Judgment No. HB 140/04
Case No. HC 4317/04
CRB 3186/04

THE STATE

Versus

T M (JUVENILE)

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 11 NOVEMBER 2004

Criminal Review

NDOU J: The accused, a juvenile aged 16 years, was convicted of shoplifting by a Gweru Magistrate. The accused is still at school doing form 3. He had $44 000,00 on his person at the time Of his conviction. He did not have savings nor assets. The accused stole two 30 amps cooker units at O K Supermarket valued at $270 000 and they were all recovered.

The inquiry into mitigation by the trial magistrate was perfunctory and unhelpful. The reasons for sentence are incomprehensible both in form and content. The reasons for sentence imply that the accused breached trust by stealing from an employer. This shows that the trial magistrate did not properly apply his mind to the facts of the case. The record of proceedings clearly shows that the accused was not employed at all, let alone by O K Supermarket. This misdirection resulted in a school going juvenile BEING sentenced to imprisonment of 60 days (he failed to raise the fine.)

The learned scrutinising Regional Magistrate, Central Division, queried this anormally. Apparently, realising that time was of the essence, the Provincial Magistrate, Midlands, did not invite the trial magistrate to respond to the query raised

by the scrutinising Regional Magistrate. Instead he sent the record of the proceedings straight to the High Court under cover of urgency for review. The procedure adopted by the learned Provincial Magistrate is correct and it is encouraged in cases of apparent gross prejudice to the accused in terms of section 29(4) of the High Court Act [Chapter 7:06] – *R* v *Van Grevnen* 1939 TPD 167; *R* v *Chidongo* 1939 SR 210; *S* v *Nyathi* HB-90-03; *S* v *Ncube & Anor* HB-48-04 and *Criminal Procedure in Zimbabwe* – John Reid Rowland at 26-11. This court has wide review powers to ensure that the accused person and the state receive fair treatment and that the proceedings of the lower court were substantially just – *R* v *Leggate* 1941 SR 2 and *Fikilini* v *Attorney General* 1990(1) ZLR 105(S). This system is designed to curb any misdirection or arbitrary exercise of power by the trial court.

In *casu*, the juvenile pleaded guilty showing some measure of contrition. He stole on account of need as opposed to greed. By saying the accused stole from his employer and the need to curb such thefts which involved breach of trust, the trial court erroneously sentenced this juvenile on facts that do not apply to him. Such a factual error resulted in the trial magistrate not realising that he was dealing with a petty offence committed by a juvenile in an hour of need. The trial magistrate did not even bother to request for a Probation Officer's report. Imprisonment of juveniles based on a perfunctory inquiry is not in accordance with true justice. The trial magistrate left the assessment of punishment of a juvenile to a haphazard guess based on inadequate information. This is a wrong approach which has resulted in serious prejudice to the juvenile. It is trite that 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 & Anor* 1972(3) SA 396(A); *S* v *Mapanga* HH-276-84; *S* v *Moyo*

HH-63-84; *S* v *Ngulube* HH-48-02; *S* v *C M (Juvenile) and Anor* HB-67-03; *R* v *Taurayi* 1963(3) SA 109(R) and *S* v *Maxaku* and *S* v *Williams* 1973(4) SA 248 (C). The sentence in *casu* is fraught with irrational and factual discrepancies. The exercise of sentencing discretion is unreasoned and based on unconsidered caprice. It warrants interference as rightly pointed out by the learned Provincial Magistrate.

Accordingly, the conviction is confirmed. The sentence of the trial court is set aside and substituted as follows:

"Cautioned and discharged"

The accused will be immediately liberated.

Cheda J ……. I agree