(1) THE STATE CRB No. BKT 603/15
versus
PHILLIMON WASHAYA

(2) THE STATE CRB No. MBR 173/16
versus
OSCAR SAINETI

HIGH COURT OF ZIMBABWE
TAGU & CHAREWA JJ
HARARE, 3 February 2016

Criminal Review

CHAREWA J: Though these are reviews from the decisions of different magistrates from different magisterial provinces, I decided to deal with both reviews together for the reason that they both raise essentially similar issues.

In the first case, accused was convicted of unlawful entry in contravention of s 131(2) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], in that he unlawfully entered complainant's unlocked house and stole a radio valued at $125.00.

The radio was recovered.

The accused is an 18 year old youth, a first offender who pleaded guilty and gained nothing from his crime.

He was sentenced to 16 months' imprisonment of which 6 months were suspended on the usual condition of good behaviour, leaving 10 months effective.

In the second case, accused was convicted of contravening s 131(1)(a) as read with s 131(2) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], in that he unlawfully forced open the door to complainant's house, entered and stole goods, mostly groceries, valued at $374.

The goods were all recovered.

He is a 23 year old first offender who also pleaded guilty and gained nothing from his crime.

He was sentenced to 13 months imprisonment, 3 of which were suspended on the usual condition of good behaviour leaving 10 months effective.

I have slight problem with the framing of the charge sheet in the first case. In my view, the crime of unlawful entry is circumscribed by s 131(1). Section 131(2) therefore only serves to qualify whether the crime was committed in aggravating circumstances. In that respect, the charge sheet ought to have read as follows:

> "The accused is charged with unlawful entry c/s 131(1) (a) as read with s 131(2) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], in that ….."

With that amendment, which is not in any way prejudicial to the accused, I have no problems with the indictments and the conviction of both accused.

I must confess however that I found the sentences totally out of sync with the paradigm shift that has evolved in sentencing trends in Zimbabwe. And like Bere J in *S* v *Tatenda Gonya* HH 46-15, I lament the casual approach that the magistrates took in sentencing these young adults.

While both magistrates, in their reasons for sentence, traversed all or most of the essential elements for sentencing, the sentences ultimately handed down, bucks the logical flow of their reasoning. It seems to me that inadequate attention or mere lip service was paid to the facts that:

a. Accused were youthful first offenders who pleaded guilty,
b. All the property stolen was recovered, and both accused did not benefit from their crimes,
c. Courts must, as much as possible, keep youthful first offenders out of jail in order to try and reform or rehabilitate them, and finally
d. That where a sentence of 24 months or less is imposed, the possibility of suspended sentences coupled with community service must be actively and seriously explored.

It is now trite that, as evidenced by the plethora of judgments handed down on the issue, the sentencing approach in Zimbabwe is that, firstly

> "it addresses the practical ways of decongesting our prisons and secondly, it gives the accused a second chance to undergo some kind of self-rehabilitation without having to subject him/her to the rigors of incarceration and its effect". (Per Bere J in *S* v *Tatenda Gonya* (*supra*).

This approach, in my view, demands that in handing down sentences, judicial officers must seriously consider the following:

1. The age of the accused
2. Whether accused was a first offender
3. Whether accused pleaded guilty

4. Whether he gained anything from his crime
5. Whether it is in the interest of the state to congest prisons and overburden the fiscus
6. Whether incarceration is the best form of sentencing in the particular case
7. Whether community service, fines, corporal punishment and other forms of sentencing do not better achieve a balance among the objectives of discouraging crime, providing a vent for retribution, as well as rehabilitating and reforming the accused.

It is for these reasons that the sentencing regime in our country puts a focus on keeping young and first offenders out of jail. Consequently, the COMMITTEE ON COMMUNITY SERVICE –REVISED GUIDELINES FOR MAGISTRATES, PROSECUTORS AND OTHER COURT OFFICIALS require that for any sentence of 24 months and below, serious consideration must be given to the imposition of community service as an alternative to a straight prison term. See also *S* v *Shoriwa* HB 37/*2003* and G. Feltoe, *A GUIDE TO SENTENCING IN ZIMBABWE,* 2nd Ed @ pp 28-29. Various other studies also buttress this approach, having concluded that imprisonment is not necessarily the best form of sentence, particularly for young and first offenders. Therefore blindly sentencing accused persons to imprisonment without seriously exploring community service as an alternative must be frowned upon.

