THE STATE
versus
EDWIN DINO HUNDA
and
ABISON GEORGE KARIWO

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 14 June 2010

Criminal Review

UCHENA J: The accused persons were convicted by a Regional Magistrate for contravening ss 131 and 113 of the Criminal Law (Codification and Reform) Act [*Cap 9.23*] herein-after called the Code. They unlawfully entered the complainant's premises and stole property from his house and a motor vehicle from his premises. They pleaded guilty to the charges, and were convicted. They were each sentenced to 15 years imprisonment, of which 6 years was suspended on conditions of good behaviour. Both counts were treated as one for sentence.

The accused persons unlawfully entered the complaint's house and stole 7 long sleeved shirts' four pairs of trousers, a two plate stove, and a jacket which contained car keys. They on searching the complainant's jacket looking for money, found the complainant's motor vehicles keys. On leaving the house with their loot the accused persons stole the complainant's motor vehicle. The motor vehicle was recovered intact except for a missing car radio and cd player. The complainant's other property which was stolen during the unlawful entry was valued at $2 billion dollars and that valued at $1.86 billion dollars was recovered. Most of the stolen property for both the aggravated unlawful entry and theft of motor vehicle was recovered. The accused persons did not therefore substantially benefit from the crimes they committed.

The accused persons were at the time they were convicted and sentenced aged 17 and 18 years respectively. They are young first offenders, who pleaded guilty. They were sentenced on 1 August 2007. The record of proceedings was submitted for review in January 2010. I raised issues on the appropriateness, of the charge in count one and the sentence in view of the accused person's ages.

The Regional Magistrate in response commented as follows;

> "In assessing sentence the court was heavily influenced by the daring and determination of the accused persons.
> However in retrospect I am of the opinion that perhaps the sentence was a trifle too harsh in view of their youthfulness.
> I agree that the charge in count 1 is not properly framed"

The charge on which the accused persons were convicted in count one reads as follows;

> "In that on the night between the 16 and 17 of July 2007 and at No 17 Arkden Road, Sunridge, Mabereign, both Edwin Dino Hunda and Abison George Kariwo unlawfully, intentionally and without permission from Martin Dangeni, the lawful occupier of the premises concerned, or without lawful authority, entered Martin Dangeni's premises at No 17 Arkden Road, Sunridge, Mabereign, and stole 7 long sleeved shirts, 4 pairs of trousers, 2 plate stove and car keys of a Peugeot 306 XN, knowing that Martin Dangeni was entitled to posses or own or control the property and intending to deprive Martin Dangeni permanently of his ownership, possession or control of the property."

The charge was framed as if it was for what used to be the crime of House-Breaking and theft. That offence no longer exists. It was replaced by two separate offences of contravening s 131 (1) of the Code for unlawful entry, and contravening s 113 (1)(a) of the Code for theft. There will however be no prejudice to the accused persons if the charge is amended on review. They admitted unlawfully entering the complainant's premises. That constitutes a contravention of s 131 (1). They by admitting that they stole the property already referred to, admitted committing an offence within the complainant's house. The unlawful entry was therefore aggravated and they should therefore in count one have been charged with contravening s 131 (1)(a) of the Code. The correct framing of charges for the contravention of s 131 (1)(a) was dealt with in *S v S Chirinda* HH 87/09 @ pages 9-10 of the cyclostyled judgment. The charge in count one, is therefore amended to read as follows;

> "Charged with unlawful entry into premises as defined in s 131 (1)(a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] as read with s 131 (2) (e),
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> In that on the night between the 16 and 17 July 2007 and at No 17 Arkden Road, Sunridge, Mabelreign both Edwin Dino Hunda and Abison George Kariwo, unlawfully, intentionally and without permission or authority from Martin Dangeni, the lawful occupier of the premises concerned, or without other lawful authority, entered Martin Dangeni's premises by opening a broken window and gained entry into those premises through the window".

