CA 458-60/2001

LUCKMORE MUSINDO
and
TAPIWA MAZENGE
and
ISSAC PHIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
BARTLETT and NDOU JJ
HARARE 29 and 3 January 2002

Ms *Chipendo,* for the appellants
Ms *M. Gurure,* for the respondent

NDOU J: The appellants were aged 27, 21 and 25 years respectively at the time of their trial. They appeared before a Marondera Magistrate jointly facing two charges. On the first count they were charged with assault with intent to do grievous bodily harm. On the second charge they were charged with theft.

On the charge of assault with intent to grievous bodily harm it was being alleged that they assaulted one Wellington Madhibha by striking him on the head with a metal bar, pulling his private parts and burning him on the legs with a cigarette lighter. On this charge the appellants pleaded not guilty but despite their protestations they were eventually all convicted and each sentenced to 12 months iwl of which 4 months were suspended on condition of good behaviour. On the theft charge they were also convicted and each sentenced to $1 000 or in default 3 months imprisonment. They do not seem to appeal

against the latter sentence.

The basis of the appeal against sentence is that it is manifestly excessive so as to induce a sense of shock.

In assessing the appropriateness of a sentence on appeal it is worth to note what GUBBAY CJ (as he then was) stated in the matter of *Ramushu and Ors v The State* SC 25/93 at page 5 of the cyclostyled judgment –

> "But in every appeal against sentence, save where it is violated by irregularity or misdirection the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as disturbingly inappropriate."

The pertinent question is whether the sentence in this case be described as being so excessive as to be regarded as being disturbingly inappropriate. A medical report was not produced during the trial. There is no denying that this omission is a handicap in the assessment of the seriousness of the assault. The trial court, however, made findings on the nature of the assaults. These findings are not disputed by the appellants. These findings are that appellants embarked on a violent and ruthless method of interrogating the complainant whom they suspected of having broken into their store and stolen some property therein. All this was done with the objective of extracting a confession from the suspect. The learned trial magistrate captured this in his/her findings in the following terms –

> "However, such a brutal attack calls for prison stints as it is shocking to hear of how the 4 teamed up to brutally thrash the helpless, complainant. In this case I believe all 4 went beyond the expected standards and went too far in what they termed trying to arrest the complainant. The use of weapons such as metal bars, baton sticks and a cigarette lighter was callous to say the least. Such a dastardly act shows that they acted as cowards by first of all teaming up and taking advantage of their number over the helpless

> complainant. I feel that although they all are first offenders, a strong message should be sent to others that the courts will not tolerate such assaults. It is fortunate that no grave injuries were occasioned on the complainant. I have ruled out the option of community service for this in my view acts to trivialise such a well orchestrated and well planned assault."

I find that the learned trial magistrate exercised his/her sentencing discretion properly. The complainant was assaulted over a period of time. The appellants commenced the assaults in the vicinity of Chiono Bar. They threw him into a vehicle were further assaults were perpetrated. Whilst in the vehicle they handcuffed him. Instead of proceeding to the police they took him to Mazarura Farm. Upon arrival at Mazarura Farm they threw him out of the vehicle onto some bricks. Further assaults were perpetrated on his person. Other persons tried to persuade the appellants from further assaulting the complainant. This was all in vain. Using a cigarette lighter they burnt him on his chest, buttocks, neck and inner thighs. When this was happening he responded to the torture by screaming in pain. After the appellants had stopped assaulting the complainant they threw him "like a sack" into the back of the motor vehicle. They took him to Mahusekwa Police Station and dumped him onto the floor. The first appellant lied to the police that the complainant had been assaulted by ZANU PF youths. The complainant was detained at Madamombe Clinic for four days receiving medical treatment.

I agree with the learned trial magistrate that a sentence of a fine or community service is not appropriate in the circumstances. According to the learned trial magistrate such brutal assaults are common in this area. Imprisonment in this case is a sad necessity for this cruel assault. The law abiding citizens need to give vent of its feelings of horror, revulsion or disapproval. It is one of the functions of the criminal law to give expression to the collective feeling of revulsion toward certain acts. An enlightened society will recognise the futility of severely punishing unavoidable retrogression in human dignity. But it is vain to preach to any society that it must suppress its feelings. As far as possible the courts should avoid cruelty in punishment. It is, however, folly to preach love of all mankind, for mankind

includes all the horrible villain whose atrocious villainies grow out of their human nature. The appellants assaulted the complainant in a callous and heartless manner. Pulling down the trousers of an adult man, pulling at his private parts burning him on his exposed things is degrading.

In the final analysis I do not think that this sentence is excessive as to be disturbingly inappropriate. Our courts have not hesitated to impose custodial sentences on deserving cases of assault with intent to do grievous bodily harm – see *Cloete v State* SC 72-98, *Sibanda v State* HCB 1-998. I find, on the contrary, that the sentence is appropriate and I accordingly, dismiss the appeal against sentence by all the three appellants.

Bartlett J, I agree.

Gambe & Associates, appellants' legal practitioners.
Attorney General, respondent's legal practitioners.