THE STATE
versus
ADMORE MATEVESE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 1 June 2020

Criminal Review

MAWADZE J: The gods should have literally smiled at the accused in this matter when he appeared before the trial Magistrate at Chivi. Indeed the accused was treated with kid gloves to say the least as a manifestly lenient sentence was imposed. The accused seemed to have continued to ride his luck as the learned scrutinising Regional Magistrate despite initial well founded reservations nonetheless was apparently persuaded to confirm the proceedings as in accordance with real and substantial justice!!

The complainants in this matter were irked by these developments and unimpressed. They proceeded to raise formal complaints administratively with the Provincial Magistrate in Charge of Masvingo Province. The Provincial Magistrate found merit in the complaints raised and consulted the Chief Magistrate on the way forward. A decision was made to refer these proceedings to this court to enable this court to exercise its powers of review. I find no fault with that decision when one considers s 29(4) of the High Court Act [*Cap 7:06]* which provides as follows;

> *"(4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review*."

In casu the criminal proceedings had been scrutinised by the learned Regional Magistrate who had certified the proceedings to be in accordance with real and substantial justice. Ordinarily this would have put the matter to rest were it not for the complaints raised to the Provincial Magistrate by the victims.

The referral minute by the Provincial Magistrate is couched as follows:-

"*May the record be placed before the Honourable Judge with the following comments:-*

Accused was convicted on his own plea of guilty on two counts of assault. On the first count he stabbed the complainant on the upper lip once and on the left ear with a knife. On the second count he struck complainant once on the rights ribs with a stick and stabbed him once just under the left breast with a knife. Medical report shows that injuries sustained by complainant in count 2 were really serious. There is likelihood of permanent injury and there is threat to life as well as many complications resulting from internal bleeding. This matter border lines on attempted murder, in my view. According to medical affidavit transplant of damaged organs might be required.

The trial Magistrate treated the two counts as one for sentence and sentenced the accused to a fine of $200 or in default of payment 50 days imprisonment. An additional 8 months imprisonment was wholly suspended for 5 years on the usual conditions of good behaviour. Aggrieved by the sentence, a complaint has been raised which is being dealt with administratively.

Notwithstanding the fact that the Regional Magistrate has confirmed the proceedings, this office, in consultation with the Chief Magistrate's Office has seen it proper to forward the record to your office for your opinion, regard being had to the circumstances of the case as well as the sentence imposed.

Respectfully referred."

The referral minute by the learned Provincial Magistrate is very lucid save for the view that what is being sought is my opinion which would be meaningless. The proper course, in my respectful view, would be to ask this court to review the decision of the learned Regional Magistrate to certify the proceedings as in accordance with real and substantial justice.

In order to put this whole matter in its proper context the summary of agreed facts giving rise to the charges should be outlined as follows;

The accused pleaded guilty to two counts involving contravention of s 89(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] relating to assault.

The charges being that on 24 November, 2019 at Masungo Villge, Headman Madyangove in Chivi, Masvingo the accused assaulted one Vusa Chinyama in count 1 with fists and stabbed

him once on the upper lip and one on the left ear with a knife causing a cut on the upper lip and a cut on the left ear. In count 2 the accused assaulted Nyasha Shonhai by striking him on right side of the ribs with a stick and stabbed him once just under the left breast with a knife causing a deep cut under the left breast.

In count 1 the agreed facts are that the 30 year old accused met the 46 year old complainant on 24 November, 2019 at about 1900 hrs as the complainant was coming from a beer drink. The complainant proceeded to greet the accused in sindebele saying;

"*Sakubona ndoda* (meaning *how you are gentleman*"

For unclear reasons the accused was offended and charged towards the complainant who was in the company of two other men. The accused proceeded to assault the complainant with fists several times all over the body and stabbed him once on the upper lip and once on the left ear with a knife causing cuts on both the upper lip and the left ear. The complainant took to his heels. As per the medical report the complainant sustained a ± 2 cm laceration on the upper lip and bruise on the left ear and right forearm. These injuries are described by the Doctor as serious although no permanent injury would result.

