THE STATE

versus

TANAKA MACHEKA

HIGH COURT OF ZIMBABWE

MAWADZE J

HARARE, 29 January 2016

**Criminal Review**

MAWADZE J: This matter was referred to me by the trial magistrate with the following comments:

“I convicted the accused on his plea of guilty and sentenced him to canning.

The medical officer at prison then certified accused unfit for canning. Had I known of the accused’s health condition I would not have passed such a sentence.

I am now referring the record to you for guidance”.

The trial magistrate convicted the juvenile accused aged 15 years on his own pleas of

guilty on 3 counts relating 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 agreed facts are that on the 4th, 5th and 17 August 2015 at Kushinga Business Centre in Mutoko, the accused entered into complainant’s shop who happens to be his uncle through a broken window. The accused on each occasion would then steal money, that is US$ 170 in count 1, US$88.00 in count 2 and US$70.00 in count 3 of which only US$88 was recovered. The accused’s luck ran out when he was caught in the shop in count 3 and he confessed to the offences in count 1 and 2.

All the 3 counts were treated as one for sentence and accused was sentenced to receive moderate corporate punishment of 2 strokes with a rattan cane to be administered in private by a designated officer at Mutoko Prison.

The certification by a medical officer that accused is unfit to receive the corporal punishment is not attached in the record. I however believe that this is merely an oversight by the trial magistrate.

The probation officer’s report indicated that the accused is being looked after by his maternal grandparents as his father is deceased and his mother is in South Africa. The accused is currently in Form 1 in Mutoko, and is described by the probation officer as dishonest and untruthful child. The probation officer is of the view that the accused should be counselled to try and inculcate positive behaviour in the accused. The recommendation by the probation officer was that the accused should be spared of prosecution and that he be dealt with in terms of s 46 (1) (b) and (c) of the Children’s Act [*Chapter 5:06*].

It would appear that this recommendation did not find favour with the Prosecutor General who proceeded to prosecute the accused. In the absence of any reasons proffered it is difficult to appreciate what informed the Prosecutor General’s decision to prosecute the accused rather than to allow the probation officer to take corrective measures on the accused’s delinquency through counselling and supervision as is provided in s 46 (1) of the Children’s Act [*Chapter 5:06*]. The accused who is just 15 years old has now a criminal record and has been subjected to the mighty of our criminal justice system. It is not clear whether the accused is now in prison or in the custody of his relatives.

It is also not clear why the trial magistrate did not refer the accused to the children’s court to be dealt with in terms of the Children’s Act [*Chapter 5:06*].

It would appear the trial magistrate is unsure of what to do after the medical officer certified that the accused is unfit to receive corporal punishment. The trial magistrate should have been guided by the provisions of s 353 (5) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides as follows;

“(5) If a medical officer has certified that a person on whom corporal punishment is to be inflicted in terms of this section is not in a fit state to receive the punishment or any part of it, the person who was to have inflicted the punishment shall forthwith submit the certificate to the court that passed the sentence or to a court of like jurisdiction and the court may thereupon if satisfied that the person concerned is not in a fit state to receive the punishment or any part of it, amend the sentence as it thinks appropriate.”

The trial magistrate is therefore guided accordingly.

The trial magistrate should also refer to case law which should guide the court in how to deal with juvenile offenders. See *S* v *Tototai* 2002 (1) ZLR 29 (H) and *S* v *Ncube & Ors* 2011 (1) ZLR 608 (H).

In the result the matter is remitted to the trial magistrate who should proceed in the manner outlined above.