Judgment No. HB 37/2003
Case No. HC 606/2003
CRB SHU 343/02

THE STATE

Versus

TAPIWA SHARIWA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 13 MARCH 2003

Criminal Review

NDOU J: The accused was convicted by a Provincial Magistrate, Gweru at Shurugwi Circuit Court of theft of stock and sentenced to undergo 8 months imprisonment. No part of the sentence was suspended. Nothing turns on the conviction. The learned scrutinising Regional Magistrate, Central Division, is concerned about the appropriateness of the sentence imposed. He holds the view that the sentence is disturbingly severe. I agree with his opinion, and I have, with the concurrence of my brother Judge CHIWESHE, ordered the immediate release of the accused. The reasons for doing so are now provided in this judgment.

I agree with the view of the learned scrutinising Regional Magistrate that the sentence imposed by the learned trial magistrate induces a sense of shock and ignores the basic sentencing principles.

The salient facts of this matter are that the accused is a young first offender aged twenty (20) years. He stole a chicken on Sunday 16 June 2002 at around 2200 hours from a chicken run. The chickens made a noise as a sign of disapproval of the accused's actions. This awakened the complainant who made a valiant attempt to stop the theft. The accused fled with the stolen chicken. He pleaded guilty and was convicted. He was not represented by a lawyer. The meagre mitigation extracted

from the accused is:

"I am aged 20 years. Not married. No children. No assets of value."

Basic elements of sentencing

It is obvious that the learned trial magistrate sentenced a youthful first offender to a custodial sentence on scant pre-sentence information. This sentence cuts across the face of decided cases of the superior courts. This intuitive approach to sentencing. I had occasion to criticise this approach in my cyclostyled judgment in *S* v *Simon Ngulube* HH-48-02 at page 2 where I stated:

> "The decision on sentence must be made on a rational and informed basis. This is an example of intuitive approach to sentencing. This approach has drawn criticism from academics in the legal fraternity e.g. R Graser in an article entitled *Sentencing as a Rational Process* (in *Crime Punishment and Correction*), journal of June 1975 26 at 30 cited and criticised the approach as crafted by United States of America Appeal Judge IRVING KAUFMAN in the following terms:
>
> "The experienced judge, like any good craftsman, does the right thing without constant awareness of his motivations. He may call it a "feel of sentencing"
>
> There is certainly no room for such instinctive sentencing in our jurisdiction. It is trite that our courts have over the years followed the rational approach to sentencing. In this approach the sentencing judicial officer determines the limits set by the legislature as far as the type and quantum of punishment is concerned and then within this, then sets limits set by the culpability of the offender. He then carefully considers the differing purposes of punishment and if they conflict, rationally balances them against each other, according to its due in the final sentence he imposes."

In other words, the sentencing court must always strive to find a punishment which will fit both the crime and the offender. The basic triad of sentencing was admirably crafted by HOLMES JA in the often quoted statement from the case of *S* v *Sparks* 1972(3) SA 396 (A) at page 410H where the learned judge held that, "punishment should fit the criminal as well as the crime, be fair to the state and to the accused and be blended with a measure of mercy."

See also *S* v *Kumalo* 1973(3) SA 697 (A); *S* v *Moyo* HH-63-84 and *S* v *Mangwere* 1972(2) BLR 139

The convicted person should not be visited with punishment to the point of being broken. This is what has happened *in casu*. Whatever the gravity of the crime and the interests of society, the most important factors in determining the sentence are the person, and the character and circumstances of the crime. See *S* v *Dualvani* 1978(2) PH, H 176(O). The determination of an equitable quantum of punishment must chiefly bear a relationship to the moral blameworthiness of the offender. However, there can be no injustice where in the weighing of offence, offender and the interests of society, more weight is attached to one or another of these, unless there is over emphasis of one which leads to disregard of the other – see *Punishment: An Introduction to Principles* by M A Rabie and S A Strauss, 3rd Ed at pages 224 to 225 and *S* v *Gaus; Mukete; Petrus; Teacher* 1980 (3) SA 770 (SWA). The court should not be over influenced by the seriousness of the type of the offence and fail to pay sufficient attention to other factors which are of no less importance in the actual case before the court – *State* v *Fags* 1980(4) SA 102 (C) at 104B. The over-emphasis of a wrongdoer's crimes and the under-estimation of his person constitutes a misdirection which justifies the substitution of the sentence *S* v *Zinn*, 1969 (2) SA 537(A).

