THE STATE
Versus
MBUSO NDLOVU

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE 10 JUNE 2002

Criminal Review

HUNGWE J: The accused was charged with the crime of assault with intent to do grievous bodily harm in that on 10 march 2004 at Majoto Village, Chief Malisa, Silobela, he unlawfully and with intent to cause grievous bodily harm, struck Misheck Joel in the face with an empty bottle in the face with an empty bottle.

He pleaded guilty.

The complainant sustained the following deep wound on the forehead, scar in the left eye and eye lid. Lost sight in the left eye.

Nothing turn on the conviction. The accused was sentenced to 12 months suspended on condition he underwent community service and conducted himself appropriately.

In assessing sentence the trial magistrate correctly observed that accused was a first offender. He also correctly observed that the accused had inflicted serious injury on the complainant who has in addition to other injuries and disfigurement permanently lost sight in his left eye. Complainant …… was to refer to accused's father as a witch doctor. The sentence is not in line with decided cases and is far too lenient.

Community service orders must be reserved for those cases where it is an ideal vehicle for reforming petty offenders without subjecting them to the trauma of incarceration. In the present case the only provocation attributable to complainant was to refer to accused's father as a witch doctor. Without any warning he was brutally struck with an empty beer bottle which must have crushed in his face causing the injuries and lost of sight in one eye.

In *S v Chitima* HH 157-94 CHATIKOBO J observed that community

service is not a substitute for punishment and another way of punishing offenders. It seems to me that offenders of crimes of violence must be punished in a way that exacts the same suffering which they conflict upon other victims. Community service does not serve that purpose and for that reason cannot be an appropriate sentence for assault with intent to cause grievous bodily harm where such harm results in permanent disability as here.

I must not be understood as saying all cases of assault with intent to do grievous bodily harm did not qualify for community service but that there are circumstances which must put the offender beyond the reach of community service.

The factors to consider in assault with the intent to cause grievous bodily harm are:-

a) the nature of the weapon used;
b) the seriousness of the injury;
c) the nature and the degree of violence used; and
d) the medical; evidence.

See *S v Mugwenhe & Another* 1991(2) ZLR 66 (SC)

As for medical evidence in the present case the trial court relied upon an affidavit deposed to by a Clinical Officer whose qualifications were stated in the pro forma affidavit as "as above" by which I assume that she was referring to her job title in the preceding paragraph. The record does not show how this "exhibit" found its way in the record. It merely records at p2 after accused's answer "Yes" that medical; report was thereafter admitted as evidence and marked exhibit "I". Thereafter accused was convicted.

Such affidavits are admitted in terms of section 278(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In terms of section 278(11) such an affidavit will not be admissible unless the prosecutor or the accused has recovered three days notice of its intended productive, or consents to its production.

It will be clear that the record must show that either the three days notice was given or that the accused consented to its production waiving his right to the notice.

As the provisions of the Act were not followed the affidavit is improperly on the record and ought not to have been admitted in evidence.

Further proper care ought to be exercised when accepting evidence under this section. Because the section categorically states that it applies to medical practitioners, it ,must follow that a Engeline Nyoni is as a medical practitioner her evidence could not be admitted in terms of this section.

As I have pointed out the sentence is too lenient. In the circumstances I am unable to certify it as being in accordance with real and substantial justice. I withhold my certificate.

……J agrees:……