THE STATE
Versus
BLESSING MANYENGAVANA

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 15 February 2023.

Criminal Review

CHILIMBE J.

BCAKGROUND

[1] On 16 September 2022 at around 1345 hours, the accused, a 20-year-old single parent, was apprehended by National Railways of Zimbabwe ("NRZ") security officers along Parsley (presumably Paisely?) Road in Harare. He was found in possession of an article described in the state papers as a "chair plate". He admitted to having picked this item up from what he described as a "Railways heap". He was subsequently arraigned before the regional magistrate at Harare. He was convicted and sentenced to an effective 10 years imprisonment, on 19 September 2022 for contravention of section 38 (4) (a) of the Railways Act [Chapter 13:09] ("the Railways Act").

INQUIRIES WITH THE TRIAL MAGISTRATE

[2] When the matter was (belatedly) placed before me for automatic review in terms of section 57 (1) of the Magistrates Court Act [Chapter 7:10]. I initially raised no quarrel with the conviction. I was unsettled by (a) the trial court`s imposition of the maximum penalty where lesser options existed, and (b) its examination of the question of special circumstances. I thus invited the trial magistrate to comment on the following; -

1. Having regard to the marked parts of the section under which the accused was convicted which provide as follows; -

    i. 4) Any person who—
    a)otherwise than for lawful cause (the proof whereof shall lie on him or her), has on his or her person, or in his or her possession, or under his or her immediate control, or upon any land or upon or in any premises, any equipment used for the provision of a railway service, including (but not limited to) any locomotive, rolling-stock, railway track,

sleeper, telephone or telegraph line, or power cable, or any part or component of any of the foregoing that is not being used in connection with any service lawfully provided to him or her by the Railways; or

b) ……..

c)……...

shall be guilty of an offence and, if there are no special circumstances peculiar to the case as provided for in subsection (5d), be liable to imprisonment for a period of *not less than five years or more than ten years.*

ii. (5c) A court sentencing a person to imprisonment under subsection (1), (2), (3) or (4) *shall not order the suspension of any part of the sentence if the effect of such order is that the convicted person will serve a sentence of less than five years*. (In the case of a conviction for an offence in terms of subsection (1) or (4)) or ten years (in the case of a conviction for an offence in terms of subsection (2) or (3)).

2. Was any consideration given to imposing a sentence lesser than that of ten years? Given that the statute leaves room for the trial court to do so? Moreso in view of the (a) youthfulness of the offender and (b) the section under which he was convicted, which does not envisage any theft or dishonesty on his part (c) his explanation that he picked up the chair plate concerned on a scrap heap?

3. In addition to the above, did the trial court consider suspending a portion of the ten-year sentence in view of the latitude extended by the Act as underlined above?

[3] The trial magistrate responded as follows; -

"The Trial Magistrate sentenced accused to a mandatory sentence of 10 years since no special circumstances were established. She considered that the accused took the chair from Railways heap which was not scrap and did not consider the accused`s youthfulness. The trial magistrate mainly focussed on the fact that accused knew that the chair belongs to railways, was not authorised to take but nevertheless took it until he was caught by security manning the railway lines. In future, regard would be made to

> suspension of part of the sentence if the accused is to serve a sentence of not less than five years as provided for by the ACT."

[4] The response is a self-explanatory admission of a number of misdirections. The court did not take proper account of relevant mitigatory factors. Such omission amounted to gross misdirection coming as it did in (i) a strict liability offence, (ii) involving a mandatory minimum penalty and (iii) an unrepresented, unsophisticated accused. This misdirection led to a serious miscarriage of justice which warrants this court`s interference. I refer to Professor FELTOE[1] who opined as follows, citing this court in *S v Mahove & Ors* 2009 (2) ZLR 19 (H*)*; -

> "…the court said that it is the responsibility of the judicial officer to consider all factors and circumstances placed before him in arriving at a just sentence. The sentence must be individualized to the particular offender. Failure to individualise the sentence is a misdirection. It makes a mockery of the reasons for the sentence that the judicial officer purports to have taken into account in assessing the sentence. Time and again the superior courts have strongly warned judicial officers against paying lip service to mitigatory features. It is an act of dishonesty to tell an accused person that the court has considered their personal mitigatory features when in fact no such features have been considered."

MATTERS CARRYING MINIMUM MANDATORY SENTENCES; THE CORRECT APPROACH

[5] The trial court noted, among other factors, that the accused`s "*unlawful conduct hinders economic development of the country and therefore his moral blameworthiness is so high*". The court`s observations, generalised as they may have been, capture the real essence of the offence. Protection of public infrastructure ranks as an absolute societal priority and obligation.