The courts have emphasised that justice should be tempered with mercy. In *S* v *V* 1972(3) SA 611 (A) at 614 HOLMES JA stated:

> "The element of mercy, a hallmark of a civilised and enlightened administration, should not be overlooked, lest the court be in danger of reducing itself to the plane of the criminal … True mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself."

See also *S* v *Groenemeyer* 1974(2) SA 542 (C) and *S* v *Van Der Westenuizen* 1974(4)

SA 61 (C). In the words of HOLMES JA in *S* v *Rabie* 1975 (4) SA 855 (A) at 862F mercy *eschews insensitive censoriousness* in sentencing a fellow mortal, and so avoids severity in anger.

In *S* v *Roux* 1975 (3) SA 190(A) RUMPFF CJ stated that, in determining an appropriate sentence, the trial court must consider the personal circumstances of the accused, the nature of offence and the interests of society. If the trial court upon due consideration of these three basic elements finds that a lenient punishment will be suitable, the court should impose lenient sentences. Youthfulness might be such an indication. As alluded to above, youthfulness is a relevant factor *in casu.*

In light of these basic elements of sentencing, it is essential that magistrates equip themselves with sufficient and meaningful pre-sentencing information in order to come up with suitable punishment. In *State* v *Maxaku*, Williams 1973(3) SA 248 (C) at 256 STEYN J emphasised that sentencing is a distinct and separate stage in the criminal process. The learned judge stated:

> "It must be remembered that it is sanctions which ultimately sustain the system of criminal justice. It little avails the court to determine guilt or innocence in accordance with long established principles of fairness and then to leave the assessment of penalty to a hazardous guess based on no or inadequate information"

See also *R* v *Taurayi* 1963(3) SA 109 (R); *Mbuyase and Ors* v *R* 1939(2) PHH 159 (N); *S* v *Joseph* 1969(4) SA 27(N) and *Guide to Sentencing in Zimbabwe* by G Feltoe pages 1 –2. In *Amon Maponga* v *State* HH-276-84 REYNOLDS J on page 6 of his cyclostyled judgment stated,

> "Turning to his second contention, however, which is to the effect the magistrate's failure to consider factors relevant to sentence amounted to a gross irregularity, therefore more room for criticism of the magistrate's court proceedings. Here, as in every criminal trial, it is virtually necessary to the magistrate to be fully informed of all factors relevant to sentence before

> attempting to assess an appropriate penalty. It is simply not possible for any judicial officer to determine a fitting punishment unless he is appraised of all the facts of the case, including the personal circumstances of the accused. In the present case the magistrate appears to have made no inquiry as to what factors led up to the commission of the offence, and it seems doubtful that he afforded the accused the opportunity of explaining either … To pass sentence in the dark, as it were, to my mind constitutes a gross irregularity within the meaning of section 27 of the High Court of Zimbabwe Act 29 of 1981. Certainly to rely only on perfunctory inquiry that was made here could result in grave prejudice to the accused. In my view, it is important that magistrates must not regard the procedure provided in section 255 (now section 271) of the Criminal Procedure and Evidence Act [Chapter 59] as a warrant to hasten pell-mell through cases. Indeed this form of trial is so truncated, and the possibility of error, as a result is so great, magistrates should be at particular pains, and should exercise every caution to avoid injustices occurring (see Mavin Zindonda AD 15-79)"

In casu, the trial magistrate decided this matter upon the minimum of pre-sentencing information. In the circumstances, the picture of the case was so incomplete that it cried out for further investigation and elucidation. As the accused was not represented by a legal practitioner the trial magistrate was enjoined to ensure that factors of mitigation were fully canvasses because such accused himself will often be ignorant about what sort of things are salient and may influence the court to impose a less severe sentence. The trial magistrate should have offered some guidance in this regard. Without such guidance the accused was hindered in his endeavour to adduce sufficient and meaningful information to enable the trial court to assess sentence humanely and meaningfully, and to reach a decision on punishment based on fairness and proportion. The basic elements of sentencing, as pointed out above, cannot, therefore, be achieved. One would expect a provincial magistrate, or every magistrate for that matter, to be familiar with these basic elements of sentencing.

