M.S.M. (A Juvenile)

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU & CHEDA JJ
BULAWAYO 25 JUNE & 8 NOVEMBER 2012

S. Mguni for appellant
L. Maunze for respondent

Criminal Appeal

NDOU J: The appellant, a female juvenile aged 15 years, appeared before a magistrate sitting at Western Comonage Magistrates' Court on 11 January 2011 facing charges of contravening section 131 and 113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. She pleaded guilty to the charges and was convicted and sentenced to 3 months imprisonment. She now appeals against sentence only. She was admitted to bail pending appeal after serving almost a month of the sentence. The strong mitigatory factors *in casu*, are that she is a juvenile as alluded to above. She is a double orphan. She is still at school doing form two at Njube High School. The value stolen is a meager US$20 and all was recovered soon after the offence. She is a first offender. She told the court that she committed the offences because she needed money to buy food. A community service officer submitted a report wherein she opined that the appellant was not suitable for the sentence of community service. Her aunt, Janet Sibanda, was called and she testified very briefly. This is the record of her testimony –

> "Q How does she behave?
>
> A She is a thief and a problem always. I am not prepared to take her home now. Rather she needs a punishment that will reform her."

Immediately after this testimony the learned magistrate imposed a sentence of three (3) months imprisonment. The learned magistrate did not give reasons for the sentence. The respondent does not support the sentence. This is a case where the trial magistrate should have called for a probation officer's report – *S* v *Tendai & Anor* 1998 (2) ZLR 423 (H) and *S* v *T M (A Juvenile)* HB-65-03. The probation officer would have greatly assisted in weighing and understanding the juvenile's circumstances in order to formulate an appropriate sentence. It is trite that punishment should fit the offender as well as the offence, be fair to the state and blended with mercy – *S* v *Sparks* 1972 (3) SA 396 (A) at 410 H; *S* v *Manwere* 1972 (2) RLR 139

(A); *S* v *Moyo* 1984 (1) ZLR 74 (H) and *S* v *Shariwa* 2003 (1) ZLR 314 (H). *In casu*, we are dealing with a 15 year old girl. She may be naughty but the courts have to be careful otherwise a misguided juvenile may be converted into a hard core criminal by dealing with her in such a cavalier fashion. Our courts have emphasized that a sentence of imprisonment is a severe and rigorous form of punishment which should be imposed only as a last resort where no other form of punishment will do – *R* v *Ndhlovu* 1967 (2) SA 230 (R); *S* v *Gumbo* 1995 (1) ZLR 163 (H) and *S* v *Tarume* HH-146-99.

To crown it all, the learned magistrate did not bother to justify his sentence by providing reasons for sentence. This is a disturbing carefree approach especially where a juvenile offender is sent to prison. The sentence cannot stand. Accordingly the appeal against sentence is allowed and the sentence of 3 months imprisonment imposed by the court *a quo* is set aside and is substituted by the following:

> "Passing of sentence is postponed for three years on condition that the accused does not within that period commit any offence of unlawful entry into premises or dishonesty and for which upon conviction she is sentenced to a term of imprisonment without the option of a fine."

Cheda J …… I agree

Justice for Children Trust, appellant's legal practitioners
Criminal Division of the Attorney General's Office, respondent's legal practitioners