

THE STATE

Versus

MATHEW MUSUSA  
TINASHE MAZURU  
LISTON KAPIRINGISHE  
TARIRO MUMANYI  
FANUEL CHINYERE  
THABANI SIBANDA  
RYAN MADYIWA AND ASHLEY H KUDZAI  
GODKNOWS PHIRI

HIGH COURT OF ZIMBABWE  
MUZOFA & BACHI MZAWAZI JJ  
CHINHOYI, 22 November, 2023,

### **Criminal Review**

**BACHI-MZAWAZI J:** These records have not been processed as timeously as the court would have wanted to. It is trite that review matters should be accorded urgent attention. The court is also mindful of the adage that justice delayed is justice denied which is also a judiciary constitutional mandate. However, in the same breathe justice hurried is justice aborted.

What is common in all the lumped up cases warranting a composite judgment is the harshness of the ultimate sentences imposed without careful consideration of tried and tested sentencing principles emboldened and embedded in judicial precedent now codified and amplified by the new sentencing guidelines, Statutory Instrument 146/21.

The sentencing tradition, has always been the counter balancing of corrective and retributive penalties weighed against individual and

peculiar circumstances of every case and the interest of the administration of justice and society at large.

Considerations have in the past been made to the age, sex, restorative justice, actual prejudice on the victim, amounts involved, recoveries made and the accused's delinquency measured against his previous brushes with the law and his novelty in the crime world. Notably, alternatives to imprisonment also featured in the traditional sentencing patterns. All these factors have been condensed and encapsulated in the new sentencing guidelines for uniformity, standardization and guidance.

As the name denotes, the sentencing guidelines are simple and straight forward guides. The presumptive sentences provided therein are the springboard or starting point which is to be considered alongside binding judicial precedent. What the judiciary officer needs to do is to justify their departure from the ceiling penalty provided for in the guide.

Though in most of the reviews grouped herein the offenders pleaded guilty to the offences they faced, in our view taking into account the above observations the sentences were not in accordance with real and substantial justice. We will summarize the facts of each case and the penalty imposed. The comments and conclusions made in the last case will then encompass the rest.

In the case of Tinashe Marufu, a 21year old first offender was sentenced to 14 months imprisonment, 6 suspended for 5 years with attached conditions after being convicted on his guilty plea for an unlawful entry offence. The accused had stolen few clothing items valued US40 dollars from a semi- constructed building. There was no prejudice on the complainant as all was recovered. Overemphasis was placed on the

presumptive penalty without appreciating that it had to be balanced with several other factors.

Liston Kapiringishe, a 19-year-old was sentenced to 13 months imprisonment with 6 suspended for unlawfully entering a neighbor's house and stealing food items valued at US\$30,00. One month was suspended on restitution meaning goods in the sum of US\$8.00. Goods to the tune of US\$22.00 were recovered. Technically, the suspended sentence was cosmetic since the accused had no means of payment. Logically, given the damaging effect of prison even for a single day was the sum of US\$8.00 proportionate to a month's extra stay in jail.

A 22-year-old female first offender, Tariro Mumanyi, who falls in the special and vulnerable category of first offenders was convicted and jailed for assault. She was sentenced to 24 months in jail, with 6 suspended with conditions. She is serving 18 months imprisonment for the single act in an uncontrolled situation. She struck her customer on the forehead with a pot after an altercation in her small canteen. She was a single mother with an infant child. Though the medical report noted the possibility of serious repercussions manifesting at a later stage but where not present at the time of observations later on there were none at the time of the examination. Evidence of her action of restorative justice in paying for the medical bills was placed before the court with little impact or effect. This is where section 12 of the new sentencing guide comes into play, an enquiry on personal circumstances and establishing the root cause or underlying circumstances behind the ventilation of such rage.

Fanuel Chinyerere a 19-year-old was sentenced to 4 years imprisonment with 1 year suspended on good behavior. He is serving an effective 3 years for having a sexual relationship and impregnating a girl

aged 16years in contravention of s70 of the Criminal law code. There was only a three-year difference. A child was on the way who needed a father and family unit. The accused and the alleged victim were in a love relationship. Though the law seeks to protect the girl child and has criminalized early child marriages it seems prevention is better than cure. Where there is a child the interests of the unborn baby should be taken abode. That is the reason why each case should stand on its own merit. The trial court in this instance was misguided by her interpretation of the presumptive penalty clause and disregarded all other factors embodied in the whole statutory instrument.

The case of Thabani Sibanda is another assault case involving a 23-year-old who assaulted a female bar patron resulting in the loosening of three of her teeth. It was after an altercation in intoxicating circumstances. He was sentenced to 24 months imprisonment of which 8 months was suspended for 5 years on condition within this period the offender did not commit any offence involving unlawful entry into premises and or theft as an element for which upon conviction is imprisoned without the option of a fine. Of the remaining 16 months imprisonment, 4 months imprisonment was suspended on condition of restitution to Melody Kaunda in the specified sum.

