

1. THE STATE
versus
ANESU PATRICK PENSULA [CRB MV 729/22]

2. THE STATE
versus
ANESU PATRICK PENSULA [CRB MV 147/23]

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 2 June 2023

Criminal Review

MAWADZE J: This review judgement has been necessitated by the apparent conflation of the provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and the Children's Act [*Chapter 5:06*] exhibited by the learned trial magistrate in sentencing a juvenile offender.

Both matters which relate to the same juvenile (CRB MV 729/22 and CRB MV 147/23) were dealt with by the same trial magistrate sitting at Mvuma, *albeit* on different dates.

On CRB MV 729/22 the juvenile was sentenced on 29 December 2022 on and CRB 147/23 he was sentenced on 9 March 2023. I however received both records of proceedings for purposes of automatic criminal review on the same date. All the offences on CRB MV 729/22 and CRB MV 147/23 relate to the offences of unlawful entry into premises in aggravating circumstances as defined in section 131 (1) as read with section 131 (2) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*].

All the matters proceeded on a plea of guilty in terms of section 271 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] and the said juvenile was properly convicted.

It is how the sentences were formulated or couched on both CRB MV 729/22 and CRB MV 147/23 which calls for corrective measures.

The Agreed Facts

The juvenile was born on 18 March 2008 and when he committed all the offences between November 2022 and 4 March 2023, he was 14 years old.

CRB MV 729/22 consists of 3 counts which were all committed in Chirumanzu *albeit* in different villages under Headman Govere, Chief Chirumanzu.

In count 1 on 5 December 2022 the accused proceeded to the complainant's residence during the day in the absence of the complainant and broke a locked door with an unknown object to effect entry. He proceeded to steal 20kgs of mealie meal, a crate of eggs, two satchel bags, a kango pot, a solar light, a silver pot all valued at Z \$ 30 225. Upon his arrest property valued was Z \$ 23 725 was recovered.

In count 2 on 6 December 2022 the accused proceeded to the complainant's homestead and effected entry into the house through a window which had no window pane. He proceeded to steal 10kg rice, 3kg macaroni, a carton of matches, 14 bath soaps, 6 tinned beans, 4 tinned fish, 5 packets, of instant porridge 2 litres of cooking oil all valued at Z \$ 149 045.65. Upon his arrest property valued at \$ 4 225.65 was recovered.

In count 3 on 12 November 2022 the accused forced the complainant's door open in the absence of the complainant with an unknown object. He proceeded to steal bicycle and various clothes all valued at Z \$48 750 and all the property was recovered.

On CRB MV 147/23 the offence which is just one count was committed on 4 March 2023. It would appear that the relevant state outline was detached from the record as the one attached seems to relate to CTI on CRB MV 729/22. Be that as it may the charge sheet and the attached Annexure shows that the accused broke the complainant's door to effect entry and stole a pair of jeans, snickers, 2 satchels, a belt, a jacket, a woollen hat, an umbrella, a cap, 2 packets of biscuits, 12 bananas, a bath soap, a piece of 3½ meters cloth all valued at Z \$ 47 500 and property valued at Z \$ 34 000 was recovered.

As already said, nothing turns on the convictions both on CRB MV 729/22 and CRB MV 147/23. As a result, the convictions should be confirmed.

On CRB MV 729/22 the sentence (presumably after taking all the 3 counts as one for sentence) is couched as follows;

" SENTENCE

9 months imprisonment of which 3 months imprisonment is suspended for 3 years on condition accused does not commit any offence involving unlawful entry and theft for which if convicted will be sentenced to imprisonment without the option of a fine. 6 months effective. Accused to be placed at Kadoma Training Institution under the supervision of a Probation Officer in terms of section 20 (i) (b) (1) of the Children's Act [Chapter 5:06] as read with section 351 (3) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07]." (sic)

On CRB MV 147/23 the sentence reads as follows;

" SENTENCE

3 months imprisonment. Accused to be placed at Kadoma Training Institution under the supervision of a Probation Officer in terms of section 20 (i) (b) (1) of the Children's Act [Chapter 5:06] as read with section 351 (3) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07]." (sic)

The Anomaly or Misdirection

On 8 May 2023 I raised the following query with the trial magistrate;

1. *Both matters were dealt with by the same trial magistrate and related to the same 14-year-old juvenile.*
2. *In both matters the juvenile was placed at Kadoma Training Institute.*
3. *My query in relation to both matters is how the sentences are drafted and couched;*
 - (a) *Did the court impose effective custodial sentences of 3 months and 6 months respectively in both matters for a 14-year-old juvenile?*
 - (b) *In imposing the sentences did the court refer the juvenile to the Children's court as per Children's Act [Chapter 5:06] or it proceeded in terms of section 351 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] or the trial court conflated and confused the said provisions in the Children's Act [Chapter 5:06] and the Criminal Procedure and Evidence Act [Chapter 9:07]?*
 - (c) *The juvenile is below 19 years. So why did the court cite section 351 (3) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07]?"*

The response by the trial magistrate skirts the issues I had raised and reflects a probable lack of appreciation of the same. It reads as follows;

"My understanding of section 3 (2) of the Children's Act [Chapter 5:06] is that

*Every magistrates court shall be a children's court for any part of the area of its jurisdiction for which no children's court has been established in terms of subsection (1).
"*

When I dealt with this juvenile, I was under the impression that there is no children's court in this part of area so I sat as the children's court in terms of the above provisions in the children's Act. However, I stand guided.

