HB 35/17
HCAR 257/17
X REF CRB KK 28/17

THE STATE

Versus

KHUMBULANI NCUBE

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 23 FEBRUARY 2017

Review Judgment

BERE J: This matter was placed before me on automatic review. I have no qualms with the conviction of the accused person but I am concerned with what I perceive to be a wrong approach to sentence.

The accused appeared at Kwekwe Magistrates' Court charged with the offence of resisting or assaulting a peace officer as defined in section 176 of the Criminal Law (Codification and Reform) Act[1]. Upon conviction the accused was sentenced to 24 months imprisonment of which 6 months were suspended on the usual conditions of good behaviour.

The facts of the case are that on the 1st day of January 2017 the complainant who is a police officer together with other officers were on patrol in Torwood high density suburb, Redcliff. The complainant and his team proceeded to a club in the suburbs where they arrested someone who was in possession of a machete. This person appeared to have been in the company of the accused who was also armed with a machete.

The accused is then said to have used his machete to strike the complainant "once on the back" and ran away.

1. Chapter 9:23

The complainant did not sustain any visible injuries and did not get any treatment hence no medical report was available when the accused was taken to court.

On these facts the accused was taken to court on a plea of assaulting the complainant and sentenced as above-referred to.

It is this high handedness in approach to sentence which has caught my attention.

It has been stated for many times without number that the court must be careful when dealing with first offenders particularly those who accept their unlawful and wrongful conduct without wasting the court's time by offering an unsolicited plea of guilty.

McNALLY JA makes the following instructive and didactic observations in *S* v *Sidat* when he states as follows:

> "… a plea of guilty must be recognized for what it is – a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. Otherwise, again, why plead guilty?"[2]

EBRAHIM JA in *S* v *Mugwenhe and Another*[3], with the concurrence of fellow Supreme Court Judges cautions against the narrowness of the "traffic" approach to sentencing particularly in assault cases. The head-note captures the court's position in the following:

> "While the "traffic" approach to sentencing is gaining wider currency, it ignores the fact that the determination of sentence is pre-eminently a matter for the discretion of the trial court. That discretion should be exercised to the full and sentences should be individualized as far as possible. Imprisonment should not be regarded as the only punishment which is appropriate for retributive and deterrent proposes nor should "deterrent" and "exemplary" sentence be regarded as just. Assault with intent to do grievous bodily harm does not automatically attract a prison sentence.

2. 1997 (1) ZLR 487 (S) at 493B

> In sentencing a person convicted of that offence, regard should be had to the aforementioned principles and the factors which must be considered include: the nature of the weapon used; the seriousness of the injury; the nature and degree of violence and the medical evidence …"[3]

It will be noted that this case by EBRAHIM JA marked a departure in this country from the orthodox approach to sentence in serious assault cases which hitherto regarded a prison term as the only appropriate sentence in such cases.

In the case which EBRAHIM JA was dealing it was a gang assault and the medial report spoke to a more serious assault than in the instant case. In that case the injuries sustained and as noted by the doctor were "a cut on the forehead above the left eye, subconjunctival haemorrhage, and contusions on the right elbow and right angle. The doctor concluded that in his opinion, the injuries he observed on the complainant were a result of repeated blows having been inflicted on the complainant with moderate to severe force with a blunt heavy weapon"[4]

After carrying out a survey of similar cases decided in this jurisdiction and beyond, the learned Judge set aside a prison term of three months and settled for a fine of $250 coupled with 2 months imprisonment wholly suspended on the usual conditions of future good conduct.

In a case that followed hotly on the heels of EBRAHIM JA's decision, ROBINSON J[5] who was also seized with a case involving gang assault followed the sound reasoning expoused in the *Mugwenhe* case. In ROBINSON J's case, the gang had assaulted the complainant with bricks and stones all over the body. The medical report revealed the following injuries:

> "(1) laceration 1cm right scalp on head
> (2) multiple bruise at the back
> (3) fracture right ulma"

3. *S* v *Mugwenhe & Anor 1991(2) ZLR 66 (SC)*
4. *S v Mugwenhe & Anor (supra)* at p 68 (C-D)
5. *Timothy Chivore & 2 Others* vs *The* State H-208-91

ROBINSON J set aside and substituted a two months prison term which had been imposed with a fine of $300 with an additional 2 months imprisonment wholly suspended on condition of future good conduct.

Compare the above two cases with the instant case where the victim or complainant was never taken to hospital with the result that the court *a quo* was deprived of a medical report in assisting it in appreciating the extent of the injuries if at all. In fact, the State summary clearly says the complainant did not sustain any visible injuries hence the absence of a medical report.

The learned magistrate went to town by emphasizing the fact that the accused had assaulted a police officer who was executing his duties. Accepted, this was aggravatory but one gets the impression that this aspect was erroneously allowed to cloud all the other issues in mitigation of the accused like the accused being a breadwinner, married with 5 children and being a first offender.

I have noticed that wherever police officers are victims of assault, magistrates generally get excited about it and that that excitement usually results in severe and disproportionate sentences being meted out.

The view that I hold is that an unprovoked assault against any individual be it a young, old person, police officer or any other person for that matter is serious by its very nature. The assailant must be adequately punished. But to send the accused in the instant case to undergo 24 months for this kind of assault is both outrageous and unacceptable. The sentence cannot be justified in any way.

Consequently the sentence of the court *a quo* is set aside and substituted with the following one:

The accused is fined $150 or in default of payment, one month imprisonment. In addition 3 months imprisonment is suspended for three years on condition that the accused is not

convicted within that period of any offence of which assault is an element for which he is sentenced to imprisonment without the option of a fine.

Mathonsi J ……. I agree