

**THE STATE**

**Versus**

**LILIAN NCUBE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 20 SEPTEMBER 2007

Criminal Review

**NDOU J:** The accused, a young female first offender aged 23, was convicted by a Gweru Provincial Magistrate of two counts of theft, commonly known as shoplifting, as defined in section 113(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. From the record of proceedings the convictions are proper. On each count, the accused was sentenced to 18 months imprisonment. Of the total 36 months imprisonment, 12 months imprisonment was suspended for 5 years on conditions of good future behaviour.

The background facts of the matter are the following.

**Count 1:** On 24 February 2007, at 1000 hours, the accused stole various items at T M Supermarket in Gweru. She put the items in plastic shopping bags and walked past the till points. As she was walking out the shop she was stopped and searched by a security guard and the property was recovered leading to her apprehension. Value of the stolen items is \$189 000,00.

**Count 2:** It is not clear from the record what transpired after her apprehension in count 1. But, it is alleged that about two hours later on the same day the accused entered O K Supermarket. She picked a bucket and loaded it with various items and walked out of the shop. She was arrested by a security guard outside the shop. The value of the stolen property is \$204 500,00 and was recovered.

At the time of the sentence, the accused was 5 months pregnant. The learned trial magistrate did not attach weight to this material mitigatory factor. It is trite that it is highly undesirable to imprison a pregnant woman and where a term of

imprisonment is justified, it should be suspended on appropriate conditions – *S v Samuel* 1976 (1) RLR 222 (G); *S v Mpofo* 1992 (2) ZLR 68 (H); *S v Ncube* 1996 (1) ZLR 577(H) and *Mativenga v S* HB 117-06. By overlooking the accused person's pregnant status, the trial magistrate misdirected herself. On account of such misdirection, I am at large as far as the sentence is concerned. From the scant pre-sentence enquiry carried out by the trial magistrate, the accused was placed under tremendous temptation in the supermarkets and ended up stealing. This is an understandable human failing which greatly reduces her moral blameworthiness – *S v Vherukayi and Anor* HH-42-87; *S v Ncube* HB-20-90 and *S v Paulo & Ors* 1971 (1) RLR 251(A).

The total value stolen is under \$400 000,00 in both counts. In striking a balance one has to arrive to the conclusion that a fine coupled with a wholly suspended prison sentence will meet the justice of the case.

Accordingly, the convictions in both counts are confirmed. However, the sentences imposed by the trial court are set aside and substituted by the following:  
**Count 1:** \$250 000 or in default thereof 3 months imprisonment.  
**Count 2:** \$300 000 or in default thereof 3 ½ months imprisonment.  
In addition, 3 months imprisonment all of which is suspended for 3 years on condition the accused in that period does not commit an offence of theft or dishonesty and for which she is convicted and sentenced to imprisonment

without the option of a fine. The accused is entitled to immediate release as she has already served the full alternative term of imprisonment.

Judgment No. HB 99/07

Case No. HC 2175/07

CRB 552/07

3

Cheda J ..... I agree