[6] Public infrastructure is at risk from members of the public. In addition, it becomes impossible to effectively police or secure all equipment, facilities or accountrenements making up the vast spectrum of what constitutes public infrastructure. Appropriately deterrent sentences must therefore be imposed by the courts and consistently so; - in order to dissuade those who may be tempted to illegally remove, steal, damage, disrupt or interfere with public infrastructure.

[1] Magistrates` Handbook-(Revised August 2021) at page 374.

[7] However, given that this was a matter involving a mandatory minimum penalty, greater care ought to have been taken in identifying aggravating factors specific to the circumstances of the matter before the court. For instance, no evidence was placed before the court, to facilitate its greater appreciation of the article in question; - its size, nature, state, purpose other such factors including effect on the Railways system, of loss of that article. (I had to resort to "Google" to establish what exactly a railway chair is; - it is a flat metal plate employed to secure the rail to anything forming its bed including the railway sleeper. The item in question was valued, at the time ZWL$30,000 and was obviously recovered.)

[8] This court has always stressed that mandatory minimum sentences are by their very nature, "*rigorous and invariably heavy*" to quote the words used by MATHONSI J (as he then was) in *S v Molo Mweembe & Anor HB 102-18,* where the learned judge observed [at 3]; -

> "This is because the mandatory minimum sentences, by their very nature, constitute an invasion of the usual sentencing discretion of the court, which it exercises having regard to the various relevant factors of the case which should inform the assessment of an appropriate sentence. With mandatory sentences the legislature intervenes and prescribes the sentence to be imposed usually in respect of prevalent crimes which are causing serious economic or social harm. One would want to believe that when prescribing a mandatory sentence, the legislature would have already taken into account the mischief that is intended to be addressed by it and fixed stern deterrent punishment that fits the offence. As stated by the learned author G. Feltoe, *Criminal Defender's Handbook* (2009) at page 164: "*By prescribing mandatory minimum sentences, the legislature is interfering with the normal sentencing discretion of judicial officers to decide upon an appropriate level of sentence based upon the particular circumstances of the offence and the offender and the various mitigating and aggravating factors in the case. With mandatory sentences, the sentence is no longer individualized. At least the mandatory minimum sentence must be imposed. Research has shown that where a minimum term of imprisonment is made mandatory, sentences imposed are considerably longer than would normally be imposed for the crime in question*."[2]

[9] It therefore means that a court sentencing an accused to a mandatory penalty must establish the accused`s guilt, correctly inquire into special circumstances and properly

[2] *[See also S v Happy Simba Manase HH 110-15; S v Phillip Guvhu HMA 55-18; Section 9 of Feltoe`s Criminal Defender`s Handbook*]

consider all the mitigatory factors. In the present matter, one notes that section 38 (4) of the Railways Act creates a strict liability offence. We will examine (a) the propriety of the conviction (b) the canvassing of special circumstances and (c) the court`s admitted misdirection in treatment of mitigatory factors.

THE CONVICTION

[10] The chair plate recovered from the accused is central to the matter. It belonged to the NRZ. We detect little risk in that conclusion. This notwithstanding that no details were placed (nor recorded) before the court. What exactly is a chair plate? What was its use? How important was it to the NRZ? Any special characteristics? What about its state or condition? Where exactly was it procured by the accused? The chair plate was admitted as an exhibit with the accused`s apparent consent

[11] It was produced not through a witness but the prosecutor. The court recorded that accused`s consent to the admission was in terms of section 278 (ii) of the Criminal Procedure and Evidence Act [Chapter 9:07] ("CPEA"). There is no such section in the CPEA. Section 278 of that act deals with the production of documentary evidence by experts or specialists to explain or account for a spectrum of situations or occurrences. Section 278 (2) of the CPEA provides for the production of medical affidavits.

[12] This means that the chair plate was improperly admitted as evidence. As stated, we are inclined to discount that misdirection as the key issue is that the chair plate did belong to the NRZ. What raises great concern however, and as a recurring defect too, is the apparent lack of integrity in the record of proceedings. What exactly were the rights which the court explained to the accused as borne by the court`s record? Was this statement not mere lip service? And to what effect when non-existent rights are said to have been read to an unrepresented accused?

[13] Further, in her response to my query, the trial magistrate (writing in second person singular) makes an admission contrary to what the record reflects; -

> [Response to query] "She considered that the accused took the chair from Railways heap which was not scrap and did not consider the accused`s youthfulness." [Underlined for emphasis].

