THE STATE
versus
TAFADZWA NDERE

HIGH COURT OF ZIMBABWE
MUSAKWA & MUREMBA JJ
HARARE, 15 August 2016

**Review Judgment**

MUREMBA J: The accused, a 15 year old boy committed 3 counts of theft as defined in s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In count 1 he stole a bicycle worth $50-00 and it was recovered.

In count 2 he stole a cellphone worth $40-00 and it was recovered.

In count 3 he stole a bicycle worth $50-00 and it was not recovered.

The 3 offences were committed on different dates and at different places in Masvingo. The accused was convicted of all the 3 counts on his own pleas of guilty. I find the convictions proper and hereby confirm them.

The Probation Officer's Report which is part of the record states that the accused whose father is unknown and whose mother passed on when he was still 2 years old has always been under the upkeep and care of his different maternal relatives. The accused went to school up to grade 5 and dropped out of school due to lack of school fees. The accused is described as a very naughty boy who is always in and out of trouble. Although no previous criminal record was produced the Probation Officer stated that the accused had a previous criminal record. The Probation Officer recommended that the accused be sentenced to a custodial sentence and sent to Hwahwa prison for young offenders.

In sentencing the accused on 25 April 2016, the trial magistrate said,

> "I feel you need to be removed from society and I agree that you need to be sent to Hwahwa Juvenile Prison till you attain adulthood."

The trial magistrate then went on to sentence the accused as follows:

"All counts as one. To be sent to Hwahwa Juvenile Prison till attainment of adulthood.'

I enquired from the trial magistrate in terms of what law he imposed the sentence that he imposed.

In response the trial magistrate said "I … looked at s 351 of [*Chapter 9:07*] and thought that under the circumstances it would be appropriate."

This answer coming from a whole Provincial Magistrate is not helpful at all. Section 351 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is a provision which deals with the placement of convicted juveniles in either a training institute or a reform school. This provision is irrelevant in the present matter because the trial magistrate did not place the accused in a training institute or in a reform school. Hwahwa Juvenile Prison is neither a training institute nor a reform school. It is a prison, so the accused was sentenced to imprisonment. The trial magistrate ought to have indicated in terms of what law he sentenced the accused who is a juvenile to imprisonment till he attains adulthood.

When an accused is sentenced to imprisonment the period of imprisonment should be specified by the court. The only exception is when an accused is sentenced to imprisonment for life. In such cases the person so sentenced is imprisoned for the rest of his life. See s 344 A of the Criminal Procedure and Evidence Act. The Criminal Procedure and Evidence Act does not provide for imprisonment of juveniles till attainment of adulthood as was done by the trial magistrate in the present matter. There is no such provision in the said Act. The sentence that was imposed by the trial magistrate is therefore incompetent.

The accused is aged 15 years old. He will attain adulthood when he turns 18 years old. This therefore means that he will be in prison for 3 years serving for 3 counts of theft wherein he stole property valued at $90-00 with property worth $50 not having been recovered. The offences that the accused committed are not very serious. What only aggravates them is that they are three. Over and above that when he committed them he

already had a criminal record. Besides that the accused is said to be a naughty boy. Obviously he is a child who needs rehabilitation. He is a child who has never been under the care and control of his parents. He has always been under the care of different relatives. He is still of a very tender age and therefore needs rehabilitation more than imprisonment. It is my considered view that instead of sentencing the accused to imprisonment the trial magistrate should have either referred him to the Children's Court in terms of s 351 (2) (a) for him to be dealt with in terms of the Children's Act or he should have placed him in a training institute in terms of s 351 (2) (b) of the Criminal Procedure and Evidence Act. The relevant provision reads as follows.

> "2) Any court before which a person under the age of nineteen years has been convicted of any offence may, instead of imposing a punishment of a fine or imprisonment for that offence, subject to subsection (1) of section *three hundred and thirty-seven*—
> (*a*) order that he shall be taken before a children's court and dealt with in terms of the Children's Act [*Chapter 5:06*]; or
> (*b*) after ascertaining from the Minister responsible for social welfare that accommodation is available, order that he shall be placed in a training institute in Zimbabwe or in a reform school in the Republic of South Africa for the period specified in subsection (1) of section *three hundred and fifty-two*."

The Probation Officer's Report shows that the Probation Officer never considered the option of having the child rehabilitated without having him imprisoned. It also appears that the trial magistrate was swayed by the Probation Officer's recommendation that a custodial sentence might help the accused to reform. The trial magistrate ought to have remained alive to the fact that the accused is still very young and needs a second chance to get rehabilitated. Imprisonment should be the last resort for very young offenders. Section 81 (1) (i) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 provides that,

> "Every child has the right not to be detained except as a measure of last resort and if detained he should be detained for the shortest appropriate period."

In *casu* imprisonment was considered as the first resort, no other options were considered. This approach is in violation of s 81 (1) (i) of the Constitution. Besides, 3 years in prison is too long a period for a 15 year old who stole items worth only $90.00.

By any stretch of imagination such a period cannot be defined as the shortest appropriate period in the circumstances of this case.

In view of the foregoing I therefore set aside the sentence that was imposed by the trial magistrate and order that the accused be taken before the Children's Court at Masvingo Magistrates Court and be dealt with in terms of the Children's Act.

MUSAKWA J agrees: ……