THE STATE

Versus

ALECK MUGANDE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 1 JUNE 2017

Criminal Review

MAKONESE J: It is trite principle of our law that prison sentences are reserved for serious offences. The principle is well established that custodial sentences are only to be imposed as a last resort and where a non-custodial sentence would tend to trivialize the case. The guiding principle is, however that the sentencing court must exercise its discretion and where such discretion is not used judicially, a higher court has the unfettered right to interfere with such sentence in the interests of justice.

This matter has been brought before me by way of automatic review. The accused appeared before a Provincial Magistrate at Binga facing a charge of contravening section 4 (b) (1) of the Domestic Violence Act (Chapter 5:16), that is to say, physical abuse. The accused was convicted on his own plea of guilty and was sentenced to 18 months imprisonment with 8 months suspended for 5 years on the usual conditions of good behaviour.

The facts as gleaned from the state outline are that complainant is accused's biological mother. On the 11th of March 2017 and at around 2000 hours the complainant was drinking beer at Simatelele business centre when the accused observed that complainant was drunk. The accused enquired what the complainant was still doing at the shop at that late hour. The complainant did not respond. This infuriated the accused who then started assaulting her with fists on the face several times. The complainant sustained minor injuries and had a swollen face, bruises and a swollen left arm. The accused left the complainant lying on the ground and went

home to sleep. The complainant was referred to Binga Hospital for treatment. The medical report reveals that the injuries are serious but there is no possibility of permanent disability.

The conviction is proper and nothing turns on it. It is the sentence which appears harsh and excessive in all the circumstances of the case. In addressing the court in mitigation the accused had this to say:

> "I am 34 years old. I am married to 2 wives. Have 7 children. No money on person. No assets.
>
> Q - Why did you commit the offence?
> A - I was trying to force her (complainant) to come home with me. She was drunk. I did not want to leave her behind at the shops as it was dark. She was lying on the ground at a business centre."

The learned trial magistrate did take into account the circumstances surrounding the commission of the offence when he stated as follows:

> *"In mitigation, he stated that his mother (i.e. complainant) was drunk and lying at the shops. He had to assault her so as to force her to go home. I do appreciate that his intention of wanting to see his mother safely home was good but he rather unnecessarily used excessive force. I feel he could have used other legal and reasonable means of making sure that his mother was safely taken home …"*

The learned magistrate's reasoning cannot be faulted at all. It is difficult to understand how the accused intended to get his drunken mother home by assaulting her. After assaulting her he left her lying on the ground at the shops. He did not assist her to get home.

In deciding to impose a custodial sentence, the learned magistrate had this to say;

> *"Analysing the circumstances of this case, I humbly believe that a non-custodial sentence would be a mockery to the administration of justice. It would seem as if the accused person's actions were condoned. That would send a wrong message to would be offenders. It is hence my view that a custodial sentence would be in the interest of the administration of justice."*

Quite clearly, the magistrate placed too much emphasis on the moral blameworthiness of the accused. She was also motivated by sending the "correct message" to would be offenders. In my view, she over-emphasised the issue of general deterrence and failed to consider other weighty mitigating features of the case. The accused was a first offender with 2 wives and 7 children. He has a large family that depends on him for survival. The injuries suffered by the complainant are superficial. Indeed a person who assaults his own mother invokes the revulsion of society. It is considered taboo to assault one's mother or father. The court ought, however to have considered the possibility of a sentence of community service. The court's failure to consider an alternative form of punishment in the form of community service is a misdirection on the part of the trial court. Imprisonment should only be resorted to as a last resort, and usually in circumstances where the imposition of a non-custodial sentence would trivialize the offence and would not serve the interests of justice.

In *S* v *Shariwa* HB-37-03, and in many cases decided thereafter, the principle has now been well settled that in certain instances the failure to consider the imposition of community service amounts to a misdirection which calls for interference by this court. This would have been a proper case for community service. I am inclined to adopt the approach laid down in *S* v *Shariwa*. I would accordingly order as follows:

1. The conviction be and is hereby confirmed.
2. The sentence of 18 months imprisonment is set aside and substituted as follows: $100 fine or in default of payment 2 months imprisonment.

Moyo J …………………………………….. I agree