**HH 107-24**
**HCHCR 5732/23**

THE STATE

Versus

TENDAI MUPAYA

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA and CHILIMBE JJ
HARARE 18 March 2024

**Criminal review**

CHILIMBE J

BACKGROUND

[ 1] According to the pre-sentencing community service suitability assessment report filed of record, the accused and complainant were husband and wife. Their marriage ended on 23 October 2023 after but a month. It ended as a result of the act of domestic violence forming subject of these proceedings. It ended with the accused headed to prison, and complainant with a disfigured ear.

[ 2] The accused was arraigned at Marondera facing a charge of "physical abuse". This being a contravention of section 4(1) as read with section 3 (1) of the Domestic Violence Act [ Chapter 5:16]. He was convicted on a plea of guilty and sentenced to 3 years imprisonment. One (1) year was suspended on conditions of good behaviour.

THE CIRCUMSTANCES

[ 3] The two parties resided at Good Grass Farm, Igava, in Chief Svosve`s area near Marondera, where they were also employed as labourers. On 22 October 2023 around noon, the couple proceeded to their quarters after knocking off. The accused immediately departed for a beer drink at a place not specified in the papers. He returned home at around 16:00 hours in the afternoon. His state was described as "violent and shouting to (sic) the

complainant". He proceeded to attack the complainant physically by striking her all over the body with open hands. He concluded that despicable attack by biting her on the right ear. In that attack, accused actually removed a piece off complainant`s right ear.

[ 4] The complainant was medically examined on 23 October 2023.The examining medical officer`s name is inscrutably obscured-courtesy of the protype doctor`s scrawl. Nonetheless, the doctor noted; - "*laceration of right ear and piece missing*". The injuries were classified as serious, with a possibility of permanent injury. The force applied to cause them was deemed to have been moderate. The doctor also ruled that the injuries were consistent with those caused by a sharp weapon.

[ 5] Complainant also filed a post-conviction victim impact statement. Therein, she stated on oath that she had expended "a lot of money" as medical expenses. She also explained that following the attack, she was experiencing great pain from the injury. In fact, so serious was the pain that she had since stopped going to work. And since she was no longer working, financial problems had set in.

[ 6] The probation officer`s report proffered further detail. It suggested childhood trauma as a possible cause of the accused`s violent behaviour. The probation officer opined that unless the couple`s underlying differences were addressed, the possibility of further conflicts between them remained high. The probation officer then recommended psychological therapy for both parties. The nature of the therapy in question was not further articulated. Finally, the report advocated for the consideration community service as a punishment option.

THE SENTENCE

[7] The trial court credited the accused for his guilty plea. It also noted that he was a first offender, a family man with two minor children and of humble station in life. The court in its own words, recognised that the accused "deserves a second chance to reform". It nonetheless expressed concern over the seriousness of the assault, the likelihood of permanent injury as well as disfigurement.

[8] The court further considered the prevalence and seriousness of the offence. It took into account the possibility of domestic violence incidents resulting in loss of life. Having so

weighed the mitigatory and aggravating factors, it sentenced the accused to three (3) years imprisonment with one (1) year suspended on conditions.

[ 9] Our view is that, the sentence is insupportably harsh and warrants interference. The reasons for such conclusion are set out below. In saying so, we are mindful of (i) the sentencing prerogative of the subordinate or trial court, and (ii) the need for superior courts to exercise restraint when reviewing proceedings from subordinate courts. MALABA DCJ (as he then was) set out the position in in *Muhomba v The State* SC 57-13 at p 9 as follows;

> "On the question of sentencing, it has been said time and again, that sentencing is a matter for the exercise of discretion by the trial court. The appellate court would not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as a trial court. There has to be evidence of a serious misdirection in the assessment of sentence by the trial court for the appellate court to interfere with the sentence and assess it afresh. The allegation in this case is that the sentence imposed is unduly harsh and induces a sense of shock. In *S v Mkombo HB* – 140-10 at p 3 of the cyclostyled judgment it was held that:
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> 'The position of our law is that in sentencing a convicted person, the sentencing court has a discretion in assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and aggravation. For an appellate tribunal to interfere with the trial court's sentencing discretion there should be a misdirection. *See S v Chiweshe* 1996 (1) ZLR 425 (H) at 429D; *S v Ramushu & Ors* SC 25-93. It is not enough for the appellant to argue that the sentence imposed is too severe because that alone is not misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence. In *S v Nhumwa* SC 40 - 88 (unreported) at p 5 of the cyclostyled judgment it was stated:
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> 'It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severe than one that the court would have imposed sitting as a court

> of first instance, this Court will not interfere with the discretion of the sentencing court.'"

