Judgment No. HB 86/07
Case No. HC 2845/07
CRB VF 1192/06

THE STATE

Versus

J M

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 9 AUGUST 2007

Criminal Review

NDOU J: The trial magistrate who dealt with this matter convicted the accused of assault and sentenced her on 11 July 2007 to 8 months imprisonment with half thereof suspended for 5 years on usual conditions of future good behaviour. The matter was referred for review with a minute in the following terms:

> "… I sentenced her to an effective 4 months imprisonment, 4 months is suspended on condition of good future conduct. It was brought to my attention after sentence that she is HIV positive and is taking Anti-Retroviral drugs. Further to that prison authorities indicated that her drugs are running out shortly. Had her physical condition been brought to my attention before sentence I would most possibly have sentenced her to community service. … I no longer believe in light of her condition that the sentence I visited on her is appropriate. I do not believe again that she will be able to source the Anti-Retroviral drugs in our prison system. I have attached her medical cards."

Under normal circumstances, the fact that she is HIV positive and has become a burden to the prison authorities would not entitle us to intervene. This would be an administrative issue to be dealt with through the Ministry of Justice, Legal and Parliamentary Affairs in terms of section 116 of the Prisons Act [Chapter 7:11]. This issue was dealt with in detail by CHEDA J in *Mpofu* versus *Commissioner of Gwanda Prison and Ors* HB-76-06.

The facts of this case are distinguishable from the *Mpofu* case, *supra*. In this case, the magistrate's minute was attached to the record when it was submitted for automatic review so we are still seized with the matter and I will deal with the matter in that context.

The conviction is proper and nothing turns on it. The trial magistrate misdirected himself, not because of the reason he advanced on the accused's medical

condition, but for a different reason altogether. This court has, in several cases stated that the trial magistrates should seriously consider community service in cases where, if imprisonment were imposed, it would not exceed 24 months – *S* v *Tigere* HH-225-93; *S* v *Gumbo* 1995 (1) ZLR 163; *S* v *Manyevere* HB-38-03; *S* v *Majaya* HB-15-03; *S* v *Shariwa* HB-37-03 and *S* v *Mpofu* HB-73-03. Failure by the trial magistrate in this case is a misdirection which warrants interference with the sentence. Community service is no longer feasible. We order the immediate release of the accused for these reasons.

Accordingly, the conviction is confirmed and the sentence imposed by the trial court on 11 July 2007 is set aside and substituted by the following:

> "8 months imprisonment all of which is suspended for 5 years on condition the accused in that period does not commit any offence of assault or involving violence upon the person of another and for which she is convicted and sentenced to imprisonment without the option of a fine."

Cheda J ………………………….. I agree