Judgment No. HB 40/2003
Case No. HC 450-451/2003
CRB ENT 1287/02

THE STATE

Versus

ARTHA GUMEDE

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

Review Judgment

CHEDA J: This is a review judgment referred to me by the scrutinising Regional Magistrate. The learned scrutinising Regional magistrate raised three queries, with the trial magistrate, which he has since conceded to. The accused was aged 15 years was charged with assault with intent to do grievous bodily harm to which he pleaded guilty. He was convicted and sentenced to pay a fine of $2 000.

The brief facts are that complainant found accused waiting at complainant's yard in the evening. He questioned accused as to what he was doing in the yard, accused without answering back, picked up a brick and struck complainant on the head thus, felling him. The medical report shows that complainant sustained a deep cut on the left eye, the injury was serious but there was no likelihood of a permanent disability and the degree of force used was moderate.

Following his conviction he was sentenced to pay a fine of $2 000 or 3 months imprisonment with labour. The first query raised by the learned scrutinising magistrate relates to the inclusion of "imprisonment with labour" when a prison sentence is imposed. In *S* v *Pride Khumalo* HB-39-03 I dealt with two issues and pointed out that in view of the new Criminal Procedure and Evidence Act [Chapter

9:07] and in particular Part XVII reference is made to imprisonment *simpliciter*. This point was dealt with by SMITH J in *S* v *Nyambo* 1997(2) ZLR 333. That case put paid doubt which always existed with regards to the couching of a sentence where imprisonment was imposed. The point which should be made clear is that the court's duty is to impose a sentence and the prison authorities see to the implementation of that sentence as they are involved in the day to day running of the prison, therefore the performance of duties in prison are their domain. It is therefore improper for the court to direct that a convicted prisoner should perform labour, for to do so, will be in my view an interference with the day to day running of the prisons. I totally align myself with the reasoning by my brother SMITH J in Nyambo's case.

The scrutinising Regional Magistrate has taken issue with the imposition of a fine alternatively imprisonment when it is clear that accused is not in a position to pay a fine and will end up serving the sentence. I agree with his reasoning. Accused is a 15 year old boy, who is not employed and apparently under someone else's custody although the record is silent on that point. The courts in meting out punishment must bear in mind that the said punishment focuses on the individual first. In other words it is the accused who must bear that punishment. However, in the event that his relatives or any other sympathiser comes to his rescue it then becomes a secondary issue. Many a time parents and/or guardians have an impression that they should shoulder sentences imposed on minors. This, in my view is not correct and it has resulted in our courts imposing fines on accused who have no means to pay in the hope that parents or guardians will pay for them. This approach is in my view wrong. If the court intends to keep an accused out of custody then the sentence should be clearly focused towards that goal and not depend on the hope of someone else coming

to his rescue unless there is clear evidence that a third party has volunteered to do so. This in my opinion will serve as a personal deterrent on the accused. In the present case it is clear that accused has no means to pay a fine and to impose a fine with an alternative of imprisonment is legally baseless, as it does not serve any purpose. See also *S* v *Windie* HH-201-97 and *S* v *Chigwedere* HH-48-99.

These courts have on numerous occasions pointed out the need for the judicial officers to regard community service as their first port of call when it comes to sentencing. Our sentencing policy has changed as it is now focusing on non-custodial sentences for less severe crimes. Where a court contemplates a prison term of less than 24 months imprisonment it should, as a rule consider community service first. The present case is one where justice would have been seen to have been done by sentencing accused to perform community service. In the light of this I find that the sentence imposed was indeed harsh.

The last point is that relating to delay. The accused was sentenced on 4 October 2002, the record left the trial magistrate's office on 4 November 2002, a month later. It landed on the Senior Regional Magistrate on 3 December 2002, that is two months later and was submitted at the Registrar's office on 18 February 2003. It has taken 4 months for the record to be placed before me. Between 4 December 2002 and 13 February 2003 there was correspondence between the trial magistrate and the scrutinising Regional Magistrate. I have no quarrels with that delay, as it was necessary for clarification's sake. The explanation by the trial magistrate that he was away between mid-October to 4 November 2002 is hallow as he does not say what he was doing with the record during that period. The absence of a reasonable explanation leads one to the unavoidable conclusion that the trial magistrate was hell bent on frustrating the proper administration of justice by holding on to the record in

order for the accused to serve his sentence without possible interference. This type of conduct on the part of a judicial officer is to say the least deplorable and should be condemned in the strongest terms. Judicial officers need to be reminded that on their appointment they took an oath of office in terms of section 7(1) as read with section 9 of the Magistrates' Court Act [Chapter 7:10] which reads:

> "I, A.B., do promise and swear that I will faithfully, impartially and diligently execute to the best of my abilities the duties of the office of magistrates. So help me God."

This undertaking should always jog a judicial officer's memory whenever an accused appears before him. It is in the interest of justice that the record of proceedings be submitted to the scrutinising magistrate or reviewing judge within [7] seven days as is stipulated in the Magistrates' Court Act. In addition, judicial officers should learn to respond to queries from those in authority with minimum delay bearing in mind that, all these queries are aimed at clarifying what is unclear which if left as it is might result in the miscarriage of justice.

It is perhaps necessary that judicial officers should cast their prejudices aside not only about those who appear before them but those who are above them as well. The delay occasioned in this matter has prejudiced the accused. I hope that it is not repeated by the trial magistrate and those of like mind.

The accused has obviously served his sentence by now. I, however, confirm both conviction and sentence as in the circumstances is not seriously out of step with other decided cases.

Chiweshe J ……. I agree