.

In this country corporal punishment of male juveniles is sanctioned by s 353 of the Criminal Procedure and Evidence Act, *Cap 9:07* ("***the CP & E Act***"). It reads:

> "**353 Corporal Punishment of male juveniles**
> (1) Where a male person under the age of eighteen years is convicted of any offence the court which imposes sentence upon him may-
> (a) in lieu of any other punishment; or
> (b) in addition to a wholly suspended sentence of a fine or imprisonment; or
> (c) in addition to making an order in terms of subsection (1) of section *three hundred and fifty-one*;
> sentence him to receive moderate corporal punishment, not exceeding six strokes."

Section 101 of the Prisons Act, [*Cap 7:17*], defines corporal punishment as a "**…** ***moderate correction of whipping referred to in section 353 of the Criminal Procedure and Evidence Act ..***"

Sub-sections (2) to (6) of the CP & E Act regulate the manner in which the corporal punishment is to be administered. In brief, it is to be administered in private. The parent or guardian of the juvenile offender may be present. It can only be administered after a medical doctor has certified that the juvenile offender is fit to receive it.

The Prisons Act and the Regulations aforesaid prescribe, among other things, the manner how, the place where, and the persons by whom, corporal punishment is to be

[1] Federal Government Notice (RGN) No. 42 of 1956

administered. Firstly, in addition to the parents or guardian of the juvenile offender that may be present in terms of the CP & E Act, the Prisons Act adds two more persons. Section 103 provides that no corporal punishment shall be carried out in the absence of the medical officer who certified the juvenile offender to be fit to receive it, and of the officer in charge of the prison. With regards the officer in charge of the prison, the Prison Regulations, in s 111(1), empower him to delegate this function to a senior or junior officer.

The Prison Regulations prescribe the type of instrument by which corporal punishment shall be administered. It is a rattan cane. No doubt, given the time of their promulgation, the Regulations still refer to the measurements of this instrument in feet and inches. They say for prisoners under the age of nineteen years, the rattan cane should be three feet long and not more than three-eighths ($^3/_8$) of an inch in diameter. (For prisoners nineteen years old and above, the measurements are four feet and not more than half (½) an inch respectively).

Then s 109(2) of the Prison Regulations reads:

> "(2) The manner in which corporal punishment shall be inflicted ….. shall be as follows-
> (a) a blanket or similar form of protection shall be placed across the small of the prisoner's back above the buttocks;
> (b) a small square of thin calico shall be dipped in water, wrung out and tied over the prisoner's buttocks;
> (c) strokes shall be administered from one side upon the buttocks of the prisoner and on no account on the back."

Elaborating on the manner of execution of corporal punishment, the Supreme Court painted the following graphic description in *S* v *Ncube*[2], a case that held that corporal punishment on adults was unconstitutional:

> "Once the prisoner is certified fit to receive the whipping, he is stripped naked. He is blindfolded with a hood and placed face down upon a bench in a prone position. His hands and legs are strapped to the bench, which is then raised to an angle of 45 degrees. (A) calico square is tied over his buttocks and the kidney protector secured above his buttocks at waist level. The prisoner's body is then strapped to the bench. The cane is immersed in water to prevent splitting. The strokes are administered to one side across the whole of the buttocks."

On 31 December 2014, MUREMBA J, in a criminal review judgment in *S* v *Willard Chokurumba*[3], with which MAWADZE J concurred, declared, among other things, that s 353 of the CP & E Act was misaligned with the new Constitution of Zimbabwe. She came to this conclusion by comparing the wording on corporal punishment in the old Constitution with that of the new Constitution. Section 15 of the old Constitution of 1979 provided as follows:

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[2] 1987 (2) ZLR 246 (SC), at p 263B –D, 1988 (2) SA 702 (ZSC) at p 714B - C
[3] HH 718-14

"**15 Protection from inhuman and degrading treatment**

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

(2) ……

(3) **No moderate corporal punishment inflicted**-

(a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone *in loco parentis* or in whom are vested any of the powers of his parent or guardian; or

(b) in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law;

shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading." (emphasis added)

On the other hand, the new Zimbabwe Constitution that came into effect in 2013 and which replaced the old one[4], made no specific mention of corporal punishment. But on inhuman or degrading treatment or punishment it provides as follows in s 53:

"**53 Freedom from torture or cruel, inhuman or degrading treatment or punishment**

No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."

