

**MUTSHINYALO SAMUEL MLAUDZI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA & NDOU JJ  
BULAWAYO 27 OCTOBER 2003 & 12 FEBRUARY 2004

*S Mlaudzi* for appellant  
*H Ushewokunze III* for respondent

Criminal Appeal

**CHEDA J:** This is an appeal against sentence imposed by the Magistrates' Court in Beitbridge. It is not in dispute that on 30 May 2003 complainant went to Kleinbegin farm to look for appellant with a view of resolving the issue of his employer's cattle which appellant did not want them on the farm. The appellant is one of the newly re-settled farmers on complainant's employer's farm. On his arrival, complainant saw the appellant among a group of people who were singing revolutionary songs. One of the songs' lyrics were "Traitor find refuge time is up". These words were apparently directed at complainant.

As the group persisted in their highly charged songs, appellant assaulted complainant with a log resulting in complainant sustaining serious injuries. Consequently complainant received medical treatment. The doctor who examined the complainant concluded that the injuries were consistent with the use of a hard object, the injuries were serious and that there was a likelihood of permanent disability. He further commented thus "Severe soft tissue injuries consistent with assault with a hard object. The patient is in severe pain from blistering on the buttocks and there is probably injury to the left kidney."

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Appellant was charged with assault with intent to do grievous bodily harm to which charge he pleaded guilty, was duly convicted and sentenced to 18 months imprisonment of which 6 months imprisonment was suspended for 5 years on the usual conditions.

He now appeals against sentence only. Mr *Mlaudzi* for appellant attacked the sentence on the basis that the trial court misdirected itself by failing to appreciate that appellant was provoked by complainant and that the sentence is severe to an extent that it induces a sense of shock.

I will deal with these points as follows:

1. Provocation

It is trite law that provocation can serve as both a partial and full defence in our law. However, in this case it is not raised to serve that purpose but to mitigate the moral blameworthiness of the appellant. The question here is whether or not appellant was provoked by the complainant. Complainant went to appellant in order to resolve the dispute they had. There is no evidence that he was armed or used any threatening words which amounted to provocation on the appellant. The agreed facts indicate that on seeing complainant approaching, appellant and his mates started singing revolutionary songs whose lyrics were directed at complainant whom they viewed as a sell-out. It is pertinent to note that this was at the time when commercial farmers were resisting the occupation of the land by new farmers and therefore tempers were running high. In my opinion, in order for provocation to serve as a factor in mitigation it should be proved that the said provocation was such that it had

a certain effect on him to an extent of clouding his otherwise good judgment thus resulting in him acting on the spur of the moment.

As pointed out above, there was no provocation on appellant and there are no facts to support this argument and it is accordingly rejected. If proved, provocation will no doubt reduce the moral blameworthiness of the appellant, see *S v Boars* HH-17-88; *S v Jinjika* HH-101-88 and *S v Moyo & 22 Others* HB-31-87.

2. Severity of the sentence

Appellant's contention is that the sentence imposed induces a sense of shock. Appellant assaulted the unarmed and defenceless man whose only crime was that he approached him seeking to resolve a dispute amicably. Without provocation he was severely assaulted with such brutality in a manner which can best be described as beastly.

Assaults *per se* attract non-custodial sentences, this includes assaults with intent to cause grievous bodily harm. However each case presents itself differently. It is therefore important that the court should focus on that particular case but must largely draw its guidance from similar cases which have appeared in these courts. In *Masviba v S* HB-57-91 appellant who was a first offender assaulted complainants with mopani poles and clenched fists. The complainants sustained injuries on their buttocks and one of them sustained a fracture of the cervical spine and a finger. The appellant was convicted of assault with intent to cause grievous bodily harm and was sentenced to 12 months imprisonment with 4 months imprisonment suspended. On appeal it was held that the sentence was appropriate.

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Also in *S v Chiradza* HB-72-91 accused was convicted of assault with intent to cause grievous bodily harm on his step-father. The assault resulted in the complainant sustaining injuries which were described as serious and the degree of force as severe. Eight months after the assault he was still not able to use his thumb. On trial he was sentenced to 9 months of which 4 months imprisonment was suspended for 5 years.

On review it was reduced to 2 months imprisonment which was what he had already served when the matter came for review. In essence the substituted sentence was 9 months imprisonment of which 7 months was suspended.

Whichever way one looks at it, such assaults attract prison terms around that region. See also *Mpofu v S* HB-97-90 and *S v Ngwenya* HB-174-88 where BLACKIE J at page 3 of the cyclostyled judgment stated;

“The court have it clear that where there is mindless and vicious assault, particularly with a dangerous weapon even first offenders will be given effective goal sentences.”

In *casu* complainant's aim was to discuss the cattle issue amicably, he did not provoke appellant and was not armed. This type of assault by appellant on him was uncalled for. It is quite clear that appellant decided to fight him as soon as he saw him approaching as evidenced by the revolutionary songs and the reference to him as a sell-out. Human beings tend to be influenced by the presence of crowds which seem to propel them to play to their expected but unnecessary excitement, for it is that audience which views the aggressor as some super man and/or hero.

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The assault was brutal, senseless and cowardly. The use of a log indiscriminately on someone's body reckless as to the consequences of such assault is sadistic indeed. The result of this assault was described as severe, serious and there is a likelihood of permanent disability.

The fact that appellant and his team had a grievance against the owner of the farm, they should have seriously borne in mind that the complainant was merely an employee who was acting under instructions. The farmer knew very well that he was going to suffer the same fate had he taken it upon himself to approach the appellant. Complainant had his job to protect and would also be punished by his employer had he refused to follow up the cattle. In view of the above, we find no misdirection on the part of the trial court. Therefore the trial court's sentence should not be disturbed and the appeal is dismissed.

Ndou J ..... I agree