Judgment No. HB 89/2003
Case No. HC 1954/2003
CRB REG 351/03

THE STATE

Versus

CHRISTINE MPOFU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 AUGUST 2003

Criminal Review

NDOU J: The accused was aged 43 at the time of her trial. She was charged with, and was convicted of theft by a Regional Magistrate in Bulawayo. She was properly convicted and, in my view, nothing turns on the conviction. She was sentenced to 5 years imprisonment with 2 years suspended on the usual conditions of good behaviour.

The relevant facts are that the accused was employed at the complainant's residence. The accused was not directly employed by the complainant but rather by her husband. The set up was that the complainant had her own domestic worker and her husband employed the accused although the couple stayed under the same roof. The accused resided at the complainant's yard at the domestic worker's quarters. She has no other home in Bulawayo as she comes from Gokwe. She stole from the main house and kept the stolen items at her living quarters in the same yard. She is married and her husband was forced to move in with her at her workplace. He is disabled and did piece jobs. After her arrest he disappeared leaving her children at the complainant's yard. She had been employed by the complainant's husband for eight years. She was in receipt of a salary of $5 000 per month. She has two children, the

youngest being four years and the eldest being twelve years. All the stolen goods were recovered. In fact the stolen property never left the complainant's yard as alluded to above. She is a first offender. The property she stole comprised mainly of household effects, clothes and electrical gadgets. The stolen property is valued at $1 226 000,00. As indicated all was recovered. She stole the property over a period of time i.e. between 1 November 2002 and 30 May 2003. The trial magistrate rightly found that she abused a position of trust and that such offences are prevalent. A reading of his judgment reveals that the single major aggravating factor working against her is the value of the stolen property.

Magistrates must, however, give careful consideration to the nature of stolen articles and value stated and then decide whether or not it is reasonable and acceptable. In this regard I find the remarks of SMITH J in *S* v *Damutoni and Ano* HH-106-02 instructive. On page 2 of his cyclostyled judgment the learned judge said –

> "In *Muzondo* v *Muzondo* 1985 (2) ZLR 240 (S) at 245D McNALLY JA said –
>
> I do not think that the High Court, sitting as it was in this case as a family court, should be required to demand the same standard of accurate accounting as it might do in a commercial case. The court, in a proper case, is entitled , I would think, to use its general knowledge based on the many similar applications made to it each week. Obviously, if evidence is lacking, it will have to err on the side of caution, and it may be that in some cases absolution from the instance may be fairer to an application than a low award., In saying that I do not intend to go in principle beyond what has been said generally in relation to claims when the evidence as to quantum is scanty, but where it is clear that some quantum exists. I am thinking of cases such as *Esso Standard SA (Pty) Ltd* v *Katz* 1981(1) SA 964 (AD) at 969H *et seq* and *Mkwananzi* v *Van der Merwe & Ano* 1970(1) SA 609 (AD) at 631B-632. I am saying only that a court may perhaps be more tolerant of a failure to adduce evidence where it has a working knowledge of the level at which maintenance orders are regularly made."

In my view, similar considerations apply in relation to cases of theft where the value of the stolen property is mentioned. Clearly, in the vast majority of cases, it would be the complainant who had estimated the value of the property that was stolen from him or her. Some complainants would be reasonably realistic, whilst others may not be so realistic. It is for the magistrate to decide whether or not he considers the valuation to be realistic, having regard to the description of the property that was stolen. He has a working knowledge of the value of ordinary common or garden or household articles. He must not blindly accept that the value stated in the outline of the state case is correct. He must give careful consideration to the nature of the articles that were stolen and to the value stated, and then decide whether or not it is reasonable and acceptable … Without some evidence as to the quality of the goods that were stolen, it is difficult to accept that the valuation … is realistic."

Another factor is that nowadays it is not safe to obtain guidance from decided cases as far as the impact of the value of the stolen property on the ultimate sentence to be imposed. As rightly pointed out by MUNGWIRA J in *Karimazondo and Ano* v *Minister of Home Affairs* HH-191-01 at page 12 of her cyclostyled judgment –

> "Since the date of the above judgment (1999) the monetory unit in this country has been on perceptible and alarming downward spiral with the result that the Zimbabwe dollar is now worth substantially less than in 1997" – See also *Biti* v *Minister of State Security* 1999(1) ZLR 165(5) at 171.

This factor has to be borne in mind when a lot of weight is attached to the value of the stolen property as is the case here. That way a more realistic value will be used in the assessment of the accused's moral blameworthiness. In quest for rational sentencing magistrates should not only carry out sufficient pre-sentence investigation. They must also utilise information obtained from such an exercise to arrive at a proper sentence. This is so because after the conviction, the court is faced

with the most difficult and morally most demanding task – that of formulating a sentence that will benefit both the individual offender and society. An American judge put it in the following terms –

> "In no other function is the judge more alone, no other act of his carries greater potentialities for good or evil than the determination of law society will treat its transgressors."

Kaufman I R *Sentencing: The Judge's Problem* Federal Probation Vol XXIV No I (March 1960) at page 3. In *United States* v *Waters* 437F 2d 722, 723 DC Civ (1970) another American judge remarked –

> "What happens to the offender after conviction is the least understood, the most fraught with irrational discrepancies, and the most in need of improvement of any phase in our criminal justice system."

Judge Frankel from the United Stated District Court, Southern District of New York remarked in an even more harsher tone when he described the American sentencing practice of the judiciary as follows –

> "… a regime of unreasoned, unconsidered caprice for exercising the most awful power of organised society, the power to take liberty and life by process of what purports to be the law … the sentencing stage has come to strike me as the key focus of disease in our apparatus of punishment. The disease is insidious; the legal profession, entrusted with the power and responsibility, has tended (in the law school and beyond) to ignore sentencing as an anti-climatic, unruly, doctrinally unalluring area"

Frankel M E *Lawlessness in Sentencing* (1972) 41 University of Cincinnati Law Review No I at page 2.

If we are not careful such statements can also become true of systems like ours in the face of increasing crime. In *casu* the accused's family has fallen apart as a

result of her arrest. Her husband disappeared after her arrest leaving her two minor children by themselves at the complainant's premises. The children have since moved to Lupane to stay with relatives. The trial magistrate emphasises the question of replacement costs. While this is relevant it seems he lost sight of the fact that we are here only dealing with potential prejudice as all stolen (i.e. for which she was convicted) was recovered within the complainant's yard.

Taking all the above factors into account, I feel that the sentence imposed does not meet the criteria of fitting the crime, fair to the state and the accused and blended with a measure of mercy – *S* v *Sparks and Ano* 1972(3) SA 396(A). While accepting that sentencing is pre-eminently a matter for the discretion of the trial court, and that I should be careful not to erode such discretion, I hold the view that the sentence here is disturbingly inappropriate. *Ramushu & Ors* v *S* SC-25-93 and *Mavhundwa* v *S* HH-91-02. The element of mercy is missing. The sentence was not sufficiently individualised. There is, therefore, an improper exercise of sentencing discretion warranting interference.

I, accordingly, confirm the conviction. I, however, set aside the sentence of the trial court and substitute it as follows:

> "30 months imprisonment, of which 15 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."

Cheda J ……………………. I agree