THE STATE
versus
TAPIWA PARWADA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 6 February 2013

REVIEW JUDGMENT

MATHONSI J: This matter was referred to me by the scrutinising Senior Regional Magistrate for the Eastern Division who felt that it needed urgent attention as there was a likelihood of a grave injustice occurring given that the accused person had been given an unjustified term of imprisonment.

Although the referral letter of the learned Senior Regional Magistrate is dated 22 November 2012, it is not clear when the record was received by the registrar of this court as it bears no stamp of receipt. The record was only placed before me on 21 January 2013, exactly 2 months after its referral. Due to that delay, the accused person had already served 73 days of an effective 3 months imprisonment term, he having been sentenced on 9 November 2012.

I find myself having to repeat what I have said several times before in expressing the need for review records to be sent with speed to the reviewing judge in compliance with the provisions of the law. See *S* v *Mhondiwa HB* 193/11; *S* v *Shava HB* 200/11 and *S* v *Moyo HH* 308/12.

I restate the pronouncement I made in *S* v *Mhondiwa* (*supra*) at pp 4-5:

> "In review proceedings time is always of the essence and for that reason there must be strict compliance with the time limits provided for in the Act for submitting records of proceedings for review. The reason for those requirements is self-evident. The reviewing judge may decide that the sentence imposed by the magistrate is excessive and should either be quashed or substantially reduced. It is therefore undesirable for an accused person to serve the whole or a substantial part of the sentence which he does not deserve while the record remains somewhere between the courtroom and the judges chambers."

As already stated, in *casu* the accused had almost completed the sentence, a sentence he did not deserve, when the record was transmitted to me. With the thankful concurrence of

my brother MUTEMA J, I directed that a warrant of liberation be issued forthwith to facilitate the immediate release of the accused person from custody.

The 38 year old accused person, who is married with 3 children and was employed as a guard earning $34 per week, is the sole breadwinner in his family. Prior to his appearance before the trial court he had been over-detained by the police for 7 days with his family unaware of his whereabouts. He had a quarrel with the complainant who refused to repay him a sum of $1-00 which was owed to him. The accused head butted the complainant once on the mouth inflicting injuries.

The medical affidavit produced by the state was not helpful at all in that the doctor who examined the complainant only observed that the injuries were caused by a blunt object using moderate force. Although he took the view that there was a possibility of permanent injury, he did not explain how he arrived at that conclusion in the circumstances.

Navigating the way to the sentence that was imposed the trial magistrate reasoned as follows:

> "Accused person is a first offender who pleaded guilty to the charge hence did not waste the court's valuable time. In passing an appropriate sentence I took into consideration that the accused person assaulted the complainant once by head butting him, the medical report indicates the force used was moderate but this has resulted in complainant's teeth shaking and the possibility of loosing (*sic*) those teeth is high, showing that when accused inflicted the assault upon the complainant he had the intention to seriously injure the complainant as he appreciate that the mouth region is a very sensitive area.
>
> I did take into consideration that the complainant is a family man with responsibilities. However I was also concerned that you assaulted the complainant for a debt of $1. If you could assault someone with such force over a $1 how much more force would you use if something more serious is done.
>
> A fine as well as community service will trivialise this offence and a custodial sentence deemed proper."

It is not clear where the magistrate got the notion that the complainant's teeth were shaking, that there was a possibility of losing the teeth or indeed that he had the intention to seriously injure the complainant when the medical affidavit does not say so and no other evidence was adduced.

Clearly this is a classic case where the court paid lip service to the mitigating factors of the matter and exaggerated the injuries sustained by the complainant even as the state had

nothing to submit in aggravation. This was a misdirection as a result of which the magistrate came up with a disproportionate sentence.

Where the court has accepted any factor as mitigation, such must be specified and must be reflected on the reduced sentence. It is no good to just pay lip service to mitigating factors *S* v *Madembo & Anor* 2003 (1) ZLR 137 at 140 B-D; *S* v *Nyenge HB* 107/10 at p 2.

This is a case in which the court should have imposed a non-custodial sentence of say a fine or a wholly suspended sentence. As the accused has already served a term of imprisonment not much can be done to regularise the issue other than to alter the sentence to fit the time he has served.

In the result, it is ordered that:

1. The conviction of the accused is hereby confirmed.
2. The sentence of 5 months imprisonment with 2 months suspended is hereby set aside and in its place is substituted the sentence of 70 days imprisonment.
3. As the accused has already served that period he should be released from custody immediately.

MUTEMA J agrees.....