HB 86/16
HCAR 368/16
CRB PT 64/16

THE STATE

Versus

MODEKAYI NCUBE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 10 & 17 MARCH 2016

Criminal Review

TAKUVA J: This matter came before me on automatic review. I ordered the release of the accused on 9 March 2016 with the concurrence of my brother MATHONSI J who agrees with me that the sentence is excessive. The accused was charged with contravening section 89 (1) (a) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 – assault.

He pleaded guilty to the charge and was sentenced to 18 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction is sentenced to imprisonment without the option of a fine.

The facts accepted by the accused were that the accused and the complainant are not related but are neighbours. On 24 December 2015 the accused and the complainant had a misunderstanding over cattle which were grazing on the roadside. The accused picked a log and struck complainant three times on the head and complainant sustained "some injuries". Jabulani Ndlovu, the village herd then intervened and stopped the accused from further assaulting the complainant. Complainant was medically examined by Dr Moyo who made the following observations on the injuries:

(a) laceration to the occiput
(b) signs of mild head injury
(c) the degree of force applied was moderate
(d) the injuries sustained were serious

(e) there was no potential danger to life

The accused is a 63 year old 1st offender married with 5 children. He is a pensioner earning $180,00 per month and had $40,00 on his person. He pleaded guilty to the charge showing contrition. On the aggravating factors the court *a quo* found that the offence was serious in that a "dangerous weapon" was used resulting in complainant sustaining serious injuries. For these reasons, the court *a quo* concluded that "a deterrent sentence is called for".

In *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66 (S) EBRAHIM JA (as he then was) at 70F – 71B; said

> "The tendency to regard all cases of violence and, in particular, those of assault with intent to do grievous bodily harm as falling within the scope of those offences where prison sentences are desirable must be avoided: see *S* v *Kulati* 1975 (1) SA 5576 (E); *S* v *Makalela* 1975 (3) SA 788 (c).
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> There is also a tendency to regard 'deterrent sentences' and 'exemplary sentences' as being just: the view being that it is more equitable to make an example of someone by punishing him more severely than he deserves so that others will be persuaded to desist from emulating him: see also *S* v *Khulu* 1975 (2) SA 518 (N); *S* v *Matoma* 1981 (3) 838 (A). Not only is the argument specious and fallacious; it is doubtful whether the claims supporting its efficacy are justified at all. This is not to say judicial officers are to throw up their judicial arms in exasperation and do nothing more. All that is being suggested is that judicial officers exercise their discretion to the full and acknowledge where necessary the shortfalls of existing penal policy. The dynamism necessary for this approach is not achieved by reference to alleged 'tariffs' of sentences for specific categories of offences. Invariably, when dealing with sentences, the court refers, or is referred to in numerable cases which purportedly lay down the limits of the range of appropriate sentences for the case actually before it."

In *S* v *Dangarembwa* 2003 (2) ZLR 87 (H), CHINHENGO J (as he then was) repeated the warning in the following words:

> "The tendency to regard all cases of violence and in particular, those of assault with intent to cause grievous bodily harm as falling within the scope of those offences where prison sentences are desirable must be avoided. In order to properly exercise his discretion in such cases, the judicial officer will often be guided by such factors as the weapon used, the seriousness of the injury, the nature of the degree of violence and the medical evidence. The factors of mitigation as put forward by the accused will also have to be considered. Imprisonment is not the only sentence which can be imposed in such cases." (my emphasis)

While it is accepted that cases of assault invariably lead to a term of imprisonment being imposed, this is particularly so where the assault causes serious injury or disfigurement. See for example the following cases:

(a) *S* v *Sibanda* HB-62-87 where the accused who severely assaulted his girlfriend with a stick after a beer drink causing a broken arm, two lacerations on the scalp and multiple bruises was sentenced to an effective 9 months imprisonment.
(b) *S* v *Ndlovu* HB-197-87 where the accused stabbed his ex-girlfriend with a knife in the stomach with severe force causing serious injuries, had a six months imprisonment imposed on him.
(c) *S* v *Sparks* HH-235-85 where accused assaulted his wife viciously with fists, towel rail and heavy object, fracturing both wrists and lacerating fore head was sentenced to 18 months imprisonment of which 9 months were suspended.
(d) *S* v *Ndlovu* HB-57-83, the accused a young man attacked his mother with an axe resulting in fairly severe injuries but no permanent disability, was sentenced to an effective two years imprisonment.

Quite evidently from the above cases, imprisonment is appropriate where only the injuries are severe. The assessment of an appropriate penalty in assault cases is not an uneasy task for a judicial officer. However, some guidance is contained in section 89 (3) which codified the common law approach. It states; "In determining an appropriate sentence to be imposed upon a person convicted of assault, and without derogating from the court's power to have regard to any other relevant considerations, a court shall have regard to the following -

(a) the age and physical condition of the person assaulted;
(b) the degree of force or violence used in the assault;
(c) whether or not any weapon was used to commit the assault;
(d) whether or not the person carrying out the assault intended to inflict serious bodily harm;

(e) whether or not the person carrying out the assault was in a position of authority over the person assaulted;
(f) in a case where the act constituting the assault was intended to cause any substance to be consumed by another person, the possibility that third persons might be harmed thereby and whether such persons were so harmed." (my emphasis)

In casu, factors (b), (c) and (d) are pertinent. As regards the degree of force used in the assault the medical report shows that it was "moderate". The weapon used is described as "a sharp object". Although injuries were described as "serious" there is no potential danger to life. The injury to the head was categorized as "mild". The trial magistrate fell into error in my view when he concluded that the accused used a "dangerous weapon: without having that weapon described with sufficient particularity. In an assault case, where a weapon is used, it must be properly described with its dimensions, weight and texture indicated in the state outline to enable the court to assess not only the intention but an appropriate sentence. This should particularly be done in cases where an accused person tenders a plea of guilt.

The weapon in this case is simply referred to as a "log" in the state outline. On the other hand; the doctor opined that the injury he observed was caused by a "sharp" object. I take the view that to describe this weapon as dangerous without any appreciation of its real nature amounts to a misdirection, the effect of which was to over-emphasise the nature of the weapon, resulting in the imposition of a disproportionate sentence.

The second misdirection the court *a quo* made, relates to the fact that although the matter falls within the community service grid, the court failed to consider community service as a sentencing option. It is trite that this amounts to a serious misdirection. The higher courts have stressed that wherever a magistrate is considering imprisoning a person for less than 24 months, he or she should always consider whether to impose a sentence of community service instead of sending the person to prison. This applies particularly to first offenders who plead guilty. See *S* v *Shariwa* HB-37-03; *S* v *Manyevere* HB-38-03; *S* v *Chinzenze* 1998 (1) ZLR 470 (H); *S* v *Gumbo* 1995 (1) ZLR 163 (H) at 168C – E.

In view of the misdirection, I am at large as regards the assessment of an appropriate sentence. In my view, the mitigation as outlined above outweighs the aggravation. The accused has already served one month of the effective 12 months sentence imposed on 9 February 2016. For this reason, a sentence which will entitle him to immediate release will be appropriate since he has already been subjected to this severe and rigorous form of punishment.

In the circumstances, the accused is sentenced as follows:

3 months imprisonment of which 2 months imprisonment is suspended for five years on condition accused is not convicted of an offence involving an assault upon the person of another and for which on conviction is sentenced to imprisonment without the option of a fine.

Mathonsi J …….. I agree