CRB 2777/2001

THE STATE
versus
KEVIN ITAYI DANGAREMBWA

HIGH COURT OF ZIMBABWE
CHINHENGO and UCHENA JJ
HARARE, 20 August 2003

Criminal Review Judgment

CHINHENGO J: The accused pleaded guilty to a charge of assault with intent to cause grievous bodily harm. He was sentenced to a fine of $2000 and in default of payment to two months imprisonment.

The facts which were admitted by the accused are these. The accused and the complainant were lovers. On 11 July 2003 at lunch time the accused accompanied the complainant to her residence for lunch. They traveled from Mutare City Center to Dangamvura where the complainant resided. At the complainant's house the accused asked the complainant about her alleged infidelity. The complainant is single whilst the accused is married. An altercation ensued which resulted in the accused assaulting the complainant with clenched fists on the face several times. He kicked her on the face with booted feet and assaulted her "recklessly" with a wooden crutch until it broke into three pieces. The medical report produced in court as an exhibit shows that the complainant sustained serious injuries:

> "Left tramatos conjunctivitis; multiple bruises on the back, thigh and torso; chipped tooth, tenderness over …chest wall; dislocation
> left wrist; occipital haematoma."

The doctor also observed that a blunt instrument was used to deliver blows to the head, "torso and body" and that there was a possibility of intracranial bleeding because of repeated trauma to the head. He concluded that the complainant had suffered "45% degree of injury" which he adjudged to be serious.

The record of proceedings went on scrutiny to the regional

magistrate who commented as follows:

> "Accused was convicted on his plea of guilty on a charge of assault with intent to cause grievous bodily harm.
>
> The conviction is proper. I find the sentence grossly lenient for his brutal battery of a girlfriend who had fallen down after being kicked with booted feet on the face. The assault was so vicious and protracted that the wooden crutch broke into pieces.
>
> Among injuries inflicted were: chipped tooth, dislocation of the left wrist and occipital haematoma. The Doctor opined that there was a possibility of intracranial bleeding due to repeated trauma to the head. He further opined that severe force caused the injuries he observed. He estimated that complainant sustained 45 percent degree injuries.
>
> The available facts do not show much provocation. The record does not mention that complainant offered to withdraw the charge against accused and that the accused helped complainant pay her medical bills. Even if this is so, I find a $2 000 fine shockingly lenient. It sends the wrong message to society…."

The regional magistrate's criticism of the sentence is right on the mark. The trial magistrate took into account extraneous factors in assessing the sentence. The record indeed does not show that the complainant intended to withdraw the charges nor that the accused assisted her with paying the medical bills. It is entirely wrong for a judicial officer to base his decision in any matter on factors that were not placed before him.

Cases of assault with intent to cause grievous bodily harm often attract a sentence of imprisonment. The following are cases summarized in Feltoe – *A Guide to Sentencing in Zimbabwe* at pp 161-164. The accused persons in those cases were sentenced to imprisonment and, depending on the seriousness of the injuries and the mental condition of the accused i.e. whether drunk or sober, the sentences varied from a few months to twenty-four months:

S v Ndlovu HB 57/83 - a young man attacked his mother with an axe resulting in fairly severe injuries but no permanent disability – effective 2 years imprisonment appropriate;

S v Lambe & Anor HH 374/84 - accused assaulted his wife with hands and fists and burnt her arm and punched another woman; he was a first offender – 8 months imprisonment of which 5 months were suspended;

S v Sparks HH 235/85 – accused assaulted a wife viciously with firsts, towel rail and heavy object, fracturing both wrist and lacerating forehead – 18 months imprisonment of which 9 months conditionally suspended appropriate;

S v Ncube HB 19/86 – prolonged attack by accused on young girl with fists resulting in laceration and loss of tooth - 6 months imprisonment with two months conditionally suspended appropriate;

S v Horwe HH 311/86 – brutal and unprovoked attack on woman – throttling her by kicking her head, knocking out two teeth – 4 months imprisonment with one month conditionally suspended appropriate;