THE SENTENCING GUIDELINES

[10] The sentencing court in Zimbabwe must, effective 23 August 2023, have regard to the Criminal Procedure (Sentencing Guidelines) Regulations, Statutory instrument 146/2023 ("the Sentencing Guidelines"). This court, per MUTEVEDZI J, issued a detailed commentary of the sentencing guidelines in *The State v Blessed Sixpence* HH 567-23.

[ 11] These guidelines represent a concise distillation of the guidance issued over the years by the superior courts on correct sentencing approaches. They commence, in section 6 (1) thereof, by reminding the sentencing court of the diverse sentencing options open to it. In doing so, a court must have regard to the age-old principles set out by MANTHONSI JA in *Simbarashe Munakamwe v The State* SC 121-23 at page 7; -

> "The starting point is to make the general observation that the objective of sentencing is to correct, rehabilitate and punish convicted offenders in a just and proportionate manner. While reformation and rehabilitation of offenders is a relevant consideration, retribution is still part of the sentencing policy of this jurisdiction. In other words, the sentencing court must always bear in mind that sentencing is also aimed at ensuring that the offender faces a sentence that is in equal measure to the harm he or she has caused. Anything short of that will bring the criminal justice system into disrepute.

PRE-SENTENCING INQUIRY

[ 12] The discretionary exercise and authority of the court *a quo* will be reviewed against the above objectives. In our jurisdiction, a pre-sentencing inquiry has always formed an indispensable tool in aid of proper sentencing approaches[1]. Sections 12 and 13 of the Sentencing Guidelines have further codified the matters which a court ought to address in its pre-sentencing inquiry.

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[1] *S v Happy Simba Manase* HH 110-15 and section 334 (3) (a) to (d) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (the Criminal Law Code).

[ 13] The purpose of that inquiry being thereof is to equip the trial court with the relevant details regarding the commission of the offence as well as the offender. Such information is invaluable in the discharge of the court`s sentencing obligation.

[ 14] The findings from the inquiry must thereafter be synthesised with the rest of the considerations into cogent reasons justifying the punishment imposed on the offender. After comparing the pre-sentencing procedure outlined in the Criminal Code to that in the Sentencing Guidelines. MUTEVEDZI J observes as follows in *S v Sixpence* at pages 10 -11; -

> "More importantly s 12(1) requires a court to inquire into and investigate particular issues. Once again, it must follow that if a court fails to do so, it would have committed a gross irregularity which can be a ground for the vacation of its proceedings. The words inquire and investigate are generally regarded as synonymous but they have their differences. The distinctions are heightened where both words are used at once in a statute like in s 12 of the Guidelines. In relation to sentencing, an inquiry on one hand, usually refers to a general solicitation for information conducted to gather superficial data about a subject. An investigation on the other, is an elaborate and comprehensive analysis of a specific issue. The purpose of an investigation is to discover or expose facts or information about that particular issue in a bid to reveal the cause of the criminal behaviour or to analyse if the particular circumstances surrounding the crime are linked to its occurrence. Unlike an inquiry an investigation extends to other activities such as collecting and examining evidence and interviewing witnesses among other activities. Put simply an inquiry entails requesting for information, while an investigation is an in-depth examination of a specific issue to find out the cause of a problem. S 12 requires both the inquiry and the investigation to be carried out. In other words the court must request information and at the same time carry out a detailed assessment of the issues listed in the provision." [ Underlined for emphasis]

[ 15] In the present matter, the court *a quo* was seized with an offence under the Domestic Violence Act. The court was obliged to adopt a sentencing approach consistent with the

objects of the offended statute. This court opined on the matters to consider in domestic violence cases and stated thus in *S v Velaphi Sibanda* HB 98-17 at page 4; -

> "Domestic Violence Act as an Act of Parliament was not enacted to destroy marriages but to strengthen them. In this regard I am inclined to re-state the views expressed by my sister judge CHIGUMBA J in the case of *S* v *Allen Gudyanga*[2] when she commented as follows; "The DVA (Domestic Violence Act) is unique in its recognition and promotion of family values, of adhesion and cohesion of the nuclear family."

[ 16] The crime of domestic violence seeks therefore, to correct societal ills taking place in a domestic, marital, familial or other close relationship. It is vital that such context be properly accentuated before the trial court. HUNGWE J (as he then was) also opined on the need to pay careful heed to the nature and circumstances of acts of domestic violence in *S v Madyambudzi* HH 333-17.

