HB 329-17
HCAR 1710-17
CRB ENT 519-17

THE STATE
versus
KHULEKANI TSHUMA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 31 OCTOBER 2017

Criminal Review

MATHONSI J: The advent of special constabularies and neighbourhood watch committees in our society heralded a very positive development in law enforcement as they provided the much needed auxillary support to the regular police service. These spirited persons who, most of the times were motivated by selflessness and a strong desire to help the community, constitute a useful link between the police force and the civilian communities. However when escaping from the lawful custody of a neighbourhood watch community member or special constabulary while being escorted to a police station, without more, attracts a 5 year term of imprisonment, we begin to get worried indeed.

This matter was placed before me for automatic review in terms of s57 (1) of the Magistrates Court Act [Chapter 7:10]. I was immediately drawn to the sentence imposed by the magistrate which, without doubt, appeared so excessive and completely detached from the offence itself that it induces a sense of shock and apprehension.

The 34 year old accused person had, in the witching hours of 7 August 2017, tried to break into a house in Old Lobengula Bulawayo when luck deserted him. The lady complainant whose house the accused person had targeted as he coveted her property secured the support of neighbours who, after thwarting the accused's criminal activity, subdued him. Police Constabulary Bob Chidzewere was on hand to effect an arrest promptly handcuffing the accused from behind. At about 0300 hours the good police constabulary was escorting the accused person to ZRP Njube station along the main Njube road as the crowd which had gathered was

baying for the accused's blood desirous of inflicting their own form of justice. Imbued with a very good sense of what is right and wrong Chidzewere was trying to protect the accused.

Next to St Pius Church he instructed the accused to stop as he turned back to converse with the complainant. The accused person took advantage of the constabulary's momentary inattention to take to his heels. The police constabulary gave chase but he had not reckoned on the sprinting prowess of the accused person who showed him a very clean pair of heels. As fate would have it, the police constabulary tripped and fell into a ditch while shouting in vain for help to apprehend the accused. The accused was re-arrested on 1 September 2017 at his place of residence following a tip-off.

When he was arraigned before a magistrate at Western Commonage he pleaded not guilty to the charge of escaping from lawful custody as defined in s185 (1) (a) of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. Following a trial, he was convicted and sentenced to 5 years imprisonment 2 of which were suspended for 5 years on condition of future good behaviour. This left him with an effective 3 years imprisonment for just escaping from the custody of a police constabulary even before they reached the police station.

In mitigation, the court was told that the accused is a first offender. He is married with four children. Asked why he had absconded from lawful custody, the accused told the court that he was afraid, presumably of facing the wrath of the law. The magistrate was unimpressed and stated that the offence is a serious one given that the accused had shown a disregard for authority, especially as he had committed another offence earlier, as if the accused was now being penalized for that earlier offence. He concluded by saying that;

> "Accused is clearly a menace to society and should thus be removed so as to uphold peace and tranquility."

In my view, the court may have unwittingly punished the accused for the offence of unlawful entry which had caused his arrest and his escape. I am certain that the accused was still to be tried for that other offence. What was before the court was the charge of escaping from lawful custody. By any stretch of the imagination it cannot be said that the accused person is a menace or that he offends against society's peace and tranquility by making a dash to freedom after he had been arrested.

In terms of s 185 of the Criminal Law [Codification and Reform] Act [Chapter 9:23];

"(1) Any person who, having been lawfully arrested and in lawful custody and—

(a) not having yet been lodged in any prison; or
(b) lodged in prison;

escapes or attempts to escape from such custody, shall be guilty of escaping from lawful custody and liable—

(i) if the crime was committed in any of the aggravating circumstances described in subsection (4) –
   A. to a fine not exceeding level eleven or imprisonment for a period not exceeding seven years or both, where the person had not yet been lodged in any prison; or
   B. to imprisonment for a period not exceeding ten years where the person had been lodged in any prison;
   or
(ii) in any other case—
   A. to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both, where the person had not yet been lodged in any prison; or
   B. to imprisonment for a period not exceeding seven years, where the person had been lodged in any prison."

Escaping from lawful custody is committed in aggravating circumstances, as to attract the stiffer penalty prescribed if the accused person uses any weapon or violence in order to escape as provided for in s185 (4). In this case, no violence or weapon was used as the accused person benefited from his sprinting ability. It means that the sentencing is governed by s185 (1) (a) (ii) because the accused had not been lodged in prison. That penalty section provides for a sentence of a fine not exceeding level ten or imprisonment for a period not exceeding 5 years or both.

It has been said before that where a statutory provision allows for a sentence of a fine, or alternatively imprisonment the sentencing court must give serious consideration to the imposition of a fine first and leave imprisonment for the most serious offences or repeat offenders. See *S* v *Chawanda* 1996 (2) ZLR 8 (H) 10 C-G; *S* v *Zuwa* 2014 (1) ZLR 15 (H) 18A-C; *S* v *Bhebhe* HB 198-17. Given that the accused person is a first offender who is married with four children, the court *a quo* should have considered the imposition of a fine. There was a misdirection calling for interference with the sentence.

The accused was sentenced on 6 October 2017 meaning that he has been in custody for twenty days. That should really atone and reduce the sentence considerably.

In the result, it is ordered that;

1. The conviction is hereby confirmed.

2. The sentence is set aside and in its place is substituted the following sentence;

> "A fine of $50-00 or in default of payment 20 days imprisonment. In addition 3 months imprisonment wholly suspended for 3 years on condition the accused does not within that period commit any offence involving escaping from lawful custody for which upon conviction he is sentenced to imprisonment without the option of a fine."

3. As the accused person has already served a period of 20 days, he is entitled to his immediate release without paying the fine.

Takuva J agrees……..