The offences were committed on the night of 16 to 17 July 2007. The accused persons were sentenced on 1 August 2007, but their record of proceedings was submitted for review in January 2010, about two and half years. The trial Regional Magistrate merely signed the

review cover and forwarded the record of proceedings for review. He should have explained the delay. I raised the issues referred to above by letter dated 25 January 2010. The Regional Magistrate's reply is dated 9 April 2010, but was referred to my office in May 2010. The trial Regional Magistrate did not again explain the delay in respondent to the issues I raised.

Delays in submitting records of proceedings for review, and responding to issues raised by the reviewing Judge are, unlawful, and unacceptable. The compromise the quality of justice, and are potentially prejudicial; to accused persons.

In terms of s 57 (1) of the Magistrate's Court Act [*Cap 7:10*], (herein after called the Magistrate's Court Act) the record of proceedings must be submitted for review "not later than one week next after the determination of the case". In this case the case was submitted for review, two and half years after the period stipulated by the Legislature. The Clerk of Court did not comply with the law. The Magistrate who have ensured that he or she did, did not take notice, He too did not treat the case with urgency it deserved. He took three months to respond to the issues I raised. Section 57 (1) of the Magistrate Court Act provides as follows:-

> "(1) When any court sentences any person—
> (*a*) to be imprisoned for any period exceeding twelve months; or
> (*b*) to pay a fine exceeding level six;
> the clerk of the court shall forward to the registrar, not later than one week next after the determination of the case, the record of the proceedings in the case, together with such remarks, if any, as the magistrate may desire to append"

The magistrate's remarks in terms of s 57 (1) can be in relation to the proceedings. He can also remark on delays in sending the record of proceeds for review. The remarks are simply those in relation to the case, the magistrate may desire to append. To simply submit a record for review two and half years after the determination of the case, without comment is unacceptable.

The issue of greater concern is the severity of the sentences imposed on the accused persons. They were each sentenced to 15 years imprisonment, both counts being treated as one for sentence. The Regional Magistrate correctly treated the two counts as one for sentence, as they were closely related in terms of time, place of occurrence, and sequence of events. The commission of count one led to the commission of count two. The accused persons were at the time they committed these offences aged 17 and 18 years respectively. They set out to unlawfully enter the complainant's house. They obviously planned and resolved to commit that offence. They however fortuitously found the complainant's motor vehicles' keys in the jacket they stole from the complainant's house during the unlawful entry. They had not come

to steal the motor vehicle. The circumstances enticed them to steal it. They are therefore circumstantial offenders in respect of the, theft of the motor vehicle. They should not have been sentenced as if they had gone out with the intention of stealing the motor vehicle.

The sentences on their own are not appropriate for young first offenders aged 17 and 18 years respectively. Their pleas of guilty should have been given serious consideration. The rigors of imprisonment on young offenders should have, had the effect of reducing the sentence to be imposed and the total effective sentence. Youthfulness and the attendant lack of serious consideration of the consequences of their actions should also have been considered.

In *S v Tendai and Anor* (Juveniles) 1998 (2) ZLR (HC), at p 429 GILLESPIE J, commenting of the sentencing of juveniles of about the accused's age said;

> "In *S v Zaranyika & Ors*, this court, through BARTLETT J, attempted to bring some rationality to the difficult area of sentencing offenders aged 17-19 years. Such persons were not normally beaten – corporal punishment cannot be imposed upon persons18 years and above. After a careful review of authorities on the principle of imprisonment for young offenders and of precedents in sentencing, the learned judge concluded:
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> > 'While Zimbabwe would not want to be a nation where rapists of the accused's age are not dealt with appropriate severity, it would also not, to my mind, want to be a nation where 17- and 18-year-olds are treated as fully grown mature adults and sent to prison for many years for offences such as rape. As I have previously indicated, a balance needs to be drawn.
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> The learned judge drew the balance in the four cases before him by recommending; sentences of 5 to 6 years imprisonment, with 11/2 to 21/2 years suspended - in the case of rapes of girl children by 17 and 18 year-olds, and a sentence of 5 years, all of which was suspended, in the case of a similar offence by a 15 year-old, where institutionalization would have been appropriate but could not be put in place. These sentences replaced punishments of 6 to 10 years, which had been imposed by the magistrates concerned.
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> That judgment has been successful in ensuring that a necessary distinction is drawn in sentencing older juveniles and young adults, as opposed to more mature offenders".