[ 17] See also Professor Feltoe`s article[3] "*Deterrent sentences for the perpetrators of domestic violence: Case notes on S v Muchekayawa 2012 (1) ZLR 272 (H) and S v Gudyanga 2015 (1) ZLR 238 (H)"*. The learned author lists, among other considerations, the factors identified by the court in *S v Gudyanga* (*supra*) as being; -

- the extent of the complainant's injuries as evidenced by medical affidavit;
- the possibility of permanent injuries;
- whether any of the complainant's property was damaged;
- whether the accused has previous convictions for assault upon his wife;
- whether the marital relationship between the parties is now so hostile and acrimonious that reconciliation seems unlikely;
- whether the accused pleaded guilty and showed contrition;
- whether the accused made reparations or amends;

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[2] HH 167-15 at p6 (reported as *2015 (1) ZLR 238 (H)*). See also *State v Ningisai Wakeni* HH 15-18 and
[3] https://old.zimlii.org/zw/journals/Deterrent%20sentences%20for%20domestic%20violence%20final.pdf

- the accused's reason for assaulting his wife e.g. was he provoked, did he find out or suspect that she was committing adultery etc.;
- whether the parties are willing to undergo counselling

[ 18] The considerations noted in *S v Gudyanga* dovetail neatly into those set out in sections 12 and 13 of the Sentencing Guidelines. In the present matter, the trial court was well-placed to ventilate these issues. Sadly it did not. Despite it having received a medical affidavit, complainant`s victim impact statement in aggravation, as well as probation officer`s report. It failed to venture further in its inquiry. It does not appear that the trial court took into account all three reports in passing sentence. Especially the probation officer`s views.

[ 19] Secondly, the court did not canvass the contents of the reports with the accused. One is forced to speculate on what his response could have been to such. Possibly, the process may have extracted further contrition, or offers of compensation. The probation officer`s report was particularly insightful.

[ 20] It tendered a possible explanation as to why accused committed the offence. But the opportunity to benefit from such from a sentencing perspective was lost. The accused committed an assault as loathsome as its motive is difficult to understand. Questioned by the trial court as to why he committed the offence, the accused gave a simple answer. "*I just lost my temper*". The court`s probe proceeded no further.

[ 21] Yet the accused`s response ought to have triggered more follow up questions. What caused him to lose his temper? Was it the complainant? Was it someone – or even something else? And why did he resort to biting complainant on the ear? All these questions form a puzzle whose answers would have greatly assisted the sentencing process. In domestic violence cases, the circumstances or causes of an assault are particularly important. Especially given the apprehension expressed by the court (and correctly too) that domestic violences matters often degenerate to tragic loss of life.

[ 22] In *S v Velaphi Sibanda*(supra), the court noted the accused`s exasperation with his wife`s persistence with an illicit relationship. On the other hand, in S *v Sithabile Ndlovu* HB 247-16, the court found that all the accused had done (in committing the offence) was to hold "a small sofa cushion" against complainant`s face. Similarly, in *S v Hazvirambwi* HH 126-23,

the accused repeatedly attacked both his wife and a neighbour who tried to restrain him. The neighbour later died from injuries sustained during the assault. In *S v Lakela Sweswe* HB 184-18, the court had to examine a history of alleged prolonged abuse. See also *S v Robert Tevedzayi* HH 206-18.

[ 23] These last three decisions were murder cases. All arose from domestic violence. Their relevance to the present proceedings is twofold. Firstly, in those decisions, the court benefitted from the fuller facts surrounding the offence. Secondly, the cases give general insights on how-and importantly -why, domestic violence can escalate from ordinary scuffles to murder. It matters not whether the court accesses such details via the state outline, witness testimony, or post-conviction inquiries. What is important are the fuller facts being placed before the sentencing court.

[24] A court faced with domestic violence offences must therefore be equipped with sufficient facts in ordered to pass balanced and informed sentences. Herein one may never know if the accused was a violent, sadistic brute. Or "*an angry man smitten by pangs of jealousy."* (Per MATHONSI J (as he then was) in *Prayer Moyo v Merjury Samponda* HB 5-18). Or possibly a spouse peeved by the withholding of conjugal privileges as in *S v Gudyanga* (*supra*)?

"THE IMPULSIVE APPROACH TO SENTENCING"

[ 25] A informed a court avoids the pitfall which BERE J (as he then was) described as the "impulsive approach to sentencing"[4]. This being an insincere and insensitive sentencing approach which pays lip service to mitigatory factors identified in a matter. See also *S v Mahove* 2009 (2) ZLR 19 (H). Herein, as the court *a quo* committed the accused to prison, it was aware of the age-old position that imprisonment is a rigorous form of punishment. A punishment that ought to be reserved only for the most deserving. The question is; -did the trial court genuinely reflect over those considerations?

