

THE STATE

Versus

CD (Juvenile)

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 26 August 2024

Criminal review

DUBE-BANDA J:

[1] This matter was placed before me on automatic review in terms of s 57 of the Magistrate's Court Act [Chapter 7:10]. The offender, a 15-year-old juvenile was arraigned before the Magistrates Court sitting at Kezi facing four counts. In count 1 he was charged with the crime of theft as defined in s 113(1) of the Criminal Law (Codification and Reform) Act [Chapter 09:23] ("Criminal Law Code") it being alleged that on 5 February 2024, at around 0100 hours extending to 0600 hours at Minda High School Cottages, he unlawfully and intentionally took one red and black bicycle. In count 2 he was charged with the crime of unlawful entry into premises in aggravating circumstances as defined in s 131(1) as read with s 131(2)(a)(e) of the Criminal law Code, it being alleged that on 29 April 2024 at Maphisa he unlawfully and intentionally entered the complainant's house and took one pair of white takkies, one white jacket, one black trousers and one black Itel cellphone.

[2] In count 3 he was charged with the crime of robbery as defined in s 126(1)(a) of the Criminal Law Code, it being alleged that on 7 May 2024 at around 1330 hours at Maphisa, armed with a knife, unlawfully and intentionally used violence or threat of immediate violence upon the complainant in order to steal cash amounting to US\$10.00. Counts 4 and 5 were withdrawn before plea. In count 6 he was charged with the crime of unlawful entry into premises in aggravating circumstances as defined in s 131(1) as read with s 131(2) of the Criminal Law Code, it being alleged that on 3 April 2024, at around 0800 hours at Mahetshe Village, Maphisa he unlawfully and intentionally entered the complaint's homestead and used stones to damage a hut and gained entry and slept.

[3] The offender pleaded guilty to all four counts and was duly convicted. He was sentenced as follows:

“The passing of sentence on the said convicted male juvenile under CRB KZ134/24 is postponed for 5 years on condition the male juvenile does not commit any offence involving dishonesty, unlawful entry and violence on the person of another within the said period for which he is sentenced to a term of imprisonment without the option of a fine.

The 15-year-old Chriswell Dube is be (*sic*) and hereby placed at Blue Hills Probation Remand Home Gweru.”

[4] Nothing turns on conviction. It is the sentence that requires closer scrutiny. The learned magistrate took all four counts as one for the purposes of sentence, and meted out two stand-alone sentences. Firstly, the passing of sentence was postponed for five years on the usual conditions. This, in terms of s 358(4) of the Criminal Procedure and Evidence Act [Chapter 9:07] means if the offender has during the period of postponement observed all the conditions specified in the order, the sentence shall not be passed. This is a stand-alone punishment. Secondly, he was placed at a training institute in terms of s 351(3)(b) of the Criminal Procedure and Evidence Act as read with s 20 and s 25(1) of the Children’s Act [Chapter 5:06]. This also is a punishment. The result is that the offender was sentenced to two stand-alone sentences which amounts to double punishment.

[5] In sentencing the learned magistrate made an error, and subjected the offender to double punishment. The matter is reviewable because the error is fundamental in the sense that the lower court subjected the offender to double punishment the result of which was to deny him the right to a fair trial. Even at sentencing stage the offender is still entitled to a fair trial, because the right to a fair trial means the entire process of bringing an accused to trial and the trial itself needs to be tested against the standard of a fair trial. See *S v Mloyi* 2020(1) ZLR 1239 (H). The sentence violates the rule against double punishment for the same offence.

[6] I do not think that any purpose would be served by remitting the matter to the lower court for sentence. All the facts relevant to sentence are on record. The magistrate followed the probation officer's recommendations and placed the offender at a training institution. This part of the sentence cannot be disturbed. He has at a young age started to develop a propensity to commit crimes of dishonesty and violence. The sentence is rehabilitative and this is what this offender needs at this moment. It must be borne in mind that rehabilitation is a purpose of

punishment only if there is the potential to achieve it. See *S v Tsotetsi* 2019 (2) SACR 594 (WCC) at paragraph [29]. He is a good candidate for rehabilitation, this is so because the probation officer's report shows that he made a full disclosure of the motive that underscored the commission of these offences, coupled with the acceptance of full responsibility for the offences he committed. He also wants to change his behaviour and return to school. These are positive indicators that he is a good candidate for rehabilitation. Such an offender will inevitably be treated with more empathy, as it indicates that there is the potential for him to reform and improve himself. He is remorseful and remorse is also a motivator to change and the courts link the presence of remorse with the prospect of the rehabilitation of the offender. Again, his age makes rehabilitation possible.

[7] It is the second part of the sentence of the lower court i.e., the postponing of passing sentence for 5 years on certain conditions that has no rational basis in this case. It does not pass the rationality test. See *The State v Ndlovu* HB 98/24. It is not in accordance with real and substantial justice and cannot be allowed to stand. The interests of justice demand that I review and alter the sentence. For the reasons provided I would therefore make the following order:

- i. The conviction be and is hereby confirmed.
- ii. The sentence is reviewed and set aside and substituted with the following:
“The offender is in terms of s 20 as read with s 25(1) of the Children's Act [Chapter 5:06] be and is hereby placed at Blue Hills Probation Remand Home Gweru.”

The offender must be re-called and be informed of the alteration of the sentence.

Dube-Banda J

Kabasa J agrees