

THE STATE

Versus

T. M. (A JUVENILE)

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 JUNE 2003

Criminal Review

NDOU J: The accused is a juvenile who was aged between 16 and 17 years at the time of his trial. He appeared before a Zvishavane Provincial Magistrate facing two charges. He was not legally represented. The first charge is one of housebreaking with intent to steal and theft. The second charge is one of escaping from lawful custody in contravention of section 44 (the trial court erroneously stated section 48) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The accused person was sentenced to undergo prison terms of 7 months and 5 months respectively. Of the total 12 months imprisonment, 5 months were suspended on condition of good behaviour.

The matter was submitted for scrutiny in terms of section 58 of the Magistrates' Court Act [Chapter 7:10]. The learned scrutinising Regional Magistrate, Central Regional, forwarded the matter for review accompanied by a minute addressed in the following terms:

- “1. In count 2 the accused was charged and convicted for contravening a wrongfully cited statutory provision. The accused should have been charged and convicted for contravening section 44(1) rather than section 48(1) of the Criminal Procedure and Evidence Act [Chapter 9:07]. May corrective measures be taken.

2. My view is that the overall sentence of 12 months imprisonment with labour imposed in both counts is unduly harsh taking into account the following factors;
- (a) There is no proof of accused's age in the record of proceedings and there is no basis for the trial magistrate to make an informed estimation of the accused's age. In that regard the trial magistrate seemed to have failed to fully appreciate (the) accused' age and to properly assess how that may affect the overall sentence.
 - (b) Accused gave his age as 16 years old which would mean accused is a juvenile. While I accept that accused's moral blameworthiness is high in that he first committed the offence of housebreaking with intent to steal and theft and in count 2 escaped from lawful custody, it remains unduly harsh, in the absence of any other compelling factors to sentence a 16 year old first offender to a term of 12 months imprisonment with labour.
 - (c) In view of accused's tender age, this was a proper case for the trial magistrate to fully understand accused's personal circumstances by either making an informed inquiry into mitigation or asking for a Probation Officer's report. None of the two was done but instead the trial magistrate boldly states that accused at 16 years of age is emancipated. I believe there was great need to properly weigh and understand accused's circumstances and the element of youthfulness."

I share the concerns expressed by the learned Regional Magistrate. The learned trial magistrate carried out a perfunctory inquiry on the accused person's age and how that factor impacted on the degree of his moral blameworthiness. In *S v "W" (A juvenile)* HH-276-83 at page 3 of his cyclostyled judgment MANYARARA AJ (as he then was) remarked –

"It is also essential for the magistrate, before passing sentence, to explore or inquire into such facts or evidence as may be relevant to mitigation of sentence as the accused was a juvenile who was not legally represented and had negligible education."

The following passage from *S v Zhira* HH-384-82, a review judgment of WADDINGTON J, is apposite:

"It is notorious that uninformed persons frequently do not understand the importance of explaining the background of their actions to the

HB 65/03

court when charged with criminal offences, and if the court does not come to their assistance by inviting them to give an explanation, miscarriages of justice can easily occur”

It is essential when deciding upon the appropriate sentence for a juvenile to investigate fully and properly the personal circumstances of the offender, his motive, the circumstances surrounding the commission of the offence – see *A Guide of Sentencing in Zimbabwe*” by G Feltoe at page 72; *S v Mudzimwa* HH-119-88; *S v Mutetwa* HH-373-87 and *S v Ngombe and Ors* HH-504-87.

The accused stated that he is aged 16 years but the learned trial magistrate stated (in response to the regional magistrate’s query) “The real age of the accused is between 16 years of age and 17 years of age. Usually the police round off the months to the nearest year. The age of the accused is 16 years and some months.” This is mere speculation in a bid to defend on indefensible shortcoming. The trial magistrate should have properly established the accused’s age if he did not believe that he is 16 as he stated. Age in such circumstances is an important factor when it comes to sentence. Where there is a doubt as to age, attempts must be made to ascertain the accused’s age as accurately as possible – see *R v Maoko and Ors* GS 88-80.

Like the scrutinising Regional Magistrate I am perturbed by the imprisonment of the 16 year old juvenile first offender. It is trite that juveniles should not be sentenced to custodial sentences unless there is absolutely no alternative. In this regard BLACKIE J in *S v Ncube and Ano* HB-9-87 at page 1 of the cyclostyled judgment remarked –

“Our courts have repeatedly said that teenage minors should not be sentenced to terms of imprisonment unless there is absolutely no alternative. The reasons are obvious. They do not need to be repeated here.”

See also *S v Gatsi* HB-87-86 and *S v Dube* HB-90-87. In *S v Mbewe* HH-323-87 at

HB 65/03

page 2 of the cyclostyled judgment SANSOLE J observed –

“And it is the policy of these courts to do as much as is reasonably practical to keep juvenile first offenders out of prison.”

I agree with the scrutinising Regional magistrate that the trial magistrate was remiss in failing to apply her mind to the issue of what would have been a suitable sentence in the circumstances. The accused was sentenced on 25 February 2003. The only useful thing to do is to ensure his immediate release.

As far as the citation is concerned the trial magistrate, with the benefit of hindsight, agrees that the correct charge is contravening section 44(1). The accused will suffer no prejudice if the citation is corrected as the body of the charge will not be affected.

In the result the citation in count 2 is altered by the deletion of 48(1) and the substitution of 44(1). The conviction in count 2 is otherwise confirmed. The conviction in count 1 is confirmed. The sentences imposed by the trial magistrate are hereby set aside. The following sentences are substituted –

Count 1 – 2 months imprisonment
Count 2 - 1 month imprisonment

In view of the fact that the accused has already served the sentences, he is entitled to immediate release.

Chiweshe J I agree