In this case the 17 year old could have been sentenced to corporal punishment, plus a wholly suspended prison term. He is now above the age of 18, and must on the consideration of the appropriate sentence on review be treated, as an adult, in the sense that corporal punishment is no longer applicable.

In *S v Zhou* 1995 (1) ZLR 329 (HC) @ page 332 to 333 CHATIKOBO J dealing with the sentencing of a juvenile who committed an offence before attaining the age of majority, but was sentenced after attaining the age of majority, said;

"If the accused was a juvenile at the time of commission of the offence but was an adult at the time of conviction should he have been sentenced as a juvenile?
Section 329(1) (formerly s 330(1)) of the Criminal Procedure and Evidence Act [*Cap 59*] (the Act) provides that –

> 'Where a male person under the age of eighteen years is convicted of any offence, the court which imposes sentence upon him may -
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> (a) in lieu of any other punishment; or
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> (b) ...
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> sentence him to receive moderate corporal punishment, not exceeding six strokes."
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> 'The precursor to s 329(1), namely s 330(1) of the Act, was dealt with in *S v Chitiki* 1986 (1) ZLR 60 (H) where GIBSON J, with the concurrence of REYNOLDS J, held that the effect of the provision is to make the operative date the date of conviction and not the date of commission of the offence. In other words, if the accused who commits an offence while he is a juvenile is convicted after the attainment of majority status he should be sentenced as an adult. I perceive this to mean that while the sentencing court is entitled to take into account the "frailty and deficiencies of youth at the time of commission of the offence" (*S v Pledger* 1975 (2) SA 244 (E) at 246H), it is not hidebound by the accused's bygone youth in settling upon an appropriate punishment. One of the reasons for distinguishing between juveniles and adults in sentencing is to ensure that young and immature offenders are not exposed to the harsh conditions which are attendant upon the fact of imprisonment. Where the offender has attained majority and is able to withstand the rigors of incarceration, the fact that he was a juvenile at the time of commission of the offence should be no bar to his incarceration if the circumstances so dictate. In any event, s 329(1) of the Act does not prohibit the incarceration of juveniles. It merely gives the court a choice. It is a choice which, like any other form of discretion, should be exercised judicially.
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> In my view, it would not be an improper exercise of discretion for a court to send to jail an adult who committed a brutal rape on an infant of four years while he was a juvenile. This is one of those cases where the accused should have been sentenced in the normal way. The proper approach to sentence is dealt with by BARTLETT J in a thorough review judgment in the case of *S v Zaranyika & Ors* 1995 (1) ZLR 270 (H). I would commend it to all magistrates. It is rewarding to read it and commit to memory the exhortations contained therein".

In this case I will extend the reasoning of CHATIKOBO J to the sentencing of a former juvenile on review. The then 17 year old, was a juvenile when he was sentenced by the trial court but has now attained the age of majority. Even though I am of the view that he should have been sentenced to corporal punishment plus a wholly suspended term of imprisonment, if the record of proceedings, had been timeously submitted for review it is now not possible to

impose such a sentence on him because he is now an adult. I am compelled to send him to prison for the portion in leu of which he should have been sentenced to corporal punishment. The offence he committed is a serious one. He must now be sentenced to a term of imprisonment, as he can no longer be subjected to corporal punishment. Other forms of punishment, like community service, or a fine would trivialize the serious offences he committed.