In the review judgment aforesaid MUREMBA J noted that s 86 of the new Constitution outlaws any law that purports to limit any fundamental rights and freedoms enshrined in that Constitution. Expressly mentioned in subsection (3), paragraphs (a) and (b), are the right to human dignity and the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.

The learned judge also noted the provisions of s 52 and s 56 of the new Constitution. Section 52(a) guarantees the right of every person to bodily and psychological integrity. This includes the right to freedom from all forms of violence from public or private sources. Section 56 guarantees equality and equal treatment of all persons before the law. Discrimination on the grounds of, *inter alia*, sex, gender or age is outlawed.

On the basis of the change in the wording in the new Constitution, and having regard to several regional and international conventions that have regarded corporal punishment of juveniles as violence against children and a violation of their human dignity, physical integrity and self-esteem, MUREMBA J concluded as follows[5]:

> "This elaboration of the children's rights in conformity with the regional and international conventions that Zimbabwe has ratified demonstrates that the new Constitution does not allow … the imposition of corporal punishment anymore. Clearly s 353(1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] is now a law which is inconsistent or *ultra vires* the

[4] Amendment No 20

[5] At pp 7 - 8 of the cyclostyled judgment

> Constitution. …… What it means under the circumstances is that whilst the Criminal Procedure and Evidence Act [*Cap 9:07*] remains in force its section 353(1) is now an invalid law. …….. [T]he courts have a duty to uphold the Constitution and to promote, respect and protect the rights and freedoms enshrined therein. I thus declare s 353(1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] to be constitutionally invalid."

In my view, and with due respect, my learned sister judge hit the bull's eye. I agree entirely with those findings and those conclusions. There can be no question that corporal punishment of juveniles has become unlawful in this country. The old Constitution made this country an outpost of tyranny and cruelty against children. Our stance on corporal punishment stuck up like a sore thumb. All around us, and in virtually all over the progressive world, corporal punishment, whether of adults or of juveniles, had been abolished. That the Prisons Act defines corporal punishment as "… ***moderate correction of whipping*** …", or that the Regulations seem to go to some length to mollify or mitigate the manner of its execution cannot, in my view, make it any less brutal. It is like applying lipstick on a bullfrog, or blowing incense on a skunk.

In fact, our old Constitution, in expressly sanctioning corporal punishment as it did, was not always like that before. Subsection (3) of s 15 that expressly said, *inter alia*, corporal punishment inflicted upon a male person in execution of a judgment or order of a court was not inhuman or degrading treatment was a 1990 amendment. The subsection was inserted by Act No. 30 of 1990 as the eleventh amendment to the Lancaster House Constitution.

In my view, by amending the Constitution in 1990 to make corporal punishment lawful, the Legislature was being reactive and retrogressive. In June 1989 the then Supreme Court, sitting as a Constitutional Court in the case of *S* v *Juvenile*[6], by a majority of three judges to two, had held that corporal punishment inflicted upon male juvenile offenders in terms of the CP & E Act was *ultra vires* s 15(1) of the Constitution. Given the weight of authority, both in this jurisdiction and elsewhere in the progressive world, except South Africa at that time, and given the provisions of the various international conventions on children's rights, such a conclusion by the then Constitutional Court was inevitable. The *Ncube* case, *supra*, had been decided two years earlier. The Supreme Court had, by a unanimous decision, adjudged corporal punishment on adults as being unconstitutional, barbaric, inherently brutal and cruel. The court said it stripped the victim of all dignity and self-respect, treating humans as non-humans.

[6] 1989 (2) ZLR 61 (SC)

In the *Juvenile* case, noting that the only significant difference between the whipping of an adult and that of a juvenile in the execution of the sentence of corporal punishment, was in the size of the rattan cane to be used, the Constitutional Court said that the strictures applied to corporal punishment of adults would apply *a fortiori* to such punishment when meted out on juveniles. The court registered its abhorrence of this type punishment in the most powerful diction and colourful nomenclature. For example, GUBBAY JA, who had delivered the court's judgment in the *Ncube* case said[7]:

> "…. [J]udicial whipping in any form must inevitably tend to brutalise and debase both the punished and the punisher alike. It causes the latter, and through him society, to stoop to the level of the offender. It marks a total lack of respect for a fellow human, be he adult or juvenile. It treats members of the human race as non-humans. By its very nature it is extremely humiliating to the recipient.
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> "…. [J]udicial whipping, no matter the nature of the instrument used and the manner of execution, is a punishment inherently brutal and cruel; for its infliction is attended by acute physical pain. …. Irrespective of any precautionary conditions which may be imposed, it is a procedure subject to ready abuse in the hands of a sadistic or overzealous official appointed to administer it. It is within his power to determine the force of the beating.
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> "In short, whipping, which invades the integrity of the human body, is an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime. It has been abolished in very many countries of the world as being incompatible with contemporary concepts of humanity, decency and fundamental fairness. The main categories of exception appear to be some former British colonies and some States where *shari'a* (Islamic law) is practised."

