THE STATE
versus
UBERT BARE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 11 September 2014

Criminal Review

MAWADZE J: The concern in this matter relates to the failure by the trial magistrate to appreciate the sentencing principles in dealing with juvenile offenders especially those at the tender age of 16 years and below. For some strange reason the learned trial magistrate harbours the shocking belief that the brutal corporal punishment is the most appropriate sentence for a 15 year old boy who probably as a result of some boyish prank threw a stone at the complainant's moving motor vehicle causing damage on the windscreen valued at US$150-00!!

It is unfortunate that the deed is done as it were and I am not able to take any meaningful corrective measures in this case. I, however, repeat the exhortation that magistrates should always understand that there are other options available in dealing with juvenile offenders in a non-retributive but rehabilitative manner. The Social Welfare Department through the Probation Officers should as a matter of practise be involved and utilised. See *S* v *Mavasa* 2010 (1) ZLR 28 (H) at 32.

In the case of *S* v *Ncube & Ors* 2011 (1) ZLR 608 (H) I discussed some very useful guidelines on how magistrates should properly deal with cases involving children in conflict with the criminal law. I stated as follows at 612H – 613A:-

> "Judicial Officers should always understand and bear in mind that children in conflict with the criminal law are a special category of offenders for which there are specific and peculiar legislative provisions designed to deal with such offenders both within our jurisdiction and other international conventions."

The point is made that in non-serious offences the juvenile other than being cautioned and discharged, or having passing of sentence postponed for a specified period, may also be referred to the Children's Court to be dealt with in terms of s 19 of the Children Act [*Cap 5:06*]. The Children's Court is better placed and equipped to deal with juvenile offenders as there are a number of options provided for in s 20 of the Children's Act [*Cap 5:06*]. Corporal punishment just like imprisonment should be resorted to in respect of juvenile offenders as a last resort and in very serious offences.

The accused in this case is a 15 year old juvenile boy and is said to be in Grade 4. He was convicted on his own plea of guilty of contravening section 140 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] which relates to malicious damage to property.

The agreed facts are that on 9 March 2014 at about 1900 hours the complainant who happens to be a police officer was driving his private motor vehicle a Honda CRV Registration Number ADD 7733 along the Mwenezana gravel road in Mwenezi, Masvingo. The accused who was herding cattle with his other two juvenile friends Stanford Mbiza and Kenneth Moyo "ambushed" the complainant's motor and as it drove past the accused threw a stone which damaged the windscreen. The accused was apprehended. The damage caused is valued at US$150-00.

Nothing turns on the conviction and it is confirmed.

The juvenile offender was sentenced to receive corporal punishment of 2 strokes with a rattan cane which was to be administered privately by a designated officer at Mwenezi Satelite Prison. It is this sentence, which in my view, offends all notions of justice.

The pre-sentence inquiring by the trial magistrate is per-functory. The trial court did not equip itself with sufficient information to arrive at a just, proper and appropriate sentence. The pre-sentence inquiry recorded is as follows:-

> "**MITIGATION**
>
> 15 years of age, Grade 4.
>
> Q. Anything that you want to say in mitigation.
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> A. If the court may forgive me."

I am amazed that after such a brief and unhelpful inquiry into mitigation the learned trial magistrate believed that he or she had gathered all useful and relevant information to be able to properly assess the sentence.

The record of proceedings does not show how one Shanangurai Makovere, a biological parent of the juvenile offender was hauled before the same court during these proceedings. All what is recorded is the exchange between the juvenile's parent or the trial magistrate which evidence was not recorded under oath. The following exchange took place.

> "Shanangurai Makovere – Guardian
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> Q. Your relationship
>
> A. My biological child
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> Q. Anything you want to say in mitigation on behalf of the child
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> A. We agreed with the complainant that we were to compensate him."

No further questions were put to the parent whom the court erroneously believed would know and understand what constitutes mitigation on behalf of the juvenile offender. As an example, the parent was not asked to confirm the age of the juvenile as there is no such proof of age filed of record. The parent may also have explained why a 15 year old normal boy would be in Grade 4 when generally boys of that age would have commenced secondary education.

The pleas for restitution made by the biological parent did not prick the conscience of the court and possibly stimulate its inherent sense of compassion and justice. The learned trial magistrate reasoned that restitution by the parents was of no consequence as it was essential to inflict pain on the juvenile through corporal punishment. In a chilling manner the trial magistrate said:-

> "The pain inflicted will punish the offender and the thought thereof would be deterrent." (sic)

It is very unfortunate and a sad day for our criminal justice system if a judicial officer believes that such a sadistic approach would add value to the life of the poor 15 year old rural boy. I cannot do more but to repeat what I said in *S* v *Ncube & Ors* (*supra*) at 615F – 616A.

> "I have noted with great concern the enthusiasm by quite a number of magistrates to sentence juvenile offenders to corporal punishment even for non-serious offences. This may be an easy way out in disposing of a matter. My strong conviction, however, is that in dealing with juveniles in conflict with the criminal law our primary concern is to safeguard the rights of these children rather than to complete the proceedings as quickly as possible. By doing the latter, we may end up imposing a retributive rather than a rehabilitative type of sentence……..
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> Magistrates should in most cases involving juveniles in conflict with the criminal law refer such cases to the Children's Court where other various option of dealing with the juveniles are available. Magistrates should note that it is not possible to correct a misdirection on review where corporal punishment has been imposed, except for academic purposes."

I am unable to confirm these proceedings in respect of sentence as in accordance with real and substantial justice. I therefore, withhold my certificate.