

THE STATE
Versus
NEVER SOZA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 11, 28 March 2024.

Criminal Appeal Judgment

R. Nikisi, for the State
Appellant in person

BACHI MZAWAZI J: This is a criminal appeal wherein the accused person was charged and convicted of contravening s185 (1) (b) of the Criminal Law (Codification and Reform Act [*Chapter 9:23*]). It is alleged that on the 20th of August 2022 whilst under prison officials' custody, fetching firewood the accused unlawfully escaped from lawful custody. He disappeared into the nearby bush whilst in the company of his inmates and escaped. He was arrested on the same day at the nearby Shopping Centre. He was sentenced to 46 months, with 12 months wholly suspended for 5 years on condition of good behavior. He is currently serving 34 months. His grounds of appeal are basically against sentence which he says it is harsh and excessive in comparison to decided cases. He prays for a sentence of 36 months with 12 suspended on good behavior.

In its opposing affidavit the State represented by *Mr Nikisi*, pointed out, correctly so, that, in terms of s185 (1) (b) (ii) of the Criminal Law Code, in offences of this nature a custodial sentence is inescapable. In my view, this is apparently the reason why the accused did not propagate for a non-custodial sentence but a reduction of the one imposed.

Mr Nikisi for the State highlighted that the accused's reason for the escape from prison authorities was not cogent and justified. Accused had

given the reason that there was too much hard labour. *Mr Nikisi* cited the cases of *State v Ngulube HH48-02* in support of his argument.

Nonetheless, the State conceded that the trial court erred and misdirected itself when it failed to make a finding on whether the offence had been committed in aggravating circumstances or not in order to justify its sentence of 48 months before deductions as dictated by s185 (4) of the Criminal Law Code. This is an accurate observation by *Mr. Nikisi* as gleaned from page 9 of the record. The court indeed omitted to make such a finding of aggravatory circumstances. In a case where an accused person is not legally represented such omissions are misdirections which ordinarily vitiates the proceedings. In *casu*, the State conceded that this was to some extent a gross misdirection.

In our view, even, the court erred by failing to stipulate the aggravatory circumstances, there are no aggravatory circumstances in this case. Escape from lawful authority perse, especially prison officials thereby jeopardizing their career is in fact very serious. All things being equal it can be an aggravatory circumstance. Notwithstanding that, case law has considered aggravatory circumstances as those situations whereby the escapee from lawful custody used force or fights his custodians. See *State v Davison Nyandoro HMA 33-2023*. In cases where there was no force the sentence ranged in the range of 18 months. See *State v Runesu HMA 38/22*.

In *State v Davison Nyandoro Supra*, the accused who had escaped from Bikita Prison after pretending to go to the toilet had his sentence of 36 months imprisonment with 12 months suspended on conditions of good behavior review on appeal. The appellate court found the sentence unduly harsh and restituted it with 18 months imprisonment with 6 suspended on good behavior. A finding was made that there were no aggravatory circumstances.

The same scenario of reduction of the original sentence on review was applied in the case of *State v Polite Runesu (Supra)*. In this case the accused sneaked from prison guard surveillance and supervision in Chiredzi whilst gathering firewood. A sentence of 36 months was further reduced to 18 months with 6 suspended on conditions, on review.

In *State v Runesu* above, Justice Zisengwe, outlined five instances that are recognized as amounting to aggravatory circumstances for the purpose of this offence. These are;

- a. The length of the prison term or what remaining of it.
- b. The offence for which he/she was serving prior to his/her escape.
- c. Whether there was damage to State or to the property in the course of escaping.
- d. Whether violence or any weapons were used in the course of escaping.
- e. The duration of the ill-gotten freedom and difficulty associated with re-apprehending the escapee.

Distinguishably, in the case of *State v Enock HCC26-22* a sentence of 48 months with 12 months imprisonment suspended was deemed appropriate as there was an element of force when the convict escaped.

Accordingly, the appeal succeeds. The conviction is upheld. The sentence is set aside and substituted with 18 months imprisonment with 8 months imprisonment suspended for 2 years on condition accused does not commit any offences involving dishonest and escape from lawful custody. He is sentenced to 10 months effective to run concurrently with his prison term.

MUZOF A J Agrees

National Prosecuting Authority for the State.