Judgment No. HB 38/2003
Case No. HC 687/2003
CRB W/C 3484/02

THE STATE

Versus

ROSEMARY MANYEVERE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 20 MARCH 2003

Criminal Review

NDOU J: The accused is a young woman aged 23 years. She is a first offender. She was employed by the complainant as a domestic worker. She had just worked for the complainant for a month and five days when she succumbed to temptation and embarked on a *mala quia prohibita* commonly known as theft from an employer. The accused was charged and convicted at Western Commonage Magistrates' Court, Bulawayo. Nothing turns on the conviction as the accused was properly convicted. The accused, after a brief enquiry on mitigation, was sentenced to 15 months imprisonment with 5 months thereof suspended on condition of good behaviour and restitution. This leaves an effective sentence of 10 months imprisonment for theft of six dinner plates, four skirts, one blouse, a set of dreads (whatever that is), three dresses, one petticoat, a pair of tennis shoes and two string tops valued at $58 000,00. Of that stolen property, $41 500,00 worth was recovered. By today's standards $58 000,00 is not much. The trial magistrate seems to have misplaced faith and mistaken zeal in imprisonment as a solution to criminal misdemeanors even for non-serious offences. This is a wrong approach to sentencing. The most popular theory today is that the proper aim of criminal procedure is to reform the offender so that he may become adjusted to the social order. Is it not better

to save the offender for a life of usefulness rather than punish them by imprisonment, which generally makes them worse after they leave than before they entered? Imprisonment as a form of punishment should always be viewed as a sad necessity of criminal law. The actual choice that life presents to a sentencing court is seldom a clear issue between absolute good and absolute evil but generally a choice between alternatives, all of which are imperfect embodiments of justice or of the highest good. Judicial wisdom consists in such a balancing of rival considerations that the total amount of evil is minimised. In the circumstances, it is essential for the trial magistrates to equip themselves with sufficient information in any particular case to enable them to assess sentence humanely and meaningfully based on fairness and proportion. The sentencing process is as distinct and vital a factual enquiry as the determination of the guilt of an offender. Punishment should as far as possible be individualised by conducting meaningful pre-sentencing investigations. Assessment of punishment should not be left to a haphazard guess based on no or inadequate information – see *S* v *Taurayi* 1963(3) SA 109 (SR); *S* v *Jabavu* 1969 (2) SA 466 AD; *S* v *Maxaku* and *S* v *Williams* 1973 (4) SA 248 (C); *Mbuyase and Ors* v *R* 1939 (2) P.H. H 159 (H); *S* v *Joseph* 1969 (4) SA 27 (N); *S* v *Manwere* 1972 (2) RLR 139; *S* v *Zinn* 1969 (2) SA 537, *S* v *Zindonda* AD 15-79; *Maponga* v *State* HH 276-84 and *S* v *Tigere* HH-225-93.

The basic elements of sentencing are that the punishment must fit the criminal as well as the crime, be fair to the state and to the accused and be blended with a measure of mercy – see *S* v *Sparks and Ano* 1972 (3) SA 396 A; *S* v *Moyo* HH-63-84; *Sentencing* by D P Van der Merwe paragraph 1-14 and *A Guide to Sentencing in Zimbabwe* authored by G Feltoe at page 1. The needs of the individual and the

interests of society should be balanced with care and understanding. In order to achieve these ideals the sentencing tribunal should be armed with appropriate pre-sentencing information. *In casu*, the information is scant and could not assist the trial magistrate make an informed decision on the appropriate punishment. Such situations attracted brash criticism of the trial court in the above cases – see also *S* v *Ngulube* HH-48-02 and *S* v *Shariwa* HB 37-03.

From the facts and the brief mitigation recorded this is a case that cried out for a serious consideration of the option of community service. Effective imprisonment is, in my view, inappropriate. A sentence of imprisonment is a severe and rigorous form of punishment which should only be imposed only as a last, and not first, 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 S*ikunyane* 1994 (1) SACR (TR);

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 *Shariwa (supra).*

In casu, as is common in most criminal cases, the accused appeared unrepresented by a legal practitioner. One should err on the side of caution and assume that she is not aware of the existence of the option of community service. In the circumstances, the trial magistrate should have canvassed this option of community service. The trial magistrate should have canvassed this option with her in mitigation. This enquiry was not carried out. This is a misdirection on the part of the trial magistrate. In this regard BARTLETT J, in the *Gumbo* case *(supra)* stated:

> "It is particularly important that magistrates give active consideration to the new concept of community service. The whole object of community service is to enable the community to benefit by non-serious offenders (those who would otherwise have been sentenced to 12 months as less) being given the opportunity to keep out of prison by doing useful work for the benefit of the

> community. This is one of the most important reforms to Zimbabwe's criminal sentencing system over the past several decades."

(At present the period has been increased to 24 months or less) See also *S* v *Tigere (supra)* and *S* v *Chinzenze and Ors* 1998 (1) ZLR 470. Although the enquiry on the suitability of community service was not carried out in her reasons for sentence did make brief reference to this option in the following terms: "If given community service, you are unlikely to perform it. Also it would be too lenient." As alluded to above, this option was never canvassed with the accused. In the circumstances, it is difficult to understand the context in which this remark is being made. The decision on whether or not the option of community service is suitable should be made on a rational and informed basis. Without the appropriate enquiry on the suitability of the option being discussed with accused on what basis did the trial magistrate make this determination? She seems to have done so intuitively. To make the determination (that the accused is not suitable for community service) in the dark, as it were, to my mind constitute a gross irregularity within the meaning of section 27 of the High Court Act [Chapter 7:06]. All in all, there were serious misdirections in the sentencing process as outlined. The sentence imposed by the trial magistrate is disturbingly inappropriate. The basic elements of sentencing were not followed to the prejudice to accused. It would not serve the interests of justice for the matter to be remitted to the court *a quo*. The accused has served the prison sentence from 18 December 2002.

In the circumstances, the conviction is confirmed. The sentence imposed by the court *a quo* is set aside and substituted as follows:

> "4 months imprisonment of which 2 months is suspended for 3 years on condition the accused in that period does not commit an offence of theft or

dishonesty and for which she is convicted and sentenced to imprisonment without the option of a fine."

As the accused has served the effective custodial sentence, she is entitled to immediate release.

Cheda J ……. I agree