It seems to me that the sentences were clearly dictated by the need to protect the public from the invasive conduct of "delinquent and incorrigible" young criminal offenders. However, I agree with the general tenor to be drawn from Tsanga J's comments in *S* v *Felix Mtetwa,* HH 112 - 15; that the risks of incarcerating young first offenders should not be easily sacrificed at the altar of expediency. Each sentence must also suit the offence and the offender. See *S* v *Nemukuru* HH 102- 09.

In the first case, while acknowledging that accused should be dissuaded from a life of crime through an effective/deterrent sentence, this should have been tempered with the consideration that the accused is a young man, barely out of his adolescence (where corporal punishment would have been appropriate). Further, the magistrate misdirected himself by totally ignoring the requirement to consider community service for sentences of 24 months and below.

Though he acknowledged the youthfulness of the accused and recognised the need to (in the magistrate's own words), "shepherd (him) so that he desists from a dishonest way of

life", as well as the fact that courts treat first offenders with leniency and tries to spare them incarceration "so that he is not hardened by seasoned criminals", this counted for nought with the magistrate who was bent on passing a deterrent sentence. Nor did it weigh for anything with the magistrate that accused did not benefit from his crime. As a result, he sent an 18 year old first offender more in need of guidance and mentorship to become a good and responsible citizen, to serve in jail with hardened criminals.

While a prison term was called for to act as a deterrent to future propensity to criminal activity, it ought to have been suspended on conditions of good behaviour and community service to achieve the objective stated by the magistrate: to "shepherd (him) so that he desists from (a) dishonest way of life", thus providing a reformative platform.

Now that accused has already served an effective one month in prison, I agree with the reasoning and words of Uchena J in *S* v *Chirinda and 3 Others*, HH 87-09 when he stated that it

> "…is no longer necessary to subject him to (community service) when he has already felt the sting of imprisonment, the period he has served should be equated to the (community service) which should have been imposed, He is therefore entitled to his immediate release from prison".

The sentence imposed by the magistrate will be set aside and substituted by a prison term suspended on condition of good behaviour as follows:

> "10 months imprisonment of which 6 months is suspended for 5 years on condition the accused does not, during that period, commit any offence involving unlawful entry for which he is sentenced to imprisonment without the option of a fine. A further 4 months is suspended on condition that the convicted person does community service".

As the convicted person has already served for one month, the matter is remitted back to the trial magistrate for an assessment of the community service.

In the second case, the magistrate, correctly detailed all the reasons why the sentence ought to take account of all the factors pertaining to keeping youthful first offenders who contritely plead guilty, out of jail. However, he illogically ended by rather dismissively and cursorily discounting community service or a fine, stating, without any basis advanced, that "community service or a fine will not be justified in the circumstances" because "the actions of the accused show pre-planning". The circumstances showing pre-planning are not traversed in the record, nor are the circumstances justifying discounting a fine or community service.

In the result, the sentence that was handed down is irrational and not in consonant with the facts or the main tenor of the magistrates own reasoning.

In the circumstances of this case, I believe that a prison term, wholly suspended on condition of good behaviour and community service ought to have done justice to the case.

The sentence imposed by the magistrate is therefore set aside and substituted as follows:

> "13 months imprisonment of which 6 months is suspended for 5 years on condition the accused does not during that period commit any offence involving unlawful entry into premises or theft and for which upon conviction he is sentenced to imprisonment without the option of affine. The remaining 7 months are wholly suspended on condition that the accused shall perform community service."

Since the accused has served almost a month in prison, the matter is remitted back to the trial magistrate for an assessment of the community service.

TAGU J agrees…….