In count 2 the facts are that after assaulting the complainant in count 1 who fled from the scene, the accused believed the complainant in count 1 had gone to complainant in count 1's residence. As a result accused proceeded to complainant in count 1's residence. Apparently at that homestead accused met one Nyasha Shonhai, complainant in count 2 whom he unbelievably mistook for the complainant in count 1. The accused proceeded to assault the 38 year old Nyasha Shonai in count 2 firstly with a stick on right side of the ribs and stabbed him with a knife below the left breast. The complainant in count 2 was taken to Chivi District hospital but due to the severity of the injuries was transferred to Masvingo General Hospital. The medical report in respect of the complainant in count 2 shows that the complainant sustained a penetrating wound on the left side of the chest which posed potential disability in the event of damage to internal organs. This injury was described by the Doctor as life threatening due to internal bleeding and potential danger posed to internal organs. There is therefore no doubt that the injury inflicted on the complainant in count 2 were of a grave nature.

In mitigation the 30 year old accused indicated that he is married with 3 children. This was his first brush with the law. The accused is employed as a driver earning R6000.00 but it not clear

where he works. The accused had no meaningful savings or assets although he indicated that he paid for the medical bills of the complainants. He apologised for what he said was his foolish conduct and pleaded to be spared a custodial sentence as he is the sole provider for his family.

In the initial reasons for sentence the trail Magistrate took on board all the said mitigatory factors and indicated the accused should not be imprisoned as he is a family man and that none of the complainants are currently in danger. The trial Magistrate emphasised that the accused is a first offender and that the complainants could still claim damages arising from the assaults perpetrated on them. This is the basis upon which a fine of $200 or in default of payment 50 days imprisonment was imposed with an additional 8 months wholly suspended conditionally.

When the record of proceedings was referred to the scrutinising Regional Magistrate, the scrutinising Regional Magistrate requested for typed or transcribed reasons for sentence to enable the scrutinising Regional Magistrate to assess if the sentence imposed especially in respect of count 2 was not too lenient.

In a rather surprising response the trial Magistrate instead of simply providing typed reasons for sentence as requested decided to have a second bite of the cherry and provided "further reasons for sentence" justifying the sentence imposed now citing case law. This, in my respectful view is improper unless a query had been raised asking the trial Magistrate to justify the sentence imposed.

In the subsequent response the trial Magistrate indicated that he or she was guided by case law not to impose a custodial sentence. Reference was made to the case of *S* v *Ngombe* HH 504/87; *S* v *Wood* 1973 (2) (improperly cited); *S* v *Hope* HB 18/93 and *S* v *Tebuno* HH 517/87.

The trial Magistrate indicated that the plea of guilty persuaded him not to impose a custodial sentence. Reference was made to the case of *S* v *Sidat* 1997 (1) ZLR 487 (S) and *S* v *Makumbe* 2013 (1) ZLR 141 (H). The trial Magistrate indicated that a rehabilitative rather than a retributive sentence was appropriate and cited the cases of *S* v *Chera & Anor* 2008 (2) ZLR 58 (H); *S* v *Steven Mutumwa* HMA 41/19.

Lastly the trial Magistrate contended that it was undesireable to impose community service in this case as the accused is gainfully employed. The trial Magistrate however had not probed where exactly the accused was employed, his work routine in order to establish how it would be difficult for the accused to perform community service.

Again in a rather bizarre turn of events the trial Magistrate now conceded that a fine of $200 was too lenient in the circumstances. No indication was then given as to what he or she perceived to be an appropriate fine or sentence.

Apparently it was after these further "reasons for sentence" that the learned scrutinising Regional Magistrate certified the proceedings as in accordance with real and substantial justice. This was so despite the trial Magistrate's belated concession that the sentence imposed was too lenient.