The trial court did not give serious consideration to the accused persons' moral blameworthiness. I have already said they are circumstantial offenders in respect of the theft of the complainant's motor vehicle. The motor vehicle was recovered intact. Only a radio and cd player were stolen from it. Therefore their stealing a motor vehicle, after unlawfully entering the complainant's premises, should have been considered in its proper perspective. The ages of the accused persons should also have been given serious consideration. It is counter productive to send 17 to 18 year olds to prison for 15 years. The length of the sentences imposed by the Regional Magistrate, induces a sense of shock.

In *S v Zaranyika & Ors* 1995 (1) ZLR 270 (HC), @ 271-272 BARLETT J dealing with the sentencing of accused persons of accused's ages said;

> "Normally a juvenile should never be sent to prison unless the offence is so serious that only a prison sentence can be justified. In prison he is bound to mix with the worst elements of society. It is a sad reflection on Zimbabwean society that the level of serious offences committed by persons in the 17-to 18-year age group is markedly increasing. Factors such as the high percentage of the population under the age of 18 and the dismal employment prospects are undoubtedly large causative factors.
> Rapes committed by young offenders are regrettably becoming more and more commonplace. **The prevalence and need for deterrence of such offences are relevant considerations but have their limitations. It is not possible to justify imposing more and more severe sentences on the grounds of prevalence; the intrinsic moral blameworthiness of the offence is the best guide as to the appropriate sentence. Indignation and passion must not be allowed to sway fairness and reason.** There is reason to believe that the deterrent effect of sentence is not necessarily proportionate to its length; in this field it is likely that there operates a law of diminishing returns. Nor should it be assumed that retribution, and recognition of the indignation and fears of the community at large, will always demand a more severe sentence. **The court should have regard not only to the nature of the crime committed and the interests of society, but also to the personality, age and circumstances of the offender. In the case of a juvenile offender, it is above all necessary for the court to consider whether the punishment would serve the interests of society as well as those of the offender. The interests of society cannot be served by disregarding the interests of the juvenile, because a mistaken form of punishment might easily result in a distorted (or more distorted) personality being returned to society.** While Zimbabwe would not want to be a nation where

> young rapists are not treated with appropriate severity, it would also not want to be a nation where 17-and 18-year-olds are treated as fully mature adults and sent to prison for many years for offences such as rape." (emphasis added)

I agree with the comments of BARTLET J. Rape is in my view a more serious offence, than unlawful entry, and of equal seriousness, with theft of a motor vehicle. I am therefore persuaded that in the absence of corporal punishment, imprisonment is unavoidable, but its length must be carefully considered. The accused are in their formative years. They need more guidance than punishment. As the accused in this case over stepped the line, punishable by none custodial rehabilitative sentences, they should be imprisoned but for a period which will let them taste the sting of imprisonment to scare them off the life of crime. The sting should not be for too long, so that they will come out adjusted to it. The sentence must seek to cause them to avoid it in future. If they are imprisoned, for periods, which brings them out as hardened criminals, society and the offenders will both lose the benefit of a rehabilitative prison sentence. Society will be the greater loser as it will at the end of such a sentence receive into it a schooled and hardened criminal no longer scared of the prospects of being, send back to prison.

In *S v Katsaura* 1997 (2) ZLR 102 (HC) @ p. 109 BARTLETT J commenting on this issue said;

> "The blameworthiness of the appellant in defrauding his employer of some $44 000 was such that only an effective term of imprisonment was appropriate but as REYNOLDS J stated in *S v Ngombe* HH-504-87 at p 2:
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> > It has been repeatedly stressed that a sentence of imprisonment is a rigorous and severe form of punishment, often bearing drastic and destructive consequences for the accused and the members of his immediate family. This form of penalty should be resorted to only if absolutely essential in the circumstances of the case, and only if no other available form of punishment would be preferable and appropriate."
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> A corollary of this approach is that where imprisonment is imposed the minimum effective period necessary should be imposed. GREENLAND J in *S v Teburo* HH-517-87 (at p 2) explained the rationale behind this approach as follows:
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> > "Given the limited avenues available to a judicial officer, he can attempt to achieve this by tempering the sentence with mercy and compassion, especially here when the accused is a contrite first offender. Such an approach is more likely to induce a positive response from the accused than a sentence which will simply brutalise him and lead ultimately to the man redefining himself as a criminal and behaving accordingly.

