THE STATE

VERSUS

MTHUKUTHELI SIBANDA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 24 JUNE 2010

Review Judgment

CHEDA J: The above record was referred to me for review.

The brief facts of the case are that accused was charged with assault with intent to do grievous bodily harm which charge he pleaded not guilty.

Both accused and complainant were drinking beer at Lalatau Bottle Store at Tshelanyemba area in the Sun Yet Sen area, Matabeleland South when accused confronted him for no reason. Accused grabbed complainant and hit him with a stone on the temple (forehead). The assault was very severe as evidenced by the medical report which describes it as follows:

Injuries found

(1) *Excessive haermorrhage +/- 2 litres, Deep frontal fracture (L) +/- 7cm long, coupled with diffuse haemotoma across (L) peri orbital – zygomatric areas. Depressed skull fracture (L) lateral aspect peri orbital.*

(2) *The injuries were likely to have been caused by – some heavy blunt weapon.*

(3) *Amount of force used: severe*

(4) *Possibility of permanent injury: depressed skull fracture permanent and likely to complicate.*

(5) *The potential danger to life: highly anticipated on head injury of such extent*

Conclusion: the injuries were severe.

Accused pleaded not guilty but was committed and sentenced as follows:

> *"15 months imprisonment of which 7 months imprisonment is suspended for 5 years on condition the accused is not convicted of any offence of which an assault on another is an element committed within that period for which he is sentenced to imprisonment without the option of a fine.*
>
> *A further 8 months imprisonment is suspended on condition the accused completes 280 hours of community service at Thselanyemba Hospital on the following conditions: the community service starts on the 26 November 2009 and must be completed within 8 weeks of that date. The community service be performed between 0800am -1300pm and 1400pm-1600pm each Monday – Friday which is not a public holiday to the satisfaction of the person in charge who may on good cause grant accused of absence which leave shall not count as part of community to be completed."*

Upon perusal of the record I formed the impression that the sentence was on the lenient side and I asked for the trial magistrate's comments. He responded and commented as follows:

> *"Kezi Magistrates Court*
> *Bag 506*
> *KEZI*
>
> *23 March 2010*
>
> *Judge's Chambers*
> *P O Box 579*
> *BULAWAYO*
>
> ***RE: THE STATE VS MTHUKUTHELI SIBANDA: CRB K195/09***
>
> *The above record refers.*
>
> *The trial magistrate did not impose a custodial sentence bearing in mind that:*
> *(a) The accused was a first offender.*
> *(b) The extent of congestion at Gwanda Prison*
> *(c) The option of community service would have a rehabilitative effect on the offender.*
>
> *Be that as it may, I agree with the learned Judge's observation that this was a serious assault warranting a term of imprisonment although I leaned towards giving the offender a second chance.*

I stand guided by the learned Judge's direction.

(Signed)
Philemon LL
Senior Resident Magistrate
Matobo Jurisdiction."

It is trite law, that, decisions regarding sentences of inferior courts are discretional and can only be interfered with by superior courts when they are of the view that the said courts have not judiciously exercised their discretion; see *Attorney General v Bvuma* 1987 (2) ZLR 96(SC). While this is the legal position, triers of facts should bind their consciences in the decision and determination of sentences to be imposed bearing in mind that justice must not only be done but be seen to be done. This court can do no more than disapprove sentences which are either manifestly excessive or lenient and further guide triers of facts as to the correct approach to sentencing. While I can not advocate a tariff approach to sentencing, triers of facts should adhere to laws regarding sentencing and at the same time strictly adhere to precedents of higher courts.

On the issue of the tariff approach, this was discouraged and criticised in *S v Mugwenhe and Another* 1991(2) ZLR 66 (S) where EBRAHIM JA said at 69B-D:

> "An examination of cases of assault with intent to cause grievous bodily harm lead me to the conclusion that a term of imprisonment is invariably imposed, particularly where the assault causes serious injury and/or disfigurement. The 'tariff' approach to sentence is gaining wider currency, if it is not already firmly ensconsed on our judicial benches. This approach to sentence, while commendable, is not without its drawbacks; the principle one being that it ignores the fact 'that the determination of a sentence in a criminal matter' is preeminently a matter for the discretion of the trial court. 'In the exercise of this discretion, the function of the trial judge has a wide discretion in deciding which factors – I here refer to matters of fact and not of law – should influence him in determining the measure of punishment:' *per* van Winsen AJA in *S v Fazzie and others* 1964 (4) SA 673 (A) at 684A."