In the same judgment, KHOSA JA, on the side of the majority, said[8]:

> "Speaking for myself, I think any law which compels a person, against his will, to expose his posterior to the gaze of total strangers while blindfolded and strapped to a wooden bench degrades and debases that person, and if this is done for the sole purpose of subjecting him to whipping, then it also dehumanises him.
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> "Even if corporal punishment were to be administered without the victim taking his clothes off, the mere idea of inflicting physical pain as a form of punishment corresponds, in my view with torture and the *lex talionis* – an eye for an eye, a tooth for a tooth, a life for a life – all of which have been condemned because they represent an inhuman approach to punishment; …."

Not only is this court bound by the decisions of the Supreme Court and the Constitutional Court, but also the manner those courts have expressed themselves on the subject is, in my view, and with due respect, the mark of leadership in the development of jurisprudence.

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[7] At pp 90G – 91C
[8] At p 101E - G

Therefore, if the new Constitution has dropped the amendment to the old Constitution that permitted the meting out of corporal punishment upon male juveniles, and if the Constitution has gone on to strengthen certain provisions of the Bill of Rights, for instance, by promulgating s 86(3)(c) that says that no law may permit the right to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; s 52(a) that guarantees the freedom from all forms of violence from public or private sources; and s 56 that guarantees fair treatment of all persons and outlaws discrimination on the grounds of, *inter alia*, sex, gender or age, there can be no doubt that s 353 of the CP & E Act, has become anachronistic.

In the circumstances, in the four cases above, like MUREMBA J did before me, I cannot certify the sentences of canning to be in accordance with real and substantive justice. Given the average ages of the accused persons and those of their victims, and given that community service is wholly inappropriate in rape cases and, in my view, cases of aggravated indecent assault such as was the situation in Case 3 above, I consider that sentences of imprisonment of three to five years wholly suspended would have been appropriate.

Section 167(3) of the new Constitution provides that it is the Constitutional Court that makes the final decision whether, among other things, an Act of Parliament is unconstitutional. It is that court that must confirm any order of constitutional invalidity made by another court before that order has any force.

That an order concerning the constitutional invalidity of any law made by any other court has no force unless confirmed by the Constitutional Court is repeated in s 175(1) of the Constitution. Subsection (4) says that if a constitutional matter arises in any proceedings before any court, the person presiding over that court may refer the matter to the Constitutional Court. I consider that this provision also applies to criminal reviews by this court in terms of s 57 of the Magistrate's Court Act, [*Cap 7:10*]. In terms of subsection (5) of s 175 of the Constitution, an Act of Parliament or rules of court must provide for the reference to the Constitutional Court of an order concerning the constitutional invalidity made by any court other than the Constitutional Court.

There is not yet any Act of Parliament or rules of court providing for the reference of matters to the Constitutional Court. In her review judgment aforesaid MUREMBA J employed the provisions of subsection (3) of s 175 of the Constitution. They say that any person with a sufficient interest may appeal or apply directly to the Constitutional Court to confirm or vary an order concerning constitutional validity by a court. The learned judge held the view that it is the Prosecutor-General who should apply to the Constitutional Court to

have the declaration of constitutional invalidity of s 353(1) of the CP & E Act confirmed. Thus, she directed that her review judgment be brought to the attention of the Prosecutor-General.

I believe that the course adopted by the learned judge was correct. But I also believe that in terms of subsection (4) of s 175 this court may directly cause the reference of the matter to the Constitutional Court without imploring the Prosecutor-General to appeal or apply.

In the premises, this declaration of constitutional invalidity of s 353(1) of the Criminal Procedure and Evidence Act, [*Cap 9:07*) is hereby referred to the Constitutional Court in terms of s 175 of the Constitution. The registrar of this court is hereby requested to prepare the necessary referral papers and ensure that this judgment is placed before the Constitutional Court.

27 April 2015

HONOURABLE TSANGA J: I agree ……*Signed on Original*……