[4] The learned judge cited with approval, the decision of EBRAHIM JA in *Maxwell Mugwenhi and Alick Karande* vs *The State* 1991 (2) ZLR 66 (SC). See also *S* v *Shariwa* 2003(1) ZLR 314(H)

[ 26] In *S v Aleck Mugande* HB 132-17, MAKAONESE J expressed this trite position as follows at page 1; -

> "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."

[ 27] The attack by accused on complainant was a sickening and cowardly act of violence by a man upon a woman. It left complainant disfigured, in great pain, saddled with financial burdens and unemployed. Clearly, the retributive aspect of sentencing called for imposition of a term of imprisonment. In *S* v *Modekayi Ncube* HB 86-16, it was held that imprisonment was a suitable punishment for offences where there was serious injury or disfigurement. But even where imprisonment is imposed, the severity thereof must however, always match the seriousness of the offence.

[ 28] The sentence of 3 years passed herein was an exercise of discretion by the court *a quo*. But the discretion was not exercised against a reasoned assessment of the relevant factors. The mitigatory and aggravating factors were perfunctorily addressed. Further, the term of imprisonment imposed appears to have been arbitrarily, albeit robustly arrived at. The court *a quo* also fell into further error by failing to revert to precedent. Precedent is an unfailingly useful guide or starting point in the quest to set appropriate penalties in criminal matters.

[ 29] The cumulative effect of the shortcomings noted above is that the court committed a number of misdirections. The misdirections impaired the proceedings with irregularities. The irregularities in question manifest as the inordinately heavy sentence passed herein. As such, we must necessarily interfere in order to correct the irregularities.

[ 30] A survey of similar matters suggests that clearly,3 years imprisonment was excessive. Especially given the severe effective term of 2 years. In *S v Gudyanga* (*supra*), a sentence of 4 months imprisonment was considered sufficient for a young, contrite but repeat offender. In

*Mudzingiri v The State* HB 151-17, a fine coupled with a 3-month suspended sentence was deemed appropriate for a man who had forcibly confined his wife between the front seat and vehicle dashboard. The man had thereafter pulled the wife`s braids and poked the back of her head with a knife. A sentence of 2 years with 6 months suspended was overruled as excessively harsh.

[ 31] In *S v Sithabile Ndlovu* (*supra*), a sentence of 6 months imprisonment was reduced to a $50 fine for an accused who had attempted to smother the complainant with a cushion. In S v *Velaphi Sibanda (supra*), a sentence of 2 years with 6 suspended was reduced to a fine of $300 plus a suspended 3-month term of imprisonment. In that matter, the accused had struck his wife with an axe handle leaving her with a swollen thigh, wrist and hand.

[32] In *Wellington Tarugarira v The State* (supra), the appellate court declined to interfere with a sentence of 15 months imprisonment. The appellant therein had been convicted of contravening section 10 (7) of the Domestic Violence Act [*Chapter 5:16*] (fail to comply with terms and conditions of a protection order). We have also had regard to sentences passed in other (non-spousal conflict) domestic violence cases such as *S v Madyambudzi*, and *S v Chinyemba. (supra)*

[33] The general view is that clearly a sentence of 3 years was excessive herein. And in the absence of a detailed pre-sentence inquiry and canvassing of all possible sentencing options, it becomes difficult to establish the most appropriate sentence that the trial court could have imposed.

[ 34] But the taking the various considerations discussed above into account, a penalty of 18 to 24 months would have formed a good starting point. This would have placed the matter within scope for consideration of community service. With that opportunity lost, and taking into account against the rest of the issues canvassed, it our view that it will be fair, just and proper to set the sentence aside and substitute it with 12 months imprisonment with 6 months suspended.; -

Accordingly is hereby ordered that; -

1. The conviction be and is hereby upheld.

2. The sentence imposed by the court *a quo* sitting at Marondera in case number CRB MRDP 1173-23, on 23 October 2023, be and is hereby set aside and substituted with the following; -

   "The accused be and is hereby sentenced to 12 months imprisonment of which 6 months imprisonment is suspended for a period of 5 years on condition the accused does not commit any offence involving domestic violence as an element, and for which he is sentenced upon conviction, to a term of imprisonment without the option of a fine."

3. The given the herein reduction in sentence and duration of prison term served, the accused be and is hereby released forthwith.

CHILIMBE J_____

CHIRAWU-MUGOMBA J _____ I agree