THE STATE
versus
MARGARET CHITUNGO

HIGH COURT OF ZIMBABWE
BHACHI MZAWAZI J
HARARE, 24 December, 2021

Criminal Review

BACHI MZAWAZI J: The accused person is a 50 year old grandmother who has been charged and convicted of three counts of unlawful entry, in contravening of s 131 (1) and (2) (e) of the Criminal Law (Codification Reform) Act [*Chapter 9:23*]. She pleaded guilty to all counts and was sentenced to nine months imprisonment on each count. Of the total of 27 months imprisonment, 7 months' imprisonment was suspended on condition of good behaviour. She is currently serving 20 months.

It is alleged that on three separate occasions, the accused person unlawfully entered the office of her son in law at his workplace and stole general electronic office gadgets. The identity of the offender was revealed through a CCTV camera within the office building. She pleaded guilty and in her mitigation she stated that she was not receiving enough maintenance money for the upkeep of her grandchildren, the son in law's offspring, so she wanted to fix him. Apparently from the record, the trial court was more offended by the motive "to fix him" uttered by the accused when she sentenced the accused person to an effective prison term.

Whilst this court appreciates the sentencing discretion of the trial court, I am not convinced that an effective jail term of twenty months was appropriate given the age and the cumulative circumstances of the convicted person in question.

This is a review matter in terms of s 57(3) of the Magistrate Court Act [*Chapter 7:06*]

In essence, the mischief under pinning the legislative provisions in both the High Court Act [*Chapter 7:06*] and the Magistrates Court Act [*Chapter 7:10*] in the relevant provisions was to safeguard the interests, of not only justice but those of an unrepresented accused persons. I am fortified in this regard by the cases of *S* v *Moyo* HH 697-2020 and *S* v *Sakawa* HH 262 of 2020

which all lean in favor of reviewing of sentences of the court *a quo*, whenever it is considered necessary. This has also been catapulted into a constitutional right in s 70 (5) of the constitution of Zimbabwe Amendment (No. 20) Act, 2013 which states,

> "Any person who has been tried and convicted of an offence has the right, subject to reasonable restrictions that maybe placed by law to:
> a) Have the case reviewed by a higher court."

What is more striking in this case is that the trial court did not even address or consider community service nor accord the accused an option of a fine. In the case of *S* v *Silume* HB12-16 the failure to address the aspect of community service was deemed an irregularity.

MANTHONSI J enunciated that:

> "Failure by a magistrates to enquire into the suitability of Community Service where he or she settles for an effective imprisonment of 24 months or less amounts to a misdirection."

Not only does community service assist in decongesting our over populated prison holding facilities, it saves both the State and public institutions where community service is carried out a lot of money. It is beneficial to the rehabilitation and reformation of the offender who pays for his crimes within his family and community environment. In turn the victims of the offence, witness the offender being visibly punished for his offence. Society is also reminded of the consequences of crime through seeing offenders publicly paying for their crime.

In the cases of *Square Zondo* HB 210/17 and *S* v *Mudondo Zava* HMA 15/17, both judges reminded trial courts of the need to capitalize the modern alternative sentencing trend encapsulated in community service when the effective sentence falls within the region or threshold of 24 months or less when it involves first offenders.

In casu the 50 year old was charged with unlawful entry in contravention of s 131 (1) (a) and 2 (e). The court did not even make a finding on aggravating circumstances but proceeded to give an effective custodial sentence without justifying why imprisonment was the only route in the circumstances.

Section 131 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] lists aggravating circumstance as those where the convicted person;

- entered a dwelling house; or
- knew there were people present in the premises, or
- carried a weapon, or

- used violence against any person, or damaged or destroyed any property, in effecting entry, or
- committed or intended to commit some other crime.

No wonder why the trial court did not even delve into the issue of unlawful entry in aggravating circumstances, as the *modus operandi* of the accused does not fit squarely and cumulatively within the listed circumstances regarded as aggravatory.

The admitted facts show that the accused entered the office by opening an unlocked door. In my view there was thus no justification for an effective prison term, as contrasted from those involving forced entry.

Interestingly, little weight was attached to the accused person's mitigation. She is a senior citizen as correctly pointed out by the trial court, who is a sole self-supportive breadwinner of the three grandchildren sired by the complainant's employee, her son in law. Uprooting such an integral figure from the family structure destroys the whole fabric of that family and does not serve the interests of society. More so when there are other options to custodial sentences available in light of the circumstances of this case. As highlighted by TAKUVA J in *S* v *Shariwa* HB 37-03, punishment should fit both the offender and the crime.

The penalty section of the charge s 131 of the Criminal Law (Codification and Reform) Act, provided for options to pay a fine. MANTHONSI J in *S* v *Mlauzi* HB 159/16 emphasized that where a statute provides for a fine or imprisonment, it is a misdirection on the part of the sentencing court to impose imprisonment without giving serious consideration first and foremost to a fine.

The same sentiments were echoed in the cases of *S* v *Ncube*, *S* v *Dzonotizei* HH 126/14 *Tsaura and Anor* v *The State* HMT 2/20, that a fine should be considered whenever possible and first offenders should be kept out of prison as much as possible.

In casu, the age and sex of the offender should have swayed the court to tamper justice with mercy. See *S* v *Manaiwa & Anor* HB- 72-90 where the courts urged trial magistrate to show some affirmative action by being lenient to female first offenders.

The likelihood that a 50 year old who had lived a crime free life for half a century will commit more offences or succumb to recidivism is very rare. See *Harvey* 1967 RLR 203 and *Malunga* 1990(1) ZLR 124.

Accordingly I find the sentence of 20 months effective imprisonment unduly harsh and not in accordance with real and substantial justice. As a result, it is ordered as follows:

1. The conviction on all three counts is confirmed
2. The sentence of 20 months imprisonment is hereby set aside and substituted with the following:
    a) the matter is remitted to the trial magistrate for the assessment and imposition of Community Service
    b) the accused person should be released forthwith from prison to be informed of the changes and to be assessed for community service.
    c) the said court shall have regard to and credit the accused person with the portion of sentence that she had already served in assessing her for Community Service.

BACHI-MZAWAZI ……

MANYANGADZE J, AGREES ……..