Judgment No. 67/2003
Case No. HC 1546/2003
Case No. HC 1547/2003
CRB ENT 231/03 &
ENT 446/03

THE STATE

Versus

(1) C.M. (A JUVENILE)
(2) Z.D. (A JUVENILE)

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 JUNE 2003

Criminal Review

NDOU J: Both accused persons were convicted by the same trial magistrate at Entumbane Magistrates' Court, Bulawayo. They were convicted in separate trials but I have dealt with them in this review as the issues I am concerned about are similar. Both accused persons are juvenile female first offenders but the record does reflect that the proceedings were held in camera. On the one hand, if proceedings were indeed held in camera it is important that this be evident from the record. If, on the other hand, the proceedings were held in an open court then this was an error on the part of the learned trial magistrate.

In the C.M. case the accused person is aged 16 years. She was employed by the complainant. She stole two dresses and a heater from her employer. Value of the stolen property was put at $40 000. None of the stolen items were recovered. At the time of theft she was earning $3 000,00 per month. After very brief mitigation she was sentenced to 18 months imprisonment with 10 months suspended on conditions of restitution.

In the Z.D. case the accused person is aged 17 years. She is related to the complainant in that she is born of his wife's younger sister. During the month of

February 2003 the accused person was given cash amounting to $24 500,00 to give to the complainant. She did not do so. She, instead converted the said cash for her own use. She used all the money to pay for accommodation and food at a lodge in the City of Bulawayo. None of the stolen money was received. Once again there was very brief pre-sentencing information extracted from the accused persons. At least in her case her father was called to testify. Strangely he was only asked two questions,-

"Q - You are the father of the accused?
A - Yes
Q - Are you prepared to assist your daughter pay restitution?
A - No"

The accused was not afforded an opportunity to question him. This is irregular. She was thereafter sentenced to 24 months imprisonment with 18 months suspended on condition of restitution.

In both cases the learned magistrate did not individualise the sentence by conducting meaningful pre-sentence investigations. The accused persons, as already alluded to, are juvenile first offenders. In the circumstances, it is expected of trial courts to seriously consider non-custodial sentences. The learned magistrate seems to have paid lip service to the often stated principle that a sentence of imprisonment is 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 *Sikhunyane* 1994(1) SACR (TL). The basic principle is that first offenders should as far as possible be kept out of prison.

In both these cases community service should have been considered because the effective sentence was below 24 months imprisonment – *S* v *Sithole* HH-50-95 and *S* v *Santana* HH-110-94. I have to emphasise that there is no room for instinctive sentencing in our jurisdiction. Over the years, our superior courts have adopted a

rational approach to sentencing – see *Maponga* v *S* HH-276-84; *S* v *Moyo* HH-63-84, *Zindoda* v *S* AD 15-79 and *S* v *Ngulube* HH-48-02. The sentence must fit both the crime and the offender, 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). Imprisonment of juveniles based on perfunctory inquiry is not in accordance with true justice. The magistrate sent these juveniles to prison upon the minimum of pre-sentence information. The picture presented by the scant information is so incomplete that it cried out for further investigation and elucidation. The trial court left the assessment of punishment to a haphazard guess based on no or inadequate information. This is wrong and, *in casu*, this has occasioned serious prejudice to these juveniles – see *R* v *Taurayi* 1963 (3) SA 109 (R) and *S* v *Maxaku* and *A* v *Williams* 1973 (4) SA 248 (C).

In both cases there has been an improper exercise of the sentencing discretion warranting interference. In C.M.'s case I confirm the conviction. I, however, set aside the sentence imposed by the trial court and substitute in its place the following:-

> "6 months imprisonment of which 4 months is suspended for 3 years on condition the accused in that period does not commit any offence involving theft or dishonesty and for which she is convicted and sentenced to imprisonment without the option of a fine."

In Z.D.'s case the conviction is confirmed. I, however, set aside the sentence imposed by the trial court and substitute in its place the following:-

> "5 months imprisonment of which 3 months is suspended for 3 years on condition the accused in that period does not commit any offence involving theft or dishonesty and for which she is convicted and sentenced to imprisonment without the option of a fine."

In both matters the accused is entitled to immediate release.

Cheda J …….. I agree