

THE STATE**Versus****DAVID MASHONGA**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 11 JANUARY 2007

Criminal Review

NDOU J: The accused was convicted by a Hwange Magistrate of assault with intent to do grievous bodily harm. He was sentenced to undergo 24 months imprisonment all of which was suspended on conditions of future good behaviour and performance of community service at a local clinic. The salient facts of the matter are that the accused and the complainant had an argument over painting brushes. The accused armed himself with an iron bar and struck the complainant once on the head. The iron bar was unfortunately not produced during the trial. The medical examination carried out by Dr Ruswa at St Luke's Hospital, Lupane revealed a very serious assault. The doctor observed, and opined as follows:-

"5. I observed the following injuries: Fractured base of skull, ruptured ear drum + CSF Otorrhea, Abrasions on the right hip and left hand.

6. The injuries that I found the patient suffering from are consistent with having been inflicted by blow to the right ear with a metal weapon.

7. The seriousness of the injury: Very serious ... Life threatening complications of these injuries are possible, such as meningitis & brain ...

8. Is permanent injury Yes/No:
Prolonged hearing loss is possible".

This is a very serious assault on the head using a lethal weapon. The manner of the assault, degree of force and part of the body where the blows landed were not properly considered by the learned trial magistrate (and the trial public prosecutor).

It is now common to find such lack of appreciation of the nature of the assault by magistrates.

This is so because the medical report is usually produced after and not before conviction. Medical reports are crucial in the determination of the appropriate charge, so they should normally be produced before the conviction. In most cases it is difficult for the trial

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court to distinguish between assault (common), serious assault and attempted murder in the absence of such a medical report. Ideally, the prosecutor should have sight of the medical report before deciding on the nature of the assault charge. Equally, trial magistrates should have sight of the medical report before the conviction. If this is not done, justice may, in a number of instances, not be done.

In this case the magistrate had sight of the medical affidavit before the conviction but I do not think he applied his mind to its contents and the manner of the assault. This has resulted in injustice.

Accordingly, I am unable to certify the proceedings as being in accordance with justice. I withhold my certificate.