Ryan Madyiwa was arrested and convicted on his plea of guilty on two counts of unlawful entry alongside Ashely Hillman Kudzai. In the first count all the property that had been stolen from the neighbors was recovered. In the second count property valued US\$65.00 dollars was recovered from a total value of US\$115.00. Both were youthful first offenders aged 21 years at the time of the commission of the offence. Both counts were taken as one and they were sentenced to 24 months

imprisonment with 8 suspended for 5 years. Effective 16 months imprisonment.

The case of Godknows Phiri also involved, a youthful first offender aged 23 years who was convicted on his own guilty plea on two counts of unlawful entry. He was sentenced to 24 months imprisonment, 6 suspended on good behavior. The other 6 months was suspended on condition of restitution in the sum of US\$280.00, US180 for the first complainant and US\$100 to the second.

Matthew Mususa was a 17-year-old first offender at the time of the commission of the first offence, and conviction. He was sentenced to perform community service but with a suspended sentence of 5 months as a deterrent obstacle barring him from the commission of other offences. A year later he was again charged and convicted of the same offence. This time around he was sentenced to an effective 6 months imprisonment after the deduction of yet another suspended sentence. However, the trial court invoked the previously suspended sentence and he is currently serving 11 months. This is the case subject to review.

The facts in Mususa case are that the accused stole an Exide battery from a neighbor valued US110, dollars. He returned the following day to steal in the same manner but an alert neighbor informed the owner of the premises who then fired warning shots resulting in the accused taking flight. He was apprehended and taken to court and convicted on two counts of theft on his own guilty plea. Subsequently, he was sentenced as described above.

What stands out in this case is that the facts of the second count do not disclose theft but attempted theft. That makes both the charge and

sentence defective and not in accordance with real and substantial justice thus cannot stand.

The second point for consideration is that the accused when he committed the first offence he was a child in terms of the definition of a child in s81 (1)(a) of the Constitution Amendment NO, 20 of 2023 as read in consonance with United Nations Convention on the Rights of the Child and the African Charter on the Rights of a Child amongst other International Human Rights instruments. Section 81(3) of the Constitution enjoins every court to adequately protect the child with the High Court as an Upper guardian. S81(2) underscores that the children's best interest are paramount in every matter concerning a child. This in my view is irrespective of whether it is a civil or criminal matter. What the first court did in the first case to impose community service cannot be faulted. However, there was ignorance or inadvertent overlooking of the diversionary sentencing part. A stint in juvenile correctional facility may have addressed his delinquent behavior.

What this basically means is that once a court is faced with a child offender it should be conscious of the difference in treatment between them and adult offenders, particularly, if the youngster is undefended. Alternatives to imprisonment must be explored and exploited.

Our law in s351 of the Criminal Procedure and Evidence Act recognizes and provides for, alongside other International jurisdictions for diversionary methods. These are optional or alternative mechanisms of diverting juveniles and young offenders from incarceration for the purpose of reformation, rehabilitation and the prevention of recidivism. Judicial precedent has on numerous occasions warned courts to guard against sending young offenders to prison where they will be contaminated

beyond redemption by the hard core inmates and the other inherent vices synonymous with jail life and environment.

Section 351, speaks to the placement of young offenders into juvenile detention centers and the need to involve the social welfare and, probation officer's report and other processes to ensure the placement in such homes.

Further, though the discretion to impose the suspended sentence lies with the trial court, of note, it seems most courts do not stop to reflect on the individual circumstances of the case before the uprooting and planting of a suspended sentence. It is like it is a must, automatic or mechanical that the suspended sentence should be put into effect but a suspended sentence can be further suspended for the purpose of further rehabilitative measures.

In *casu*, the accused was asked why it had become a habit to steal and in mitigation he said he stayed with his grandparents and was hungry. Though he was a repeat offender, his situation depicted a troubled child not just a delinquent who needed help more than a punitive sanction. Section 12 of the new sentencing guidelines caters for such enquiries to establish the motive behind some criminal behavior. The new sentencing guidelines goes further and enjoin trial courts to firstly consider other alternatives to imprisonment and a fine where a statutory fine is prescribed.

The cumulative factors of the present case did not warrant a custodial term even in the presence of a suspended sentence. The trial court exhibited a misapprehension and lack of appreciation of the

statutory instrument 146 of 2023 underpinned by binding judicial precedence.

For instance, section 6 of the said law speaks to the objectives of sentencing. The word shall which is preemptive is used. The objective shall be to correct, rehabilitate and punish the offender to the extent and in such a manner that it is just and proportionate. Punishment is not meant to break as illustrated by case authority. In *S v Muvhami* HB89/10 it was highlighted that punishment is not meant to break the offender but to rehabilitate young first offenders and they should as much as possible be spared the jail term.