A second reading of section 351 (3) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07] revealed that persons who are nineteen years of age or more but are under twenty-one years may be dealt with in terms of the Criminal Procedure and Evidence Act. I conceded I wrongly interpreted this section and apologise for such an oversight. I should not have cited this section at all."

There are indeed special provisions in our criminal jurisprudence which explicitly explain how the courts should treat children in conflict with the criminal law. They are a special category of offenders.

In the case of *State v Mavasa 2016 (1) ZLR 28 (H)* Makarau JP (as she then was) pointed out that the thrust of the criminal justice system in relation to juveniles is reformation rather than retribution. As a result, the courts should always be slow to impose custodial sentences.

In the matter of *State v Ncube & Ors 2011(1) ZLR 608 (H)* I did, in my small way, dealt with the question of how the courts should treat juvenile offenders in conflict with the criminal law and cited the various options available. The whole purpose is to safeguard the rights of such children as is provided for in various local legislative provisions and international instruments [which are cited in that case].

In the book *Criminal Procedure in Zimbabwe* by John Reid Rowland, 1997 Edition, Chapter 13 at 13:7, the author also outlines the options available to a criminal court after convicting a juvenile of various criminal offences and also how the Children's Court is involved after referral of a convicted juvenile to the Children's Court [however note that corporal punishment has now been outlawed].

It is clear to my mind that the trial magistrate may not have fully appreciated the issues which I raised in paragraph (3) of my minute referred to *supra*.

Firstly it would be judicial barbarism in my respectful view to sentence a 14 year old juvenile to effective custodial sentences as was done both on CRB MV 729/22 and CRB MV

147/23. That would be a serious indictment on our society if we are to treat children of that age who are in conflict with the criminal law. It is an affront to our morality and civilisation. Needless to say that it flies in the face of International Instruments like 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).

Secondly, I do understand how the trial magistrate believes that the juvenile offender can be given on effective custodial sentences and as the same time be placed in a Training Institution. That is clearly incompetent and impractical. Once a young person is placed in a Training Institution the court can not competently impose an effective custodial sentence in addition to such an order. The simple logic is that such a convicted juvenile or young person can not serve a custodial sentence while at the same time being in a Training Institute. It was therefore improper for the trial magistrate to impose such an improper and impractical sentence.

Thirdly, the trial magistrate conflated the provisions in the Criminal Procedure and Evidence Act [Chapter 9:07] and those in the Children's Act [Chapter 5:06]. There is a clear misunderstanding of section 351 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] and section 351 (2) (a) of the same Act.

In terms of section 351 (2) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07] after convicting a young person below 19years the court may, instead of imposing a punishment of a fine or imprisonment for that offence grant an order that such a convicted young person be referred to or taken to the Children's court to be dealt with in terms of the Children's Act Chapter 5:06. Clearly once the court grants such an order it becomes *functiuos officio* for the purposes of those criminal proceedings before it. It is therefore improper for the same Magistrate to instantly switch chairs as it were in the same proceedings and like instant coffee sit as a Children's court. The proceedings in the Children's Court, albeit relating to the same young person are completely different from the criminal proceedings which resulted in that same young person being referred to the Children's Court.

It is important to note that the Children's Act Chapter 5:06 which governs the proceedings in the Children's Court have very elaborate and specific procedures and provisions on how such a referred young person should be dealt with. This is clearly different from the rules and procedure in criminal proceedings envisaged in the Criminal Procedure and evidence

act [Chapter 9:07]. Further the Children's Act [Chapter 5:06] provides for such orders which such a Children's Court may impose.

If the Magistrate's Court decides to proceed in terms of section 351 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] all it does after the conviction of the young person in a criminal court is to ascertain the availability of a vacancy or accommodation at a specific Training Institute from the relevant authorities. Thereafter, if the answer is in the positive place such a young person in that Training Institution.

The last misdirection in these proceedings is that the trial court erred by purporting to be granting orders in terms of section 351 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. That provision relates to young persons who are 19 years old and below 21 years old. In *casu* the juvenile was 14 years old.

DISPOSITION

I am inclined to take corrective measures in respect of both matters CRB (MV 729/22 and MV 147/23. Given the juvenile's age and the recommendations of the probations officer, I should set aside the custodial sentences, effective or otherwise. I shall treat both matters CRB MV 729/22 and CRB MV 147/23 as one and grant an order in terms of Section 351 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] placing him at Kadoma Training Institute. It would now not be necessary to grant a different order referring him to the Children's Court as by now he should be at Kadoma Training Institute. Further this would not be a proper case to withhold my certificate but to take corrective measures which are both in the interests of this child and of justice.

Accordingly, it is ordered as follows;

- i) The convictions in both CRB MV 729/22 and CRB MV 147/23 be and are hereby confirmed.
- ii) The sentences imposed by the court on both CRB MV 729/22 and CRB MV 147/23 be and are hereby set aside in their entirety and substituted with the following,

"Both cases CRB MV 729/22 and MV 147/23 are treated as one for purposes of sentence and the juvenile offender is ordered to be placed at Kadoma Training Institute in terms Section 351 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07]"

MAWADZE J

ZISENGWE J agrees.....