> [Reasons for sentence] "In assessing sentence the court has taken the following mitigatory factors…...That you are a youthful offender aged 20 years and, in most cases, first and youthful offenders are treated with leniency".

[14] To what extent then, can this reviewing court enjoy the confidence that the accused`s plea was properly and legitimately recorded by the trial court? It may be felt that these issues ought to have been further ventilated with the trial magistrate but the point is that a record ought to speak for itself in the first instance. FELTOE[3] opines as follows, citing this court in *S v Mahove & Ors* 2009 (2) ZLR 19 (H*)*; -

> "…the court said that it is the responsibility of the judicial officer to consider all factors and circumstances placed before him in arriving at a just sentence. The sentence must be individualized to the particular offender. Failure to individualise the sentence is a misdirection. It makes a mockery of the reasons for the sentence that the judicial officer purports to have taken into account in assessing the sentence. Time and again the superior courts have strongly warned judicial officers against paying lip service to mitigatory features. It is an act of dishonesty to tell an accused person that the court has considered their personal mitigatory features when in fact no such features have been considered."

[15] Which brings us to the issue of the "Railways heap" versus the "scrap heap". The accused communicated to the court that he had obtained the chair plate from a "*Railways heap*". The exact nature of this place or source of acquisition of the offending gadget was not described. I formed the impression that this could have been a scrap heap of some sorts. The trial magistrate in her response to my inquiry insisted that it was a "*Railways heap which was not a scrap heap"*. Firstly, it is unclear how the learned trial magistrate came to express such firmness of conviction given that (a) the place was neither described in the papers nor discussed in the proceedings, and (b) the term "*Railway heap*" is not as commonplace as say "*railway station*" or "*railway line*."

[16] The concept of a scrap heap carries, as a necessary implication, questions around nature and status of the property concerned. On a scrap heap one finds property that is may be stored for salvage or re-use, or simply discarded, abandoned or valueless. JTR Gibson gives the following useful classification of property at page 165 of his Wille`s Principles of South African Law (7th edition Juta); -

[3] Magistrates` Handbook-(Revised August 2021) at page 374.

"*Owned and Unowned Things.*

"This classification relates only to things which are susceptible of ownership. The law divides things into those which are actually owned by some person, and into those which are not owned by anybody at all; the latter things are termed *res nullius*, the chief examples of which are wild animals, and things which have been abandoned by their owners." [Emphasis added]

[17] The court should have realised the possibility of a defence issuing from the accused`s submission that he picked the chair plate from a "*Railways heap*". Moreso in view of the fact that no other evidence (or allegation) had been placed before the court with regard to the source of the chair plate. As stated, the court was faced with a strict liability offence. Ownership of the property in question was key. If the NRZ had abandoned the property and condemned it to a scrap heap, then it would render the property "ownerless". The accused is recorded as having admitted that he knew that the property belonged to the NRZ and that his possession of it was unlawful. Firstly, the admission related to a legal concept of unlawfulness which was not further explained. Secondly, the unreliability of the court record becomes a concern. Section 272 of the CPEA provides that; -

272 Procedure where there is doubt in relation to plea of guilty

If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed—

(a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or

(*b*) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or

(c) is not satisfied that the accused has no valid defence to the charge;

the court shall record a plea of not guilty and require the prosecution to proceed with the trial:

Provided that any element or act or omission correctly admitted by the accused up to the stage at which the court records a plea of not guilty and which has been recorded in terms of subsection (3) of section *two hundred and seventy-one* shall be sufficient proof in any court of that element or act or omission.

SPECIAL CIRCUMSTANCES

[18] For completeness, I will now comment on the issue of special circumstances. The legislature recognises, in the Railways Act as it does in all other statutes where minimum mandatory penalties are prescribed, the need to temper the severity of such. The Railways Act provides in section 38 (5) (5d) that; -

> 5d) If a person referred to in subsection (1), (2), (3) or (4) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded by the court, why the penalty provided under subsection (1), (2), (3) or (4) should not be imposed, the convicted person shall be liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding five years or both.

[19] This court has, on countless occasions stressed the need for special circumstances to be treated with the greatest care by the trial court. MUREMBA J issued detailed guidelines on how to properly canvass special circumstances in matters involving unrepresented accused in the instructive *S v Happy Simba Manase* HH 110-15. Similarly, HUNGWE J (as he then was) not only reiterated the same position in *Manase* but in fact, went further. In *Arnold Bvuto v The State HH 94-18* (reported as 2018 (1) ZLR 119) the learned judge stated thus at page 5 of the cyclostyled judgment; -

> "In my respectful view, it is high time that our legal system give [s] effect to the constitutional right to a fair trial by enacting appropriate legislation that would entitle every suspect standing trial who faces a minimum mandatory sentence to legal representation at the expense of the State. Besides being a positive fulfilment of the right to a fair hearing, such a step would ensure that the wheels of justice turn more swiftly and efficaciously. The Law Development Commission should consider the suggestion seriously."

