THE STATE
versus
ELINA CHIWOTAUNGA

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 20 July 2016

Criminal Review – Sentencing – Guilty Plea

MUSHORE J: Accused, a 23 year old female, was charged with, and pleaded guilty to one count of kidnapping as defined in section 93 (1) (b) (11) of the Criminal Law (Codification and Reform) Act: [*Chapter 9:23*] and two counts of escaping from lawful custody as defined in section 185 (10 9) of the Criminal Law (Codification and Reform) Act: [*Chapter 9:23*].

The facts as they appear on the state outline are scant and sketchy but from what I have gathered from the record it was the State's case that on 24 April 2016, accused kidnapped complainant's eleven month old infant and got away with the baby unnoticed. After a report was made to the Police and investigations conducted, accused was arrested. She was detained at Madziwa Police Station when on 9 June 2016, almost three weeks later; she escaped from custody during an electricity black-out. She was found after a search was carried out and then she was detained at Chivaridzo Police Station in Bindura on 11 June 2016. It seems that the Police made arrangements for her to make indications and it was whilst she was making indications that she requested permission to relieve herself. When Constable Chidodo was escorting her to relieve herself, she took advantage of the situation and attempted to make a run for it. However Constable Chidodo and another Constable chased her and apprehended her.

Having been convicted on her own pleas of guilt to all three counts, she was sentenced as follows:-

"Count 1: 18 month's imprisonment
Count 2: 4 months imprisonment
Count 3: 4 months imprisonment".

Of the total 28 months imprisonment, 4 months imprisonment were suspended for 5 years on condition that the accused does not commit any offence of which kidnapping is an element for which upon conviction she is sentenced to imprisonment without the option of a fine.

Before coming to the sentence imposed the court *a quo* gave its reasons as follows:-

"Reasons for sentence

> I will consider that accused person is a first offendor. She is contrite by pleading guilty to the said charge. Against that kidnapping is a serious offence. In this case on the 24th April 2016 accused person without authority took into her custody a baby who is 11 days old. She was later arrested and on two different occasions she tried to escape from lawful custody. It is clear that she was determined to escape. The court does not condone such kind of behaviour. Her reason for taking the child was that she had a miscarriage. As such accused will be sentenced as follows"

The reasons given before passing sentence are pathetically shallow. They demonstrate inattentiveness on the part of the sentencing court. So much more ought to have been enquired into before passing sentence. When a sentencing court records a guilty plea, it must attend to sentencing with the same depth and thought that it does with a full trial. Recording a guilty plea does not lighten the degree of attentiveness required to properly assess the factors, both in mitigation and aggravation. There is a tendency for magistrates to record the essential elements in a robotic manner and then rush to sentence and actually impose sentence after providing the scantiest of reasons for the sentence to be imposed. Very often I gain the impression that the sentencing court considers the job of sentencing after recording a guilty plea to be a very mundane and routine task. The result of reasoning in a superficial manner is usually that the sentence passed is either manifestly lenient or excessive as has occurred in the present case. In the current case, I made the following observations from the facts on record which should have immediately alerted the court *a quo* to investigate and enquire into in more detail.

Kidnapping is not a trivial offence. It is a serious offence and more particularly in that from the facts of this matter, the consequences could have been tragically life altering. Had the accused not been caught the minor child would have been displaced from its mother for a lifetime. At the same time the natural mother would have suffered the hardship of being permanently deprived of her child. The emotions which the complainant must have gone through in the days after the kidnapping until her baby was found must have been insufferable.

The state outline discloses that the child was kidnapped at a Goora Johanne Musora Shrine. The court *a quo* ought to have enquired whether the accused and the complainant were worshipping together; or whether the complainant way lurking and waiting for an opportunity to snatch the baby. This distinction was important in determining whether the kidnapping was pre-planned, cold and calculated or a spur of the moment opportunistic crime. The degree of culpability which is crucial in determining punishment was overlooked. That line of enquiry was, in my considered view essential bearing in mind:-

(i) the seriousness of the offence;

(ii) to clarify the accused's medical history, particularly her mental state at the time she kidnapped the baby.

From the brief facts in the record, accused said she was suffering from depression when she kidnapped the infant. Maybe at the time that she snatched the child, she did not fully comprehend nor appreciate the consequences of her actions. There was no medical evidence as to her state of mind neither was there any proof that she had indeed suffered a miscarriage. All these issues remain speculative but are important questions to answer and address before arriving at a sentence in *casu*.

In sentencing an accused person, although the effect of a crime may be taken into account in assessing an appropriate sentence, the most important factor remains the moral blameworthiness of the offendor. See: *S* v *Goodson* 1976 (2) PH. H. 169 (R).

Any judicial officer must take into account all the relevant features and must give proper weight to all of those features. See: *R* v *Dematema* 1967 R.L.R 311 G.D.

The enquiry which to be made should go beyond merely ticking all the boxes and then capriciously passing a sentence. See *R* v *Boyd* 1956 (1) P.H. H. 107 (R).

Magistrates must re-acquaint themselves with the provisions of the Criminal Procedure and Evidence Act: [*Chapter 9:07*] so that they understand the depth of enquiry which they must make even after recording a guilty plea and before even considering sentence. Section 271 (2) (4) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides:-

'***Section 271 (2) (4) (b)***

Where a person is arraigned before magistrates' court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea-

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(4) the court may

(a)

(b) *<u>with regard to the sentence, hear any evidence, including evidence or a statement made by or on behalf of an accused</u>"* (Emphasis added)

The offence of kidnapping is, as I stated earlier, serious. It attracts a sentence of life imprisonment or and definite period of imprisonment. (General Laws Amendment Act, 2016) as read with s 93 (1) (b) (ii) and 93 (1) A of the Criminal (Codification and Reform Act) [*Chapter 9:23*]. But even though the recommended sentence is serious, perhaps an enquiry into the accused's medical history, both mental and physical may have influenced the court to arrive at a different sentence than the one called for by the legislature. If the accused's mental state was called into question as seemed to be the case, then it may have become necessary to have the accused examined. If indeed she suffered a miscarriage, then the magistrate should have done more than fleetingly mentioning this in the reasons for sentence. Was the accused suffering from depression as the result of her miscarriage when she kidnapped the infant? None of these aspects were dealt with nor was the necessary evidence enquired into prior to sentencing the accused on the kidnapping charge.

Turning to the other two counts, escaping from lawful custody, the court *a quo* trivialised the implications of accused escaping from custody twice in one week. It can be reasonably inferred that by accused escaping not once, but twice from lawful custody, she did not want to be made accountable for her actions. The legislature proposes a maximum of 5 years imprisonment in such instances (Section 185 (1) (b) (ii) A). The magistrate *a quo* imposed an extremely short 4 months for each account of attempting to escape lawful custody. I fear that the accused may never understand the severity of the crime of lawfully escaping custody. The court *a quo* displayed a most capricious approach to sentencing. The 4 month sentence bears no relation to the legislated parameters attendant to the sentence.

Thus on all three counts, I consider the court *a quo*'s reasoning before arriving at sentence to have been a rushed job. In all the circumstances I cannot confirm that the proceedings were in accordance with real and substantial justice.

Accordingly, I withhold my certificate.