> Moreover, overlong incarceration is counter-productive. It destroys and contaminates. See *S v Khumalo & Anor* l984 (3) SA C 327 (A) at 331. The court therefore ends up contributing to the criminalisation of society.
> For the above reasons, it is a better approach for a judicial officer to appeal to the good sense of responsibility residual in the contrite first offender and impose the least punishment which will still achieve the objectives of punishment.

A further salutary explanation was made by BLACKIE J in *S v Hope* HB-18-93 at p 3-4, quoting the words of MACDONALD JP (as he then was) in *S v Wood* l973 (2) RLR (A) 11 at p 13H-14C: D"

> **'In imposing a prison sentence on a first offender, sight should never be lost of the fact that, for the greater part, the form of punishment itself, much more than the length of the sentence, is likely to reform him and act as a deterrent to others.** This is particularly true where the offender belongs to a class, the members of which, whatever their race, feel deeply the shame and stigma of a prison sentence. The publicity of the trial, the exposure as a criminal, the far reaching and often devastating effect of imprisonment on his social, family and economic life are, in the case of a first offender, aspects of punishment which should never be overlooked or underestimated. **It is these consequences attendant on serious criminal conduct, much more than the length of the prison sentence, which are likely to deter other persons and to reform the first offender. If they do not, it is unlikely that the length of the prison sentence will, in the majority of cases, have a significant effect on bringing about the desired results.** In this connection **I should make the point that it should not be thought that to deprive a first offender of his liberty, even for a short period of six months, is not to impose a substantial term of imprisonment. To the first offender, accustomed to liberty and deprived of it for the first time, even such a period would, I would think, seem to be interminable. It is of course, of the utmost importance that a person should not be kept in prison for longer than is necessary in the interests of the offender, of society, or both.** The reasons for this need hardly be stressed, nor is it necessary to stress that in a civilised society, the retributive effect of punishment should not receive great weight.

> These salutary explanations are, however, it seems seldom given meaningful effect by magistrates. Like the inability to give proper weight to a plea of guilty, the need to impose only the minimum appropriate term of imprisonment, is a custom more noted in the breach than in the observance". (Emphasis added)

Sections 131 (1)(a) and 113 (1)(a) of the Code provide for sentences ranging from a fine not exceeding level thirteen to imprisonment for a period not exceeding 15 years, and a fine not exceeding level fourteen to imprisonment for a period not exceeding twenty five years respectively. The Regional Magistrate treating both counts as one for sentence imposed the

maximum sentence imposable for contravening s 131 (1)(a) of the Code The ranges provided by ss 131 and 113 of the Code are fairly wide. This gives judicial officers a very wide discretion in assessing the appropriate sentence. A judicial officer must thus avoid the temptation of imposing ever increasing sentences for these offences. He or she must avoid imposing sentences around the maximum, level of the range for cases which, are far from being the worst under that crime. He or she must carefully consider the appropriate sentence for each case bearing in mind that the least sentence is for the least offence, above, the trivial level referred to in s 270 of the Code, under that crime, and the maximum sentence for the worst offence under that crime. Each case must be assessed and be punished according to the offender's moral blameworthiness, which pegs the level of punishment deserved by the accused. The sentence must suit the offence and the offender.

In *S v Butau* (1) ZLR 240 (H) at p 242 to 243 GARWE J (as he then was) said;

