Judgment No. HB 129/2002
Case No. HC 4384/2002

THE STATE

Versus

MECKTAI YAKOBE GONDWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 28 NOVEMBER 2002

Criminal Review

NDOU J: The accused was charged with theft by conversion at Western Commonage Magistrates Court. She was convicted and sentenced to 15 months imprisonment with 8 months suspended on condition the accused pays restitution of $32 000.

I am not satisfied that the accused was properly convicted of theft of $43 000 cash. From the facts and what she admitted during the trial one can safely accept that she had converted $32 000 for her own use. She still had $11 000 on her person. The learned trial magistrate did not adequately canvass with her whether she also intended to convert that amount into her own use. This was necessary as the accused was unrepresented during the plea proceedings.

In the circumstances I alter the findings of theft by conversion from one of $43 000 cash to one of theft by conversion of $32 000 cash only. As far as sentence is concerned I hold the view that even on the original finding this is a case where community service should have been seriously considered. The accused was in gainful employment at a creche earning $17 200 per month. She is a female first offender aged 43. She is married with three children. The salient facts of the case are that the complainant and accused are known to each other.

They actually resided together in Pumula East,Bulawayo. On 23 June 2002 the complainant gave the accused cash amounting to $43 000 for the latter to purchase a bed and wardrobe on her behalf. The complainant left Bulawayo and went to Lupane were she worked as a teacher. The complainant returned on 1 August 2002 and discovered that the accused had not bought the bed and the wardrobe but instead had used part of the money i.e. the $32 000 for her own use. The accused offered to reimburse the complainant by the end of September 2002. The pre-sentence information at the disposal of the learned trial magistrate was scant. Our courts have on a number of occasions emphasised the need for the trial magistrates to equip themselves with sufficient pre-sentencing information in any particular case to enable them to assess sentence humanely and meaningfully and to reach a decision based on fairness and proportion. The needs of the individual and the interests of society should be balanced with meticulous care and understanding – see *S* v *Moyo* HH-63-84, *Maponga* v *S* HH-276-84, *S* v *Sparks and Ano* 1972(3) SA 396 (A), *Zindonda* v *S* AD 15-79, *S* v *Manwere* 1972(2) RLR 139, *S* v *Zinn* 1969(2) SA 537, *S* v *Rabie* 1975(4) SA 855 and *S* v *Ngulube* HH-48-02.

Such pre-sentencing information is even crucial in instances where the magistrate is contemplating sending a first offender to prison. It is trite that our courts view imprisonment as a severe and rigorous form of punishment which should be imposed only as a last resort and where no other form of punishment will do. See *S* v *Kashiri* HH-174-94, *S* v *Gumbo* 1995(1) ZLR 163, *S* v *Sithole* HH-50-95, *S* v *Chinyama* HH-199-98, *S* v *Mangena* HH-28-99, *S* v *Tarume* HH-146-99, *S* v *Mugauri* HH-154-99 and *S* v *Sikhunyane* 1994(1) SACR (TL)

This is the guiding principle for sentencing tribunals. It is the starting point. In the circumstances, at time of the imposition of the custodial very little was known of the accused and why she committed the offence. The relationship between the accused and complainant was not established. From the meagre information on record it seems to me that this was an appropriate case for community service. There is no indication in the record on whether this option was considered at all. The accused did not address the court on community service. The magistrate should have made a brief inquiry on the suitability of community service – *S* v *Nyamadzawo* HH-13-94, *S* v *Mugebe* 2000(1) ZLR 376(H) and *S* v *Tigere* HH-225-93. If the learned trial magistrate considered community service as being inappropriate this should have been explained in the reasons for sentence – See *S* v *Chinzenze and Ors* 1998(1) ZLR 470 (H) and *S* v *Gumbo* 1995(1) ZLR 163(H).

Regrettably, the learned trial magistrate did not do all this. I think it is no longer appropriate to consider community service as the accused has already served around two months before the matter was submitted for review. This is another sad example of injustice occasion by the failure to comply with the provisions of section 57 of the Magistrates' Court Act [Chapter 7:10]. The accused was convicted and sentenced on 10 September 2002 after a truncated trial conducted under the provisions of 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07].

The trial magistrate only signed the review case cover on 30 October 2002. There is no explanation given for the delay. These delays are disturbingly becoming a common feature of our criminal justice system at this level. Magistrates are once more reminded of the need to submit automatic review matters timeously for scrutiny or review.

As far as sentence is concerned, I hold the view that although the conviction has been altered justifying tempering with sentence, substantial justice will be done by reducing the sentence imposed.

In the circumstances the conviction of theft by conversion of $32 000 is confirmed. The sentence imposed by the trial court is set aside. The accused is sentence as follows:

> "10 months imprisonment of which 8 months is suspended on condition accused restitutes Sinikiwe Sibanda $32 000 through the Clerk of Court Western Commonage Magistrates' Court by 29 November 2002".

Cheda J …….. I agree