Imprisonment as last resort

Imprisonment, originally a mere matter of detention until a debt is paid or a

trial determined, has now become the most usual punishment for most crimes, except for minor offences for which non-custodial sentences are imposed. This is so because despite the various associations of benevolent men and women and experts in penology, no practicable alternative has worked in most jurisdictions. In our jurisdiction there has been a paradigm shift. First, over the years our superior courts have emphasised 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. Second, there have been concerted efforts to shift from the more traditional methods dealing with crime and the offender towards a more restorative form of justice that takes into account the interests of both society and the victim, i.e. community service (discussed hereunder)

Before I deal with these new approaches I find it necessary to share a relevant statement attributed to Sir Winston Churchill, 1923. I, unfortunately can no longer lay my hands on the original text where I got it from but he is reported to have stated:

> "The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted, criminal against the state – a constant heart searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts towards the discovery of curative; unfailing faith that there is treasure, if you can only find it, in the heart of every man."

The trial magistrate in this case did not impose imprisonment as a last resort. She seems to have a misplaced faith that offenders are like putty that can be remoulded at will by benevolent intentions of imprisonment. The approach of our courts over the years has been that imprisonment should be used sparingly and only where no other punishment is appropriate. A number of decisions of the superior courts show that they have consistently called for a parsimonious use of imprisonment

as a form of punishment – See *S* v *Ndlovu* 1967(2) SA 230 (R); *S* v *Defu* GS 10-66; *S* v *Muzila* GS 173-73; *S* v *Mudzimba* HH-150-87; *S* v *Mutetwa* HH-373-87; *S* v *Kazingizi* HH-402-88; *S* v *Matanhire* HH 146-82; *S* v *Benetti* 1975(3) SA 603 (T); *S* v *Muratu* HH-383-86; *S* v *Kashiri* HH-174-94; *S* v *Gumbo* 1995(1) ZLR 163; *S* v *Sithole* HH-50-95; *S* v *Sikunyane* 1994(1) SACR (TL); *S* v *Chinyama* HH-199-98; *S* v *Mangena* HH-28-99; *S* v *Tarume* HH-146-99 and *S* v *Mugauri* HH-154-99. All these cases, and many more, emphasise that 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. Author G Feltoe in *A Guide to Sentencing in Zimbabwe* 2nd Ed at page 28-29 stated:

> "Because of the drastic nature of imprisonment as a punishment and the deleterious effect stemming from locking persons up in prison, the courts have emphasised time and again that this punishment should be used most sparingly and should only be used where there is no punishment of a less serious nature which can be employed … This call went largely unanswered until after independence. Since then, and especially over the last two years, judges have concertedly stressed that imprisonment must be used with restraint. If an offender is gaoled for a short period it has no rehabilitative effect on him, and he becomes a burden to the state for the period he is in prison. If his social and economic life is disrupted, he may thereafter continue to be a burden upon the community, and the social and economic disruption of his life is a very probably consequent of going to prison."

General Deterrence

When asked to comment on her severe sentence the learned trial magistrate stated:

> "When I sentenced him I was aware of the value and age of the offender and took that into consideration when I passed the sentence. My intention was to make this sentence a deterrence to other offenders because it is improbable for complainants to spend the whole day looking after their chicken (sic)"

