

THE STATE  
**versus**  
TATENDA MUSHAYI

HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 4 APRIL 2019

### **Criminal Review**

**TAKUVA J:** The trial court erroneously caused the prosecution of a 12 year old juvenile without the Prosecutor General’s authority in terms of section 231 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. The section provides:

“231. Prosecutor-General to authorize prosecutions of children under fourteen years.  
No proceedings in respect of any crime shall be instituted or continued against any person who is under the age of fourteen years, other than proceedings for the purposes of remand, without the authority of the Prosecutor-General.”

In *casu*, the anomaly was conceded by the trial court. Unfortunately, the authority cannot competently be granted retrospectively. The proceedings have to be quashed. The only issue that exercised my mind is whether or not to order a trial *de novo*. My major concern in this matter is that the accused is not an ordinary 12 year old boy given to boyish prank but is one who has clearly chosen not just a life of crime but one of serious crimes. In 2017 he committed a series unlawful entry and theft cases for which upon conviction was detained at Blue Hills Reformatory in Gweru. To be precise, the accused committed 15 counts of unlawful entry and 14 counts of theft. However, in February 2018 he escaped from that institution and immediately went on a spree of unlawful entry and theft cases in Zvishavane. This led to him being prosecuted without the Prosecutor-General’s authority.

He was sentenced as follows:

Count 1- 9 months imprisonment of which 3 months is suspended.

Counts 2 and 3 taken as one for sentence- 6 months imprisonment

Counts 4 and 5 taken as one for sentence- 6 months imprisonment

Counts 6 and 7 taken as one for sentence- 6 months imprisonment

The total sentence was a whopping 24 months imprisonment. Despite the fact that the accused had escaped from Blue Hills Home, the probation officer saw it fit to recommend that he be placed at Blue Hills Probation Hostel in Gweru. The court *a quo* was not so persuaded and rightly so in my view. It ordered that the accused be placed at the juvenile offenders section at Hwahwa prison.

In my view, these are the reasons why there must be a trial *de novo* in order to ensure that the accused's criminal record is not erased by my order. It is absolutely necessary in the interest of justice that the accused's behaviour is kept in check by providing relevant information to the courts when sentencing him in future in the unfortunate event that he goes back to his errant ways.

In the circumstances, I make the following order;

- 1) The proceedings are hereby quashed.
- 2) The conviction and sentence are hereby set aside.
- 3) The matter is remitted to the same magistrate who is directed to upon the production by the prosecutor of the Prosecutor-General's authority to prosecute, hear the matter *de novo*.
- 4) In the event of a conviction, when assessing an appropriate sentence, the magistrate is directed to consider the period that the accused has already spent in prison.

Moyo J.....agrees