The process of assessing what is an appropriate sentence is each particular case is not an easy exercise. This was aptly captured by MAFUSIRE J. in the case of *Anesu Mharapara* v *The State* HMA 26/17 at page 4 of the cyclostyled judgment in which the learned Judge said;

> "*Sentencing is a complex exercise. It is a balancing act. From time to time jurists have espoused brilliant philosophies around it. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences. There are certain basics. The penalty must fit the crime. The interests of the offender must be balanced against those of justice. It is not right that someone who has wronged society should go scot free, or escape with a trivial sentence. But at the same time he should not be punished beyond what his misdeed deserves. Punishment should be less retributive and more rehabilitative*."

See also *S* v *Harrington* 1988 ZLR 344 (S); *S* v *Mpofu* 1985 (1) ZLR 285 (H).

In my respectful view a proper assessment of the mitigatory and aggravating factors in this case clearly show that the aggravating factors outweigh the mitigatory factors.

There is absolutely no reason at all why the accused attacked both complainants in counts 1 and 2. I wonder how this escaped both the trial Magistrate and the learned scrutinizing Regional Magistrate. Put differently this was a savage and unprovoked attacked by the accused on persons who had not wronged him in any way. In both counts the accused used a lethal weapon, a knife, even in circumstances where both complainants did not fight back, even after being initially assaulted with fists and a stick. It is clear the accused is a saddist. The injury inflicted on the complainant in count 2 are very grave to say the least. A knife was thrust deep into his chest with the potential to damage internal organs.

Prior to the codification of our criminal law this offence was referred to as "assault with intent to cause grievous bodily harm." There are indeed a plethora of cases which enunciated the principle on circumstances in which a custodial sentence would be warranted for such an offence.

The case of *S* v *Melrose* 1984 (2) ZLR 217 defines what grievous bodily harm entails. It is explained as such harm which must be so serious at to interfere with the victim's health. There is no doubt that the injury inflicted on the second complainant seriously interfered with his health. He had to be hospitalised initially at Chivi District Hospital and then at Masvingo General Hospital.

In appropriate cases custodial sentences are invariably imposed in cases of assault where the harm is such as to seriously interfere with the victim's health. In the case of *S* v *Mugwenhe & Anor*. 1991 (2) ZLR 66 (S) EBRAHIM JA at pp 69 B – D had this to say;

> "*An examination of cases of assault with intent to do 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 ----------. In the exercise of this function the trial judge has a wide discretion in deciding which factors ---------- I here refer to matters of fact not law, should influence him in determining the measure of punishment*."

The Learned Judge of Appeal continued at page 71 E to say;

> "*the nature of the weapon used, seriousness of the injury, nature and the degree of violence and the medical evidence must be considered*."

This same principle was reiterated by BLACKIE J. with the concurrence of CHEDA J. in the case of *S* v *Mpofu* 1992 (2) ZLR 68 (H) in which the learned JUDGE said that imprisonment is invariably imposed for assault with intent to do grievous bodily harm unless there are other important mitigatory factors like provocation or where the accused is pregnant.

After the codification of our criminal common law useful guidance is provided in s 89(3)(a) to (f) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] on what factors to consider in assessing sentence in cases of assault.

I have no doubt in my mind that the accused *in casu* deserved to be sentenced to a minimal effective custodial sentence of 6 months. The degree of force or violence he used on the victims was uncalled for and high. He used a knife which is a lethal weapon. The injury inflicted on the second complainant was amounts to serious bodily harm. The assaults were not only persistent but unprovoked. There are no other important mitigatory factors warranting the accused to be treated leniently.

There is no explanation as to why both counts were even treated as one for sentence. I say so because in count 1 due to the none serious nature of the injuries caused a hefty fine may have

both deemed appropriate. In respect of count 2 accused deserved to be incarcerated. Clearly a fine of $200 for both counts is manifestly lenient and offends one's sense of justice.

In the result I am unable to confirm the proceedings as in accordance with real and substantial justice. The order by the learned scrutiny Regional Magistrate certifying the proceedings as in accordance with real and substantial justice should be set aside. I would in the circumstances withhold my certificate.

ZISENGWE J. agrees ……..