The learned trial magistrate evidently over-emphasised deterrence. The use of the words "a deterrence to other offenders" is an indication that the

learned trial magistrate had in mind the concept of general prevention. General prevention is justified in that it is calculated to prevent people in general from committing crimes, in other words to keep people law abiding. People are thus restrained from committing crimes by the threat of punishment rather than by the imposition of punishment. The idea here is that man, being a rational creature, would refrain from the commission of crimes if he should know that the unpleasant consequences of punishment will follow the commission of certain acts. It is thus the inhibiting effect of the threat of punishment, or of the imposition of punishment on others, which should cause man to think twice. This restraint is referred to as psychological coercion. It is worth noting, that the success of general deterrence is dependent to a large degree upon the publicity of the threat. It is the publicity and not punishment which deters in this regard – see *Punishment: An Introduction to Principles (supra*) at pages 89-93. It has been frequently stated, by academics, that the success of general deterrence is more dependent upon the relative degree of certainty that punishment will follow the commission of a crime, than upon the severity of the penalty – see *Driver Behaviour and Legal Sanctions: A Study of Deterrenc*e by Cramton, 1969 (67) Michigan Law review 421-454 and *Deterrence: The Legal Threat in Crime Control* (1973) by Zimning and Hawkins. *In casu*, the learned trial magistrate did the opposite, she used severity of sentence, and not relative degree of certainty that punishment will follow as her basis for general deterrence. Generally, the trial magistrate overlooked the personal circumstances of the accused before her, and instead

concentrated on would-be similar offenders. This is misdirection. In this regard I refer to the case of *S* v *Khan* HH-86-86 wherein MFALILA J stated:

> "While general considerations with regard to deterrence have a place in the sentencing process, they are not the dominant factor. The dominant factor is the accused before the court who should be treated as an individual rather than as a member of a criminal fraternity who collectively are determined to destroy society"

See also *Harington* v *S* SC-198-88 and *S* v *Mahati* HH-138-88. In *Contemporary Punishment*, Gerber and McAnany (1972) stated, "The prevention of crimes as a goal of society is not ultimately achieved by either crass fear of huge detention centres but by a successful communication of disapproval." It is often the fear of being branded with a social stigma rather than the fear of punishment itself which prevents persons from committing crimes i.e. the socialisation process keeps most people law abiding than the police and subsequent imprisonment. *In casu*, the dominant factor in the mind of the trial magistrate was deterrence and not the youthful offender before her. In her apparent obsession with general prevention she overlooked the young man before her. This was a misdirection on her part. In any event, general deterrence should be considered in the context of the kinds of crime, kinds of persons and kinds of societies. In this regard in *In Punishment: For and Against* (1971) at page 15 the learned author, Middendorff commented:

> "The effectiveness of all forms of deterrence is directly connected with the structure of a given society. The smaller or closer a society is, the better deterrence can work. Group intimidation is the foundation of deterrence. The more distant people are from the group, the smaller the influence of deterrence."

In *General Preventive Effects* at page 959 author Andenaes remarked;

> "In a small, slowly changing community the informal social pressures are strong enough to stimulate a large measure of conformity without the aid of penal laws. In an expanding urbanised society with a large degree of mobility

> this social control is weakened, and the mechanism of legal control assume a far more basic role."

Suitability of Community Service

Community service is appropriate in cases of first offenders convicted of non-serious offences. As alluded to above, the basic principle is that first offenders, especially young ones like the accused *in casu*, should as far as possible be kept out of prison. Community service is one way of ensuring that this objective is achieved. Our courts have, over the years emphasised the need to adopt this holistic approach to sentencing in that it punishes the offender, it causes the offender to pay reparation by way of rendering services to the community, and integrates the offender into the society – *Ndlovu* v *State* 1994 (1) ZLR 290, *S* v *Sithole* HH-50-95; *S* v *Dube* HH-67-95; *S* v *Wilson* HH-125-94; *S* v *Santana* HH-110-94 and *S* v *Gumbo* 1995 (1) ZLR 1634. *In casu*, when asked by the learned scrutinising Regional Magistrate whether she considered imposing community service, the trial magistrate responded in the following terms:

> "I did not carry out the inquiry into community service because I wanted the accused to spend that period in jail. I did take into consideration that these days it is not easy to keep these chickens."