[20] The soundness of this proposal is beyond argument. The superior courts regularly emphasise the importance of properly examining special circumstances where an inquiry into such must be conducted. But it appears that judicial officers and legal practitioners alike fall short of standard, from time to time, when it comes to the issue of special circumstances. The question then becomes; -if trained jurists find difficulty in fully fathoming the principle of special circumstances, what more the undefended accused person?

[21] And is the standard explanation of what constitutes special circumstances; -the regular one made by trial magistrates, sufficient for purposes of fully communicating to an accused?

In this case, one may picture the accused, a 20-year-old simpleton who is dragged for the first time in his life, to appear before the daunting halls of the law. He is confronted with the following warning; -

> "You are facing a serious offence that comes or provides a minimum mandatory sentence of 10 years if you are convicted. You can only escape the minimum mandatory sentence if there are special circumstances peculiar to the case. Special circumstances peculiar to the case are extraordinary factors peculiar to the offence or arising out of the commission of the offence. They are factors that are more than the natural consequences which flow from the imposition of the punishment imposed. In simpler terms, they are factors connected to the circumstances which diminish the degree of one`s guilt.
>
> Q. Do you understand?
>
> A. Yes."

[22] Perhaps the court interpreter (assuming the accused requested assistance in that regard) decoded the complicated encryption embedded in the court`s explanation. Granted the court correctly articulated what constitutes special circumstances and followed the script seemingly approved for that purpose. But the accused must have been one of extraordinary intellect to instantaneously grasp the trial magistrate`s explanation given his immediate response of "yes" noted on record. He sought no further clarity neither did he raise questions arising from the explanation. After conviction, the court further engaged the accused; -

> "I explained to you at the commencement of these proceedings that you are facing a very serious offence that provides for a minimum mandatory sentence of 10 years unless if (sic) you establish that there are special circumstances peculiar to the case. As indicated earlier on special circumstances are factors that are out of the ordinary either in extent or nature arising out of the commission of the offence. Poverty or hardships in life or co-operation with the police for example cannot be taken as special circumstances. These are factors that are out of the ordinary that are more than mitigatory factors that diminish the degree of your guilt. Do you understand?
>
> A-Yes.
>
> BY COURT
>
> Now I want you to address court if you have such special circumstances or special reasons.

A. It was out of poverty that I committed the offence. That is all.

RULING ON SPECIAL CIRCUMSTANCES

The issue of poverty adduced by the accused do not (sic) constitute a special circumstance."

[23] And so the accused proceeded to "mitigate" briefly before he received his 10-year mandatory sentence for being found in possession of an item of railway equipment. The question then is why, if the accused had fully appreciated what special circumstances were, did he then go off on a tangent? The answer could lie in that he had none to offer and merely mumbled the next best thing out of desperation. Or it could mean that the accused simply had no clue what special circumstances were. It would not be far-fetched for one to doubt that the accused fully comprehended the issue of special circumstances during that fleeting exchange. Given the gravity of the issue before the court, the terse exchange confirms, beyond measure, the soundness of HUNGWE J`s advice in *Arnold Bvuto*.

[24] I will also revert, once more, to the remarks of MATHONSI J in *Molo Mweembe* regarding how mandatory minimum provisions in statutes stricture judicial latitude in sentencing. It may not matter as much that courts regard imprisonment as a last resort option nor that youthful first offenders must be spared the harshness of gaol. The contrition shown by that prisoner who pleads guilty before the court will not because of that fact alone, earn him a reprieve in the form of a fine. The omnipotent priority of the mandatory penalty renders established pre-sentence considerations subservient. This strictness having been seen as a necessity by the legislature in a bid to defend public infrastructure from miscreants.

[25] Fortunately, the same penalty provisions, however return a modicum of that latitude in the form of special circumstances. For that reason, it is our view that courts should take the greatest advantage of such, and in any event, discharge statutory obligation, by ensuring that special circumstances are explored to the extent required by the law. In doing so, the overriding requirements that courts must conduct proceedings in accordance with real and substantial justice must encourage various innovative approaches.

