Judgment No. HB 39/2003
Case No. HC 450-451/2003
CRB ENT 1288/02

THE STATE

Versus

PRIDE KHUMALO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 27 MARCH 2003

Review Judgment

CHEDA J: This record was forwarded to me for review together with one for Artha Gumede – CRB ENT 1287/02. The learned scrutinising Regional Magistrate decided to send them together as she was of the view that they presented the same issues. On perusal I find that there are only two issues which arise in this matter and the only issue which is in common with the other matter being that whether or not it is appropriate when sentencing an accused to imprisonment to further state that his imprisonment is to be with labour.

I have decided to separate these two cases and I will deal with them separately. The brief facts of this matter are that accused who was aged 19 was charged with theft of $4 000 cash from his friend whom he had paid a visit. He pleaded guilty to the charge and was duly convicted and sentenced. The sentence is couched as follows:

> "12 months iwl of which 7 months iwl is suspended on condition accused restitutes complainant $4 000 through the clerk of court by 4pm 15/10/02."

The learned scrutinising Regional Magistrate raised two issues namely the way the charge was couched and the appropriateness of the sentence.

When asked whether a non-custodial sentence would not have been appropriate the learned trial magistrate while admitting that it would have been appropriate went further to state that he was of the view that accused had abused his friend's (complainant) hospitality. While this, indeed is a valid point, it can not be a sole determining factor. There are various other factors which weigh in his favour. Accused is a youthful first offender, he pleaded guilty to the charge albeit that this money was not recovered.

The fact that he was not a stranger to the complainant is in my opinion mitigatory particularly when it is born

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without number that the first line of sentence of first offenders for less serious crimes particularly where a custodial sentence of less than 24 months is to be considered, the court must as of necessity consider community service. The appropriate authorities have indeed gone out of their way by holding seminars in an attempt to educate judicial officers to accept positive changes in our sentencing policies. There is nothing on the record that shows that the learned trial magistrate ever considered this approach. Failure to consider it in circumstances where there is a clarion call for one is in my opinion a misdirection which therefore invites interference by this court as

the sentence is manifestly excessive.

In addition, our courts should as a matter of a practical approach accept that due to the run-away inflation the amount of $4 000 is nothing but a figure as compared to its value in real monetary terms.

The other point raised is whether it is necessary to suffix a term of imprisonment with the words “imprisonment with labour”. This wording is found in the previous Criminal Procedure and Evidence Act which specifically provided for imprisonment with labour. However the position has since changed, Part XVII of the Criminal Procedure and Evidence Act [Chapter 9:07] refers to imprisonment *simpliciter*. The prison authorities under the Prisons Act [Chapter 7:11] are empowered to use their discretion as to what type of labour if any, a convicted prisoner should perform and in what manner it should be performed. The courts therefore do not have power to determine the day to day performance of the said punishment. Their mandate ends after pronouncement of the sentence which

orders lodgement in prison. To order the prisoner to perform labour would be an usurpation of the prerogative bestowed on the prison authorities. In *S* v *Nyambo* 1997(2) ZLR 333(H) at 338A-B SMITH J had this to say:-

> "It is not for the magistrate to require that a committed person who is sentenced to imprisonment must perform labour. It is therefore wrong for a magistrate to sentence a person to imprisonment with labour."

See also *S* v *Ketinah Chiwai, Juliet Chamborara & Jona Evylene* HH-93-02 (cyclostyled judgment).

As pointed out above the sentence of 12 months imprisonment of which 7 months imprisonment is suspended for 5 years is unduly harsh in the circumstances. Accordingly, the conviction is confirmed but the sentence is set aside and substituted

by the following:

> "3 months imprisonment of which 1 month is suspended on condition accused restitutes complainant the sum of $4 000 through the clerk of court by 4pm 15 October 2003."

Chiweshe J …….. I agree