The above case captures all the important principles regarding the approach to sentencing.

While this is so, assault on another poses serious danger to both life and limb. It is for that reason, that, invariably a custodial sentence is imposed in serious cases. There are numerous cases which buttress this point. In *S v Dangarembwa* 2003(2) ZLR 87H CHINHENGO J while emphasising this point the learned Judge referred to the following cases with approval;

"*S v Ndhlovu HB 57/83*- a young man attacked his mother with an axe resulting in fairly severe injuries but no permanent disability – effective two years' imprisonment appropriate;

S v Lambe and Another HH 374/84- accused assaulted his wife with hands and fists and burnt her arm and punched another woman; in the absence of provocation, 12 months of which three were suspended was appropriate;

S v Sparks HH 235/85- accused assaulted a wife viciously with fists, towel rail and heavy object, fracturing both wrists and lacerating forehead- 18 months' imprisonment of which nine months suspended appropriate;

S v Ncube HB 19/86- unprovoked and prolonged attack by accused on young girl with fists, resulting in laceration and loss of tooth- six months' imprisonment with two months conditionally suspended appropriate;

S v Horwe HH 311/86 – brutal and unprovoked attack on woman- accused first offender, throttling girlfriend by (sic) kicking her head, knocking out two teeth- four months' imprisonment with one month conditionally suspended appropriate;

S v Mwembe HB151/86- accused struck woman on head and arm with hoe handle and fractured her arm – a short prison sentence appropriate;

S v Donga and Others HB 37/87- deliberate assaults by the accused causing serious injuries which necessitated hospitalisation of the complainants- effective prison term rather than a fine appropriate;

S v Sibanda HB 62/87- accused severely assaulted girlfriend with a stick after beer drink causing a broken arm, two scalp lacerations and multiple bruising – effective nine months' imprisonment appropriate;

S v Ndlovu HB 197/87- accused stabbed his ex-girlfriend with a knife in the stomach with severe force causing serious injuries – effective six months' imprisonment appropriate;

S v Razawu HH 257/87- accused drunk and provoked. Stabbed his wife in the face and side, but, did not cause serious injuries – eight months' imprisonment of which four months were conditionally suspended."

As a way of a guideline I urge the courts to pay particular attention to doctors' reports as it is through their findings that a court can make an informed assessment of the severity and consequences of the assault on the complainant. In as much as the court is entitled to form its opinion bearing in mind the mitigatory features of the accused, such opinion is in danger of

being off-the mark as the courts lack the requisite training and expertise necessary in the assessment of medical findings.

The three reasons for a non-custodial sentence proffered by the learned trial magistrate are far from convincing any reasonable scrutiny magistrate or reviewing Judge.

The principle of keeping first offenders out of prison is not a be-all-and-and-all procedure. It is infact a guiding principle which should always be applied with caution. It is not only first offenders who should be kept out of prison as to do so would not do justice to particular cases which demand nothing other than an effective prison term in the circumstances.

The congestion of Gwanda prison is purely an administrative issue and not a legal issue at all, therefore, by allowing it to cloud its mind, the court seriously misdirected itself. While it indeed is a factor to be considered, it can not be a factor which can justify a non-custodial sentence where all the facts point to a prison term.

With regards to giving the accused a second chance, this indeed is a noble idea, but, however, this objective can be achieved by suspending part of the sentence, but, still impose a custodial sentence. This, in my view, is the only way justice would not have been done but would have been seen to have been done.

The sentence imposed is so manifestly lenient, so as to induce a sense of shock to all reasonable and fair minded people.

In view of this, it will be a serious indictment on our judicial system to confirm these proceedings as being in accordance with real and substantial justice.

For the above reason, my certificate is withheld.

Cheda J.....

Mathonsi J agrees.....