

THE STATE

vs

X

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 20 May, 2019

Criminal Review

MAWADZE J: This review judgment has been occasioned by the need to assist judicial officers especially Magistrates in sentencing juveniles convicted of criminal offences in light of the decision of the Constitutional Court in the case of *State v Willard Chokuramba & 4 Ors.* CCZ 10/19.

The Constitutional Court outlawed corporal punishment administered on male juveniles as was provided for in s 353 of the Criminal Procedure and Evidence Act [Cap 9:07]. This was with effect from 3 April., 2019. Male juvenile offenders convicted of any criminal offence cannot be sentenced to receive corporal punishment. Consequently, Magistrates are now enjoined to resort to other forms or methods in dealing with juveniles in conflict with the criminal law especially those convicted of such offences.

Prison sentences have long been regarded as undesirable in dealing with juvenile offenders. In the case of *S v Ncube and Ors.* 2011 (1) ZLR 608 (H) I discussed in some detail on other forms of punishment or options open to judicial officers in dealing with such juveniles. The guiding principle is that in dealing with juveniles in conflict with the criminal law is to impose a rehabilitative rather than a retributive sentence. This is in line with the international best practices and international instruments which include *inter alia* Article 40 of the *United*

Nations Convention on Rights of the Child (1990) and Article 17 of the African Charter on the Rights and Welfare of the Child (1999).

I should applaud the trial Magistrate in this matter for attempting to adhere to these principles. The only problem which arises in this case is that the trial Magistrate did not fully adhere to the proper procedure.

The bare bones of the case is that a 15-year-old male juvenile was convicted on his own pleas of guilt of 10 counts. Five counts relate to unlawful entry into premises as defined in s 131(1) of the *Criminal Law (Codification and Reform) Act [Cap 7:23]* and the other five counts relate to theft as defined in s 113(1) of the same *Act [Cap 9:23]*.

The agreed facts are that between the period extending 28 February, 2019 and 15 March, 2019 in and around Chivi growth point, Masvingo, the 15-year-old juvenile broke into five different premises from which he stole various goods all valued at \$548.50 of which goods valued at \$395.00 was recovered this causing actual prejudice of \$153.50.

The matter proceeded in terms of s 271(2)(b) of the *Criminal Procedure and Evidence Act (Cap 9:07)* and the male juvenile was convicted on his own pleas of guilty in all the 10 counts.

A detailed probation officer's report was compiled and produced. It was recommended that the male juvenile be found to be a child in need of care as defined in s 2 (c), (d) and (g) of the *Children's Act [Cap 5:06]*. The recommendation was that the male juvenile be placed in a Training Institute at Kadoma in terms of s 20(1)(b)(vi) of the *Children's Act [Cap 5:06]*. This recommendation was informed by a number of reasons.

The male convicted juvenile is described in the probation officer's report as an habitual truant. His biological father is unable to exercise proper care and control over him. Secondly, as already said the male juvenile is facing and had been convicted of 10 counts which clearly shows his propensity to crime. Thirdly, the convicted male juvenile has a relevant previous conviction for contravening section 131 (1) of the *Criminal Law (Codification and Reform) Act [Cap 9:23]* as per CRB CH 275/18 dated 28 August 2018. In that case passing of sentence was suspended for 5 years on the usual conditions of good behaviour. Clearly the said male juvenile has failed the test in less than a year. The trial Magistrate proceeded in this case at hand to place the convicted male juvenile at Kadoma Training Institute for 3 years.

The first anomaly in this matter is that the trial Magistrate did not deal with the convicted male juvenile's previous conviction on CRB CH 275/18 in which passing of sentence had been conditionally suspended for 5 years. The convicted male juvenile as already said breached the said conditions by committing these offenses at hand. To his or her credit the trial Magistrate, in the reasons for sentence, suggested that it would be prudent to further postpone the passing of sentence on CRB CH 275/18. However, the misdirection is that this remained a wish on the part of the trial Magistrate as it was not captured on the ultimate sentence imposed. The trial Magistrate profusely apologised for this oversight and implored this court to rectify the omission. I am of the view that the convicted male juvenile should be afforded the proverbial second chance to reform hence the need to further postpone the passing of sentence on CRB CH 275/18 for another period of 5 years on the same conditions.