> "The principle is now established that the maximum penalty should be reserved for the most serious offences or persistent offenders.
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> In *S v Mutusva* HH-156-86, the accused was charged with wrongfully and unlawfully:
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> > Carrying on the business of an ivory dealer without being in possession of the necessary licence, contrary to the provisions of the Parks and Wild Life Regulations 1981. On conviction, he was sentenced to pay the maximum possible fine. In reducing the sentence", REYNOLDS J remarked that –
> > ...the maximum sentences prescribed should be reserved for the worst or most persistent of offenders...Once again...the magistrate attempts to justify the most severe sentence allowed by the Legislature on the basis of prevalence. I can only repeat that this approach is improper. It is to be hoped that the magistrate will now bear this well-recognized principle in mind in future cases.
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> In *S v Mathe* HB-104-83 the accused, who was 18 and a first offender,
> killed a heifer on a commercial farm and took away the meat. He was subsequently convicted, on his plea of guilty, of theft of stock and sentenced to receive 10 cuts with a light cane and in addition to a wholly suspended prison term of 18 months' imprisonment with labour. Having considered that ten strokes was the maximum number of strokes imposable under the Criminal Procedure and Evidence Act, GUBBAY J (as he then was) remarked:
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> 'I do not question the propriety of ordering the accused to receive a moderate correction co-joined with a period of conditional imprisonment. After all he committed a serious offence and one which is particularly prevalent in the Gwanda area. But the number of cuts inflicted was grossly excessive. Ten cuts is the maximum that may be imposed on a juvenile in terms of s 330 (1) of the Criminal Procedure & Evidence Act [*Cap 59*]. I venture to think that very few crimes would demand a juvenile being visited with such a degree of judicial barbarism. Perhaps offences of unprovoked and extreme violence or of bestial

> or wanton cruelty to the person of another might qualify. The present offence certainly does not'.
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> The same sentiments were expressed by REYNOLDS J in *S v Bote* HH-340-87 and by SANSOLE J in *S v Maposa & Ors* HH-395-85".

Applying the above principles to this case, I am persuaded that though theft of a motor vehicle would normally attract sentences ranging between 7 to 10 years, such sentences are not appropriate in this case. I have already pointed out that the accused persons did not set out to go and steal the motor vehicle. They stole it when they fortuitously found its key in the complainant's jacket. They can therefore not be classified as dealers in stolen motor vehicles. The principles enunciated in S *v Dube & Anor* 1995 (2) ZLR 321 (SC), do not apply in this case. Although theft of motor vehicles has become rampant, in this case the theft was induced by the accuseds' finding the motor vehicle's keys in the jacket they had stolen. There is no evidence of international connections in the accuseds' conduct. There is no evidence that they deal with stolen motor vehicles, nor that the motor vehicle was found intact because, as dealers they had an interest in its preservation. A much shorter sentence is therefore called for when this case is compare to *S v Dube* (*supra*) and the cases there cited. The sentence to be imposed on the accused should also take into account there youthfulness. The sentence for unlawful entry should because of the value stolen, and the recovery of most of the stolen property, be closer to the lower level suggested in s 131 (1)(a) of the Code. As the offence in this case is aggravated by subsection (2)(e), the sentence should range from a fine not exceeding level thirteen or double the value of the stolen property. This means consideration should start from a fine moving upwards to the maximum of 15 years imprisonment. The maximum as already said should be reserved for the worst contravention of s 131 (1)(a) of the Code. The present case is far from being the worst. It is merely above the lower level, but below the middle level. That coupled with the accused persons' ages, must result in a sentence not exceeding 2 years. The theft of the complainant's motor vehicle, in the circumstances described above, must on its own not attract a sentence exceeding 5 years. When both counts are treated as one, their cumulative effect, and interrelationship must tone down the global sentence to a total of 6 years.

After considering the above I am satisfied that the accused persons have already felt the sting of imprisonment. They were sentenced on 1 August 2007. They have spent, close to three years in prison. They are however still young, and need deterrence, against committing

crimes. A reasonably long portion of the total term of imprisonment to be imposed should be suspended to deter them from committing similar crimes.

The sentence imposed by the Regional Magistrate is set aside, and is substituted by the following;

Each accused, both counts being treated as one for sentence; 6 years imprisonment of which 3 years is suspended for five years on condition the accused does not during that period commit any offence of which dishonesty is an element and for which he will be sentenced to imprisonment without the option of a fine.

BHUNU J, agrees----------