

**THE STATE**

**AND**

**TICKSON SIBANDA**

**AND**

**THABISANI MOYO**

**AND**

**ORLANDO DUBE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 21 FEBRUARY 2013

Review Judgment

**CHEDA J:** This matter was forwarded to my brother Ndou J for review. He has however, left the bench. Prior to his departure he had raised the following queries:

- “1. May the learned Provincial magistrate explain her sentence?
2. Is the sentence for both counts treated as one?
3. It appears that accused 1 is a first offender yet he got a more severe sentence than his two co-accused persons who have previous convictions.”

On the 17<sup>th</sup> January 2013 the Provincial magistrate advised the Registrar that the trial magistrate has since left service, therefore there is no one to address the issues raised by the learned Judge.

I have perused the record and indeed I find an anomaly in the record of proceedings with regards to sentence.

The brief facts of the matter are that the three accused aged 38, 27 and 42 were charged with and were convicted of one count of assault and 2 counts of robbery. They were sentenced as follows:

“Accused 1- 5 years imprisonment of which 6 months is suspended for 5 years on condition the accused is not within that period commit of any offence involving violence as an element for which upon conviction he is sentenced to imprisonment without the option of a fine.

Accused 2 – 2 years imprisonment. In addition the 2 years suspended on CRB 200/08 is hereby brought into effect. 4 years effective.

Accused 3 – 4 years imprisonment. In addition the 2 months suspended on CRB 14/00 is hereby brought into effect as well as the 40 days suspended on CRB 283/10 (Filabusi). 4 years , 3 months and 10 days effective.”

The learned Judge’s concern was with the disparity of sentences passed.

The accused were convicted of the same crimes, but, were sentenced differently. Indeed the trial court is at liberty to treat accused differently depending on their personal circumstances, most importantly in relation to the role each accused played in the commission of the offence.

This is the general approach, however, should the court find it necessary to differentiate, it should clearly state its reasons for doing so.

In *casu* the learned trial magistrate has not proffered any reasons for her departure from this general approach. In the absence of such reasons I am left with the only irresistible conclusion that she did not apply her mind to the sentencing process.

Failure to apply one’s mind to the work at hand is tantamount to a misdirection.

It is therefore clear that accused one has been prejudiced due to the learned magistrate’s misdirection. In light of this, her sentence should be interfered with: The following order is made;

**Order**

(1) The conviction is confirmed, but, the sentence for accused 1 is set aside and is substituted by;

1.1 3 years imprisonment of which 1 year imprisonment is suspended on condition accused does not within that period commit an offence of which violence is an element for which upon conviction he is sentenced to imprisonment without the option of a fine.

Cheda J.....

Mutema J agrees.....