[26] Sadly, the tenuous nature of Legal Aid is well recognised although it remains an option that could deliver solutions to the challenges of indigent accused persons facing serious offences[4]. A possible solution (in the future) might come (as one example among many) from

[4] *See also the discussion in Sawaka v S HH 262-20,*

noting how the combined effect of superior court guidance, legislative change, training and administrative initiative delivered the procedure in use today in the verification of an unrepresented person`s plea to a charge. Section 271 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] dealing with the explanation of an offence to an unrepresented accused is decoded in practice by reducing offences to the simplicity of their essential elements.

[27] These elements are then put as questions to be answered in a conjunctive sequence by an unrepresented accused, in order to confirm that the guilty plea tendered is fully informed. That approach may not work perfectly all the time, but has it not served criminal justice in Zimbabwe quite decently? Could a similar approach not be adopted with respect to special circumstances? With necessary adjustments? Would a fit-for-purpose pre-sentencing inquiry not be useful? An inquiry similar to that conducted when imposition of community service is envisaged? These are but a few suggestions in a sea of many more which join the proposal by HUNGWE J in *Arnold Bvuto.*

[28] It is necessary to state though, that the concept of special circumstances remains fluid, unlike essential elements constituting an offence or its defences. Associated with this is the fact that whilst the trial court dealing with an unrepresented accused has a duty to assist as far as possible, that accused in conducting his or her defence, the trial court cannot litigate on behalf of the accused[5]. The accused remains seized with the responsibility of key aspects of his defence and special circumstances are one such aspect. It is the accused and the accused alone who must communicate the existence of special circumstances to the court. The severe limitations placed on the trial court insofar as special circumstances are concerned are what prompted HUNGWE J to caution and proffer the advice he shared in *Arnold Bvuto*.

[29] These challenges do not however, lessen in any manner, the trial court`s responsibility to ensure that the proceedings before it meet the standard of “real and substantial justice”. It becomes the responsibility of the trial court in charge of such proceedings to guarantee adherence to correct standards of justice as noted in [20] above. That responsibility places many demands, especially the need for alertness, on the part of the trial court. It must remain alive to the considerations which impact an inquiry into special circumstances. These

[5] *See DIDCATT J, in S v Khanyile and Anor 1988 (3) SA 795 (N) at 798*

considerations are open ended and vary from matter to matter. The trial court must feel at large, as noted by MUREMBA J in *Happy Simba Manase*, in its investigation.

[30] Obviously, foremost in a trial court`s considerations must be the capacity, status, educational background and intellect of an accused. These should inform the trial court as to such accused`s ability to grasp its explanations into special circumstances. An inquiry into special circumstances also entails engaging an accused. How a trial court will exploit such to best advantage, lies entirely in that trial court`s capabilities to engage the defendant before it. In summary the following matters are noted; -

i. Mandatory minimum sentences generally entail the imposition of harsh penalties.

ii. These penalties have been considered a necessity by the legislature as part of efforts to address pressing societal problems.

iii. A sentencing court`s discretion is severely curtailed by mandatory minimum penalty provisions in statutes.

iv. The harshness of mandatory minimum penalties can however, be tempered by special circumstances.

v. A proper investigation into special circumstances is not only a judicial necessity; it is also a statutory obligation placed on the sentencing court.

vi. Special circumstances generally present difficulties in the trial court.

vii. The sentencing court must be alive to challenges faced by unrepresented accused persons during the canvassing of special circumstances.

viii. The trial court`s responsibility to ensure that proceedings before it are conducted in accordance with real and substantial justice is not diminished by difficulties or complexities of subject matter arising during the course of proceedings.

ix. Trial magistrates must exercise discretion and astuteness, within the latitude of their administrative and judicial authority, to deal with difficult principles which may compromise propriety of such proceedings.

x. The area of special circumstances appears ripe for law reform.

[31] In stating this, we are doing nothing more that retrace the guidance issued by this court per MUREMBA J in, among other authorities, *Happy Simba Manase*; that a trial court should be at large in inviting, receiving and examining evidence in the process of canvassing special circumstances. Again, by so stating this, it is not at all being suggested that if the accused *in casu* sourced the chair plate from a scrap heap, then special circumstances would automatically arise. The point is simply that special circumstances were not fully ventilated in accordance with the law and that misdirection materially vitiates the proceedings before the court a quo. The court a quo`s misdirection cumulatively taints the proceedings and incurably so. The misdirection warrants this court`s intervention.

DISPOSITION

It is ordered that

1. The proceedings in case number CRB R 1735/22 be and are hereby quashed.
2. The accused`s conviction and sentence are set aside and the accused be immediately released from the operation of the court` a quo`s sentence of imprisonment.

CHILIMBE J_____

CHIRAWU-MUGOMBA J _____I agree