This approach flies across the face of guidelines by the National Committee on Community Service and case law. It is trite that community service should be considered in all cases warranting an effective prison sentence of 24 months or less. (12 months or less at the time these cases were decided upon). *In casu*, the sentence imposed is 8 months imprisonment and yet the trial magistrate did not even consider community service. This is a clear disregard of the precedents of this court – see *S* v *Tigere* HH-225-93; *S* v *Nyamukapa* HH-108-94; *S* v *Chikomo* HH-107-94; *S* v *Tiriboyi* HH-166-94; *S* v *Mumvuri* HH-106-94; *S* v *Wilson (supra)*, *S* v *Gumbo*

(supra). The accused, *in casu*, is unsophisticated and was not represented by a legal practitioner. In such circumstances it is essential for the trial magistrate to canvass the issue of community service with him. This was not done. This was a misdirection.

In the *Gumbo* case (*supra)* BARTLETT J remarked:

> "There is nothing in the magistrate's reasons for sentence to indicate that the option of community service was considered. It is particularly important that magistrates give active consideration to the new concept of community service.""

In *S* v *Antonio and Ors* 1998 (2) ZLR 64 (H) CHINHENGO J rightly observed:

> "In the first three cases, no reasons were given as to why community service was not at all considered. In failing to do so, the magistrate concerned clearly misdirected themselves."

In *S* v *Chinzenze and Ors* 1998 (1) ZLR 470 GARWE J (as he then was) emphasised that the trial court should carry out a full enquiry, not only as to the accused's means, but also his general suitability for community service. From the tone of her response, the trial magistrate seems to be one of those judicial officers who begrudgingly consider the option of community service. If my observation is correct, then what SMITH J state in *S* v *Msindo and Ano* HH-207-94 should be repeated here –

> "I am distressed at the magistrate's approach to sentence in these two cases. He says that he suspended the sentence in both cases on condition the accused performed community service because that is fashionable sentence these days. In determining the appropriate sentence to be imposed in each case, the magistrate should consider carefully the gravity of the offence committed and the circumstances of the accused. He should not merely impose a sentence which considered to be 'fashionable'. One of the reasons for introducing the concept of community service was to protect first offenders from falling under the influence of hardened criminals by keeping them out of prison."

This is a typical case where the trial court should have considered the option of community service. By failing to do so, the trial magistrate committed an

elementary error which one would not normally associate with judicial officers at the level of provincial magistrate. The consequences of such error unfortunately constituted a serious misdirection.

Dilatoriness on Submission of matters for Review of Scrutiny

Justice delayed is justice denied. This statement is all too familiar to the ears of lawyers. In this case, the accused was convicted on 8 November 2002. The review cover was typed on 15 November 2002. The trial magistrate only signed the review cover on 30 November 2002. The record of the proceedings was received by the scrutinising Regional Magistrate on 2 December 2002. The scrutinising Regional Magistrate promptly sent the record back with a query. He deliberately stated in his minute: "May I have an urgent reply in view of possible prejudice occasioned to the accused." This remark did not shake the judicial conscience of the trial magistrate. She only responded on 24 January 2003 and signed and dispatched the response on 27 January 2003. All this time the accused was in custody. It did not occur to the learned trial magistrate that she had to explain the overall dilatoriness on her part. Such delays have, unfortunately, reached disturbing proportions in terms of both frequence and length of time. In cases, as in this one, where an accused person is in prison, the delays invariably result in injustice being occasioned thereby. Review and scrutiny records and resultant correspondence are not being treated with the urgency they deserve. There was here, a complete disregard of the spirit of the provisions of section 57(1) and 58(1) of the Magistrates' Court Act [Chapter 7:10]. Magistrates must realise that they are obliged to comply with these provisions and ensure that the records are submitted on review or scrutiny timeously. In cases where there is a delay of weeks or months it is imperative for the trial magistrate to

acknowledge the non-compliance and explain the reason thereof. The trial magistrate should not adopt a business-as-usual approach premised on the ground that condonation for dilatoriness is automatic – see also *S* v *Manhondo* HH-186-01 at pages 5-6 of my cyclostyled judgement.

In this matter the most appropriate option that would meet the justices of the case is one that will ensure immediate release of the accused.

In the circumstances, the conviction is confirmed and the sentence of 8 month imprisonment is set aside and substituted as follows: $3 000 or in default of payment 2 months imprisonment. As the accused has already served the alternative term his release was ordered as stated above.

Chiweshe J ………………………… I agree