Judgment No. HB 71/2003
Case No. HC 345/2003
HC 346/2003
HC 1717-18/2003

THE STATE

Versus

(1) CELESANI BERMAN (CRB 10468/02)
(2) TRACY MPOFU (CRB 10459/02)
(3) ABRAHAM BANDA (CRB INY 195/03)
(4) NKULULEKO MOYO (CRB INY 207/03)

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 26 JUNE 2003

Criminal Review

CHEDA J: These 4 matters were referred to me by the learned scrutinising Regional Magistrate. They contain the same issues and hence I will deal with them as one.

The learned trial magistrate raised an issue which with respect should not have had a bearing on a particular accused namely that on many occasions shoplifters have given wrong names and addresses which makes it difficult to trace them. While this indeed may be true, it is not proper to paint all of them with one brush, as it were. Our courts' approach in sentencing is that they look at an individual's personal circumstances first. There are however, instances where members of the public's conduct and or behaviour can influence a judicial officer's decision on an individual but this in my view should only be resorted to in situations where failure to apply that principle will lead to substantial prejudice to the basic principles of the administration of justice. In *Mayberry* v *S* HH-248-86 at page 1 EBRAHIM J (as he then was) stated –

> "Reduced to its bare essential, sentencing involves a process of weighing up against each other the nature of the crime and the crucial interests of society. There is no scale of which these matters can be measured. In some cases the

> interests of the individual accused will pre-dominate, in other the interest of society.
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> In the end result the punishment imposed depends upon the judicial officers' view of the particular case. Each offender is in a sense, unique. He differs from other miscreants by reason of his age and circumstances, his personal history, his mental make-up, his good or bad character, the temptation to which he was exposed and his apparent reformability."

This in fact is the time-honoured approach which is also the South African approach. In *G* v *Scheepers* 1977(2) GA 154 VILJOEN AJA stated (headnote) –

> "It is an established principle of our law that in regard to punishment, there should be individualisation. Not only just the nature of the offence be taken into account and the interest of the public protected, but the interests of the offender should also be cared for. In the process of individualisation sociological circumstances, punishment experience factors, the prospects of rehabilitation and other relevant circumstances which surround the individual can not be lost sight of. However, desirable uniformity might otherwise be, the observance of these factors must necessarily encroach thereupon."

An accused must feel that he has been punished for the offence pertaining to him and not to other people. When this feeling sets in, the accused will no doubt view the punishment imposed as unjust. However, there are instances where a general deterrence is called for, but I am of the view, that this case is not one of them.

The learned scrutinising magistrate pointed out that the problem of default can be traced back to the police themselves. I agree with this observation. It will therefore be wrong to shift the bureaucratic inefficiency of the system to the accused who has no absolute say in the administration of justice in this instance. If there is indeed an administrative problem it should be solved administratively by referring it back to where it started.

The learned trial magistrate has unfortunately adopted a stereo type attitude towards this class of offenders. This, with all respect should be discouraged.

Community service is now part of our law and it has to be encouraged at all costs. It should also be borne in mind that failure to give an accused time to pay when circumstances are crying out for one, is in itself a misdirection which this court is at liberty to interfere with.

The other aspect relates to the couching of a prison term. It is no longer necessary to order that an accused serves a term of imprisonment with labour - see *S* v *Nyambo* 1997 (7) ZLR 333 at 337; *S* v *Khumalo* HB-39-03; *S* v *Gumede* HB-40-03. There has been prejudice to the accused as a result of how the trial was conducted, however in view of the amount involved and probably due to the fact that the fine was paid, though after the accused had done some soul searching in order to avoid prison, the prejudice is not that which can necessitate the withholding of my certificate.

The proceedings are otherwise confirmed as being in accordance with true and substantial justice.