Judgment No. HB 85/2003
Case No. HC 798/2003
CRB G 1157/02

THE STATE

Versus

NGONIDZASHE NKALA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 24 JULY 2003

Criminal Review

NDOU J: The accused aged 21 years was convicted at Gwanda Magistrates' Court of theft on his own plea of guilt. Nothing turns on the conviction. The salient facts are that the accused and two others stole a satchel containing items of clothing at Collen Bawn Beerhall. They took the property to their place of abode and shared the loot. The value of the stolen property is $43 000,00. Property valued at $3 500 was recovered. The recovery was not through a change of heart on the part of the accused but as a result of police efforts. The accused is of single marital status. At the time of the offence he was employed and in receipt of a monthly salary of $3 000,00. He indicated to the trial magistrate that he wanted to use the stolen property. The trial magistrate did not consider the option of community service. On reflection he concedes that he should have considered community service. The accused was sentenced to 24 months imprisonment with 6 months thereof suspended on the usual conditions of good behaviour. A total effective sentence of 18 months imprisonment for theft of property valued at just $43 000,00. The trial magistrate did not conduct any meaningful pre-sentencing investigations. I accept that with current shortage of manpower, magistrates are operating under immense pressure.

However, in cases where custodial sentences are being considered without fines as alternatives, meaningful investigations and proper assessment of the facts are expected. *In casu* the trial magistrate 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) SA CR (TL) and *S* v *C M (Juvenile) and Z D (Juvenile)* HB-67-03. The basic principle as far as first offenders are concerned is that they should be kept out of prison.

This is a case where community service should have been considered. The accused is a youthful first offender. The effective sentence is under 24 months imprisonment.

Over the years our superior courts have emphasised the need for a rational approach to sentencing. 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 – *S* v *Sparks and Ano* 1972 (3) SA 396 (A); *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.

Sentence is the discretion of the trial court and at this level one has to be careful not erode such discretion. I will not interfere with the sentence simply because I consider it to be severe. I will, however, interfere with sentence if it is disturbingly inappropriate - *Ramushu and Ors* v *S* SC 25-93 and *Musindo and Ors* v *S* HH-25-02. In my view the sentence imposed is disturbingly severe amounting to an improper exercise of sentencing discretion. As indicated with the benefit of hindsight, the trial magistrate agrees that community service should have been considered. I agree with his latter position – *S* v *Sithole* HH-50-95 and *S* v *Santana* HH-110-94.

The accused was sentenced on 27 December 2002. He has already served over six months imprisonment. Community service is, therefore, no longer an option in the circumstances. The period served will suffice.

I, accordingly, order that the conviction be and is hereby confirmed. The sentence imposed by the trial court is set aside and substituted as follows:

> "9 months imprisonment of which 4 months is suspended for 3 years on condition the accused in that period does not commit any offence of theft or dishonesty and for which he is convicted and sentenced to imprisonment without the option of a fine."

The accused is entitled to his immediate release.

Chiweshe J ………………………… I agree