Judgment No. HB 4/05
Case No. HC 4538/04
CRB ENT 216/03

THE STATE

Versus

CHIPO MAPHOSA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 27 JANUARY 2005

Criminal Review

NDOU J: The accused was aged 16 years, a juvenile, at the time of her trial. She was charged with, and convicted of theft by a Provincial Magistrate in Western Commonage. Although she was a juvenile at the time of the trial there is no evidence on record that the proceedings were held in camera. She was properly convicted of theft of her erstwhile employer's blouse, a pair of sandals and cash amounting to $150 000,00. In my view, nothing turns on the conviction. Before I deal with the sentence I wish to highlight a serious problem at Western Commonage Magistrates' Court where records are submitted for review and scrutiny very late contrary to the provisions of sections 57 and 58 of the Magistrates' Court Act [Chapter 7:10]. The above statutory requirement state that the records for automatic review must be submitted within one week of the determination of the case. The excuse for the delay is that there was no typist during the period in question. The matter in *casu,* was determined on 6 May 2003 and the record was only forwarded for review in December 2004 i.e. over one and a half years later. The purpose of review is inevitably defeated by the delay.

Coming to the sentence, the accused was sentenced to 40 months imprisonment with 18 months suspended on the usual conditions of good behaviour

and restitution. The question of community service was not canvassed during mitigation. The trial magistrate only made reference to this option in her reasons for sentence. As alluded to the accused was a juvenile at the time. She is a first offender. She had been employed by the complainant for two weeks. The blouse and the pair of sandals were recovered. The amount not recovered was $146 000,00. Generally, the sentence was not informed by the meaningful pre-sentence investigations. As the accused was a juvenile the trial magistrate should have seriously considered a non-custodial sentence. Overall, the trial magistrate paid lip service to the 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 – *S* v *Kashiri* HH-174-94; *S* v *Gumbo* 1995(1) ZLR 163; *S* v *Sikhunyane* 1994 (1) SACR (TL); *S* v *CM and ZD* HB-67-03 and *S* v *TM* HB-140-04. The sentence imposed is grossly out of proportion with the moral blameworthiness of the juvenile accused. It is trite that sentence must fit both the crime and the offender, be fair to the state and the accused and be blended with a measure of mercy – *S* v *Sparks and Anor* 1972 (3) SA 396 (A); *S* v *Mapanga* HH-276-84; *S* v *Moyo* HH-63-84; *S* v *Ngulube* HH-48-02; *R* v *Taurayi* 1963 (3) SA 109 (R) and *S* v *Maxaku*; *S* v *William* 1973 (4) SA 248 (C). The sentence here does not meet these requirements. There has been an improper exercise of sentencing discretion warranting interference on review.

Accordingly, the conviction is confirmed. The sentence is however, set aside and substituted as follows-

"12 months imprisonment of which 6 months is suspended for 3 years on condition that the accused in that period does not commit any offence involving dishonesty and for which she is sentenced to imprisonment without the option of a fine."

The accused is entitled to immediate release.

Cheda J ……. I agree