The second anomaly in this matter is that the trial Magistrate did not comply with the provisions of s 351(3)(b) of the *Criminal Procedure and Evidence Act [Cap 9:07]* which provide as follows;

“Section 351 Manner of dealing with convicted juveniles

- (1) *irrelevant*
- (2) *Any court before which a person under the age of nineteen years has been convicted of any offence may, instead of imposing a punishment of a fine or imprisonment for that offence, subject to subsection (1) of section three hundred and thirty-seven—*
 - (a) ----- (*irrelevant*)
 - (b) *after ascertaining from the Minister responsible for social welfare that accommodation is available, order that he shall be placed in a training institute in Zimbabwe or in a reform school in the Republic of South Africa for the period specified in subsection (1) of section three hundred and fifty-two.”*

After I raised a query with the trial Magistrate as to whether he or she had complied with the provisions of s 351(2)(b) of *Criminal Procedure and Evidence Act, [Cap 9:07]* by ascertaining that that there is indeed accommodation at Kadoma Training Institute before committing the convicted male juvenile to that institution, the response by the trial Magistrate was rather perfunctory.

The trial Magistrate said he or she simply complied with the recommendations of the Probation Officer as per the Probation Officer's report. This is incorrect. The Probation Officer had suggested that the convicted male juvenile be referred to the Children's Court and dealt with in terms of s 20 (1) of the *Children's Act [Cap 5:06]*. The trial Magistrate although placing the convicted male juvenile at the said training institute he or she did not do so sitting as a Children's Court and was not exercising the powers outlined in s 20(1) of the *Children's Act [Cap 5:06]*.

The truth of the matter is that the trial court simply proceeded in terms of s 351 (2)(b) of the *Criminal Procedure and Evidence Act [Cap 9:07]*. Be that as it may, whether the trial Magistrate had exercised the powers outlined in s 20 of the *Children's Act [Cap 5:06]* sitting as Children's Court or acted in terms of s 351(2)(b) of the *Criminal Procedure and Evidence Act [Cap 9:07]* the bottom line is that the trial Magistrate was enjoined to first ascertain from the responsible authority whether there is accommodation at Kadoma Training Institute before committing the convicted male juvenile to the institution.

The trial Magistrate in a bid to explain this omission said he or she telephonically contacted the said institution and was advised telephonically that there was such accommodation. I have no reason to doubt the integrity of the trial Magistrate. His or her ability to think on his or her feet is remarkable! However, the fact remains that a Magistrate Court is a court of record. This means that inquiries made in compliance with the law cannot be sufficient if they are made telephonically only. There is need for written documents or proof.

How will this court in exercising its review powers ascertain compliance with the law where such compliance has purportedly been made telephonically? The proper way to comply with the provisions of s 351(2)(b) of *Criminal Procedure and Evidence Act [Cap 9:07]* is to simply obtain and attach such proof. This may be in the form of a letter of confirmation from the head of such a training institute that accommodation for the convicted juvenile is available. The need for this confirmation is obvious. In my view it matters not whether such an inquiry is done by the trial Magistrate or the Probation Officer. The bottom line is that such proof of confirmation should be part of the record of proceedings.

I am inclined to condone this omission by the trial Magistrate in the interest of the convicted male juvenile. This court would be not acting in the best interests of the said convicted male juvenile if it was to decline to confirm these proceedings by withholding its certificate, worse still by setting aside the order imposed. This court as the upper guardian of minor children should always and at all times act in their best interests. Be that as it may my

exhortation is that trial Magistrates should nonetheless comply properly with the provisions of the law. I shall however confirm the proceedings as in accordance with real and substantial justice but nonetheless seek the concurrence of my brother MAFUSIRE J as I have made an addition to the order made by further suspending the passing of sentence in CRB CH 275/18 for 5 years on the usual conditions.

In the result, I make the following order;

1. The proceedings are confirmed as in accordance with real and substantial justice.
2. The order of placing the convicted male juvenile at Kadoma Training Institute for 3 years be and is hereby confirmed.
3. The passing of sentence on the said convicted male juvenile on CRB CH 275/18 is further postponed for 5 years on condition the said male juvenile does not commit any offence involving dishonesty within the said period for which he is sentenced to a term of imprisonment without the option of a fine.

Mafusire J. concurs