S v Musombe HB 151/86 – accused struck woman on head and arm with hoe handle and fractured her arm – a short prison sentence appropriate;

S v Donga & Ors HB 37/87- deliberate assault by the accused causing serious injuries which necessitated hospitalization of the complainants – effective prison term rather than a fine appropriate;

S v Sibanda HB 62/87 – accused severely assaulted girlfriend after beer drink causing a broken arm, two scalp lacerations and multiple bruising – effective 9 months imprisonment appropriate;

S v Ndlovu HB 197/87 – accused stabbed ex-girlfriend with knife in the stomach with severe force causing serious injuries – effective 6 months imprisonment appropriate;

S v Razawu HH 257/87 accused drunk and provoked. Stabbed his wife in face and side but did not cause serious injuries – 8 months imprisonment of which 4 months were conditionally suspended.

In referring to the above-cited cases I do not intend to recommend a tariff approach to sentencing. Such an approach was criticized in *S v Mugwenhe & Anor* 1991 (2) ZLR 66(SC) where EBRAHIM JA said at 69 B-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 esconsed 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 & Ors* 1964 (4) S A 673(A) at 684A."

And at 70F-71B:

> "The tendency to regard all cases of violence and, in particular, those of assault with intent to cause grievous bodily harm as falling within the scope of those offences where prison sentences are desirable must be avoided. (See *S v Kulati* 1975 (1) S A 557 (E); *S v Makkahela* 1975 (3) S A 788(c)). There is also a tendency to regard "deterrent sentences" and "exemplary sentences" as being just: the view being that it is equitable to make an example of someone by punishing him more severely than he deserves so that others will be persuaded to desist from emulating him. (See also *S v Khulu* 1975 () S A 518 (N) at 521; *S v Matema* 1981 (3) 838(A). Not only is the argument specious and fallacious; it is doubtful whether the claims supporting its alleged efficacy are justified at all. This is not to say that judicial officers are to throw up their judicial arms in exasperation and do nothing more. All that is being suggested is that judicial officers should exercise their discretion to the full and acknowledge where necessary the shortfall of existing penal policy. The dynamism necessary for this approach is not achieved by reference to alleged "tariffs" of sentences for specific categories of offences. Invariably when dealing with sentences the court refers to, or is referred to, immeasurable cases which purportedly lay down the limits of the range of appropriate sentences for the case actually before it."

Mugwenhe's case places emphasis on the proper exercise of the sentencing discretion. In order to properly exercise that discretion in a case such as this , the judicial officer will often be guided by such factors as the weapon used, the seriousness of the injury, the nature of the degree of violence and the medical evidence (*Mugwenhe supra* at 71E). The factors of mitigation as put forward by the accused will

also have to be considered. *S v Mpofu* 1992 (2) ZLR 68(H) is another case where it was stated that imprisonment is not the only sentence which can be imposed in cases of assault with intent to cause grievous bodily harm.

In the present case the trial magistrate, cannot, in principle be faulted for opting for a non-custodial sentence. He can and must be faulted for failing to exercise his sentencing discretion in respect of the *quantum* of the sentence which he imposed. It is apparent from the facts accepted by the accused and from the other evidence, particularly the medical report, that the accused sustained very serious injuries. The accused used a wooden crutch to assault the complainant until it was broken into three pieces. The force which he used was severe. To impose a fine of $2 000 was in my view misdirection. A comparison with the cases I have referred to above shows clearly that this sentence was manifestly lenient. A further misdirection was of failure by the trial magistrate in this case to impose in addition to a fine a wholly suspended sentence of imprisonment in order to deter the accused from committing a similar offence. In my view a sentence of a fine of $50 000 and in default of payment 5 months imprisonment would have been the more appropriate. Alternatively the magistrate could quite appropriately have sentenced the accused to 5 months imprisonment, suspend 2 months on condition of good behaviour and 3 months on condition that he performed community service. In the result I decline to certify the proceedings as being in accordance with real and substantial justice.

CHINHENGO J:.....

UCHENA J, agrees:.....