Looking at this case holistically, the penalty of incarceration, on a youthful teenager, over a criminal *de minis*, a petty crime, whose value was recovered at no actual prejudice to the complainant, after a guilty plea was not proportional to the offender and the crime committed. In a *S v Khumalo & Anor* SAFLLI 03/2021 (ZAPGPJHC 187) it was recanted that punishment should fit the criminal, the crime and be blended with mercy.

The guilty plea was in itself a sign of contrition listed in S6 of SI 146/2023 as an important mitigating factor the youthful offender falls in the special category of offenders as spelt out s 21 of the new sentencing guidelines and directions thereunder. Crime must fit the crime and the offender. See *S v Shariwa* HB37.2003

The penalty provision of the section charged gives an option of a fine. Section 7 of the instrument, says the first port of call in such a scenario is to look at the aspect of a fine. This provision, simply reiterate and cement what had been traversed and pronounced over the years through case law. Social justice does not want to see the future of their



generation perish and degenerate in prisons in the face of the socio-cultural-economic and political challenges our youth found themselves in. See, *Sv Chiyeza* HH782/22, *S v Chikanga*, HH 233.2022

The new sentencing guide calls upon judicial officers to weigh all the mitigation and aggravating factors against the information obtained in the pre-sentencing enquiry and counterbalance them in order to come up with an all- embracing penalty. It is our considered view that the conviction in the first count, in Mususa case, cannot be faulted. The conviction in the second count is quashed. The sentence of twelve months imprisonment with 6 suspended is set aside and substituted with 6months imprisonment to run concurrently with the 5months prison term suspended in case CHN CD144/22.

We will proceed to deal with the sentences in the rest of the cases. In the case of Tinashe Marufu, the conviction is confirmed. The sentence is set aside and substituted with 12 months wholly suspended for 5 years on condition that he does not commit similar offences.

Liston Kapiringishe,'s conviction is confirmed. His sentence is set aside and substituted with 12 months imprisonment wholly suspended for 5 years on condition that he does not commit any similar offences.

Tariro Mumanyi,'s conviction is also confirmed. The sentence is set aside and substituted with 12 months imprisonment, 6 suspended on condition that she does not commit similar offences upon which if convicted will be imprisoned without an option of a fine. The remaining 6 months is wholly suspended on condition of Community service. The record is remitted to the trial court for placement on Community service taking into account time already served.

Fanuel Chinyerere's conviction is affirmed. The sentence is set aside and substituted with 12 months with 6 suspended on condition that he does not commit similar offences upon which if convicted will be imprisoned without an option of a fine. The remaining 6 months is wholly suspended on condition of Community service. The record is remitted to the trial court for placement on Community service taking into account time already served.

The same applies to Thabani Sibanda, whose conviction is confirmed. The sentence is set aside and substituted with 12 months imprisonment of which 6 months is suspended for 5 years on condition within this period the offender does not commit any offence involving unlawful entry into premises and or theft as an element for which upon conviction he is imprisoned without the option of a fine. One month imprisonment, is suspended on condition accused makes restitution to Melody Kaunda in the specified sums. The remaining 6 months is wholly suspended on condition of Community service. The record is remitted to the trial court for placement on Community service taking into account time already served

Both convictions against Ryan Madyiwa and Ashely Hillman Kudzai on the two counts are confirmed. The sentences against each accused person are set aside and substituted with, both counts taken as one. They are sentenced to 18 months imprisonment with 8 suspended for 5 years on condition that each accused person does not commit similar offences. The remaining 10 months is wholly suspended on condition that each accused performs Community service. The record is remitted to the trial court for placement on Community service taking into account time already served.

Godknows Phiri's conviction is confirmed. The sentence is set aside and substituted with 18 months imprisonment, 6 months suspended on good behavior. Two months is suspended on condition of restitution in the sum of US\$280.00, US180 for the first complainant and US\$100 to the second. The remaining 10 months is wholly suspended on condition that the accused performs Community service. The record is remitted to the trial court for placement on Community service taking into account time already served.

In conclusion, what resonates in all the above cases is the arm chair approach taken by the trial courts in the face of very young and youthful first offenders, some who fell under the special category of offenders. It also shows the respective trial courts' disregard of other alternatives to imprisonment in light of the general lengths of the prison terms imposed *viz aviz* the amounts involved, the recovered amounts, restitution and the actual prejudice to the victims of the crimes. This is all because of sheer ignorance, misapprehension, lack of comprehension or outright disregard of well-established sentencing principles and guidelines which have been now compressed in statutory instrument S.I.146/23 as well as a mechanical armchair approach to sentencing.

It is our considered view that the convictions in all the cases are confirmed. The sentences are set aside as outlined herein against each and every accused person. The records are remitted back to the respective stations and court for the community service placement.

BACHI MZAWAZI J  
MUZOFA J, I agree

HCC 58/23

REF CASES: CHN-CD113/23

CHG1048/23

CHG1055/23

Kad162/23

CHNR144/23 KAD1569/23

CHG997/23 REV 179/23

CHG1185/23

BKT-CD688-89/23