Judgment No. HB 11/05
Case No. HC 3794/04
CRB 2125/04

THE STATE

Versus

TSITSI MHUNGU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 FEBRUARY 2005

Criminal Review

NDOU J: The accused, a young woman aged 20 years, was convicted of infanticide by a Gweru Provincial Magistrate sitting in Lalapanzi. She was sentenced, according to the record, to 3 months imprisonment all of which was suspended as follows: 1 month on conditions of good behaviour and the remaining two months on condition that she performs 630 hours of community service at stated clinic. On the charge, the trial prosecutor did not state the particular section of Infanticide Act [Chapter 9:12] that the accused is alleged to have contravened. However, from the state outline and the essential elements canvassed with accused it seems that the intention was to charge a contravention of section 2(1) of the Act. There would be no prejudice to the accused if the section is inserted in the charge sheet.

The learned scrutinising Senior Regional Magistrate, Central Division, queried, *inter alia*, the appropriateness of the sentence. In order to give context to the query I propose to quote from his minute:-

> "The penalty provided for is a fine not exceeding $1 000 000,00 or 5 years imprisonment with labour. In the case the 20 year old accused gave birth secretly in a blair toilet and threw the newly born baby into the toilet. The baby was later rescued after a lady teacher heard the baby crying but the baby later died due to a head injury caused by falling on to a hard surface."

In response to the query the trial magistrate gave the matter a new twist. She stated that she in fact pronounced in court a sentence of 3 years imprisonment with one year suspended on condition of good behaviour and the remaining 2 years on condition that the accused performs community service as states above. She indicated that she erroneously endorsed "months" instead of "years". When the record was re-submitted there were veil attempts to make these changes. I do not think the trial had the power to make the changes at that stage. In a bid to verify the trial magistrate's response the learned scrutinising Regional Magistrate embarked on a thorough, and indeed commendable investigation of what transpired. He checked and found that the criminal record book entry tallied with the sentence apparent on the record. He also checked with the trial prosecutor who confirmed that the trial magistrate pronounced "months" and not "years". In any event the entry in the docket of the sentence depends on such verbal pronouncement by the trial magistrate. I agree with the conclusion by the learned Regional Magistrate that the sentence reflected in the record is what was pronounced in court. If what the trial magistrate is now saying is what she intended she certainly did not pronounce in court and the sentence cannot be changed to reflect that.

The sentence, as pronounced in court, is manifestly lenient. No wonder the trial magistrate attempted to put it in line after the query.

Accordingly, I amend the charge sheet to reflect that the accused was charged and convicted of contravening section 2(1) of the Infanticide Act[Chapter 9:12]. I am, however unable to confirm the sentence as being in accordance with true and substantial justice. I accordingly withhold m certificate.

Cheda J ……. I agree