

THE STATE
versus
TERRY NKATA

IN THE HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 8 July 2015

Review Judgment

MWAYERA J: The accused was properly convicted of assault as defined in s 89 (1)(a) and 89 (1)(b) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. He was also properly convicted of resisting a peace officer as defined in s 176 of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

The accused was sentenced to an effective prison term of 7 Years for all the four counts he was convicted of. In count one it was alleged that on 2 November 2014 the accused had a misunderstanding with one Ever Gomba at a Night Club. The complainant one Wallace Banda intervened to stop the misunderstanding following which he was struck with a stone on the head and leg by the accused.

In count two, on 17 January 2015 at Nyamuziwa Night Club it was alleged that the accused was hired by one Lady Tariro who had a misunderstanding with Tinashe Tarimirastiri, to assault the complainant. The accused assaulted the complainant by stabbing him with a knife on the left back of the shoulder thereby inflicting injuries.

In respect of the third count it was alleged that on 20 January 2015 the accused was disturbing patrons at the complainant Trust Nyamuziwa's Gomba Night Club. When the complainant remonstrated with the accused to stop his behaviour of disturbing the complainant's customers as it impacted negatively on his business the accused threatened the complainant. He threatened to stab the complainant and hit him with a machete.

In respect of the fourth count it was alleged that the accused resisted and fought police constables who had gone to apprehend him over the violence at the third complainant's night

club. After a protracted trial the accused was convicted of all the four counts. It is apparent from the record that the first complainant as per the medical report sustained serious injuries as he suffered a painful knee and also headache. There was however no potential danger to life.

The second complainant sustained a 3cm laceration on the right back and the injuries though serious had no potential danger to life.

The third complainant was emotionally injured by the threats of assault that he reported leading to the arrest of the accused by the constables who overpowered him after he initially offered stiff resistance leading to the accused's commission of the fourth count.

The sentence imposed by the trial magistrate for the offences is on the harsh side even for a repeat offender. It is instructive to note that for assault cases it is not every case of violence which calls for imprisonment. Imprisonment is a rigorous form of punishment which should be resorted to in bad and deserving cases. Lengthy imprisonment of 7 years in the circumstances of this case is too severe and rigorous. More so when one considers the nature of assault, the degree and extent of force used and the extent of injuries sustained. A number of decisions by the superior courts show that they have consistently called for parsimonious use of imprisonment as a form of punishment.

In the first and second count the accused used a stone and knife to assault the complainants. Given the nature of the injuries and the weapons used an imprisonment term ought to have been considered. However given that there was no potential danger to life 4 years was excessive. The third count was a threat to assault using a matchet. Although the complainant suffered emotionally, it was not severe for he managed to report to the police leading to the fourth count of resisting arrest.

It is accepted the accused was being a "nuisance" because of the number of drunken brawls. Also it is clear violence is frowned upon by the courts as it shows lack of civilisation and respect for other human beings. It also puts the lives of the victims at risk. Deterrence is called for. In coming up with an appropriate sentence the trial court should weigh mitigatory factors *visa a vis* aggravating factors. The court should endeavour to strike a balance between the societal interests of the offender and the nature of offence. The case *S v Daulani* 1978(2) PH, H 1760 is instructive. Rigorous punishment for assaults which occurred during the drunken state of the accused would not be appropriate more so given there was no permanent injury and potential

danger to life occasioned. The trial court ought to have treated the first three counts as one for sentence since they are offences of a similar nature committed in more or less similar circumstances. This would assist in palliating the overall sentence to fall within appropriate limits. The fourth count of resisting lawful arrest given the accused was subdued and arrested by the police without inflicting any injuries on them a prison term of 18 months is too harsh.

It is worth noting that for assault cases the sentences imposed are out of sync with sentences imposed by this court on review in kindred offences.

Decided cases have discouraged the tendency to regard all cases of violence as deserving of lengthy imprisonment. See *S v Dangarembwa* 2003 (2) ZLR 87. In the case of *S v Matiza* the accused hit the complainant on the head with an empty 750ml cooking oil bottle causing injuries. The sentence of 6 months imprisonment with 4 months suspended on conditions of good behaviour was reduced on review to a fine of \$50-00 or 1 month imprisonment. In addition 4 months imprisonment was suspended on appropriate conditions of good behaviour.

In *S v Hondokanayakunda and Ors* HH 58/89, a group of 4 accused assaulted the complainant and one of them struck the complainant with a beer bottle on the forehead, causing an injury which had to be stitched at hospital. The sentence of 12 months imprisonment of which 3 months imprisonment was suspended was substituted on review with a sentence of \$300-00 or 30 days imprisonment. In addition 2 months wholly suspended for 3 years on condition of good behaviour.

It is instructive to note from the examples that it does not necessarily follow that in every case where there is use of violence imprisonment is appropriate. Due regard and weight has to be placed on the nature of assault, degree and extent of force, the part of the body assaulted, whether or not a weapon was used and the nature and extent of injury. The circumstances of each case, regard being given to both mitigatory and aggravatory factors have to be properly weighed. In the present case the accused had developed a habit of being violent and even though in the third count he just threatened to use a matchet he used weapons in count 1 and 2 namely a stone and knife. Deterrence is certainly called for. The assaults were at a beer drink but unprovoked as the accused appeared aggressive.

A short imprisonment term as opposed to the excessively harsh and lengthy sentence, which I believe has been brought about by not treating the counts as one for sentence is

appropriate. The sentences imposed by the trial court which are viewed as harsh must be set aside. The sentences imposed are accordingly set aside and substituted with the following:

Count 1 - 3 treated as one for sentence 12 months imprisonment

Count 4 - 12 months imprisonment.

In addition 6 months imprisonment suspended on CRB K 2102/12 is hereby brought into effect.

CHIGUMBA J: agrees.....