THE STATE
versus
PATIENCE USAVI

HIGH COURT OF ZIMBABWE
MAWADZE J.
HARARE, 16 August 2010

CRIMINAL REVIEW

MAWADZE J: The accused was convicted after she pleaded guilty to the charge of assault as defined in s 89 (1) (a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] by the Resident Magistrate at Murambinda on 15 June 2010.

The accused was sentenced to 3 months imprisonment and was unrepresented. On 17 June 2010 the accused engaged the services of a legal practitioner and successfully applied for bail pending appeal before the same magistrate. The appeal is only in respect of sentence. On 18 June 2010 accused was admitted to bail pending appeal on condition she deposited US$20.00 with Clerk of Court and reports once every last Friday of the month at ZRP Murambinda (presumably between 6am and 6pm). It is not clear why after noting the appeal the record was referred to this court for review. Due to serious misdirections on the part of the trial magistrate no useful purposes would be served by referring the matter back to the magistrate court to allow the accused to proceed with the appeal. I have decided to deal with the matter in terms of s 29 (4) of the High Court Act [*Cap 7:06*].

The conviction of the accused is in order. The misdirection I have noted relates to how the trial magistrate approached the question of sentence. It is very clear that the trial magistrate ignored almost all basic principles of sentencing when accused was slapped with a term of 3 months imprisonment with no portion conditionally suspended.

A brief summary of the facts of the case is in order.

The accused is a 21 year old female first offender with one child (whose age was not ascertained). On 15 June 2010 she was at Murambinda Magistrates Court for a maintenance case hearing involving the complainant Victor Chiminya and herself. Details of the maintenance case and the outcome were not canvassed (even in mitigation). The accused and complainant had a misunderstanding as they left the court premises. One may assume accused was probably aggrieved by the outcome of the maintenance case hearing. In mitigation accused simply said that she was angry because the complainant had

promised to fix her. She was not asked to elaborate on this. The accused then picked a stick, described as a walking stick and struck complainant once. She was not asked to explain where she directed this single blow she admitted to. The state apparently conceded that she struck complainant once No injuries were inflicted on the complainant. A court orderly who should have witnessed this drama promptly arrested the accused. She was charged and arraigned before the magistrate that same day. The wheels of justice moved swiftly. She pleaded guilty to the charge. She was slapped with a term of 3 months imprisonment.

The conviction of the accused as already stated is in order and is accordingly confirmed.

The custodial sentence imposed by the trial magistrate is not only too severe but offends the basic notions and principles of justice. Magistrates should always endeavour to avoid the temptation of imposing the so called "sharp and short" custodial sentences which often results in sending undeserving persons to prison for seemingly non serious offences. The court should, as a matter of principle and at all material times strive to ensure that the cardinal principle that the punishment should fit both the crime and the offender is observed and applied. All relevant factors both in mitigation and aggravation should be carefully considered and an appropriate balance struck. See *S v Sparks* 1972 (3) SA 396 and *S v Manwere* 1972 (2) RLR 139 (A).

It is always important to carry out a full pre sentence inquiry before arriving at an appropriate sentence. In *casu* the pre sentence inquiry carried out by the trial magistrate is unhelpful and perfunctory. It is recorded as follows:-

> "Aged 21. Not married. A mother of one child. No savings. No movable assets.
> Q Why did you assault compl?
> A I had been angered because he had promised to fix me." (sic)

In my view, such scant pre sentence information is unhelpful in arriving at an appropriate and just sentence. This approach deservedly received censure from NDOU J in *S v Shariwa* 2003 (1) ZLR 314 (H) at 316 C to G in which NDOU J also referred to similar sentiments he expressed in *S v Ngulube* 2002 (1) ZLR 316. The pertinent words I find very instructive are captured in *S v Shariwa* supra at pp 316 F to G;

> "It is true that our courts have over the years followed the rational approach to sentencing. In this approach, the sentencing judicial officer determines the limits set by the legislature as far as the type and quantum of punishment is concerned and then within this, the limit set by the culpability of the offender. He then carefully considers the differing

purposes of punishment and, if they conflict, rationally balances them against each other, according to each its due in the final sentence he imposes." (emphasis is my own)

In *casu* a number of mitigatory factors were not given due consideration by the trial magistrate. In this case the accused pleaded guilty to the charge. One may argue that she had no choice as she was caught in the act as it were, but none-the-less a plea of guilty remains a major mitigatory factor as it contributes to the swift administration of justice. See *S v Sidat* 1997 (1) 487 (S) and *S v Katsaura* 1997 (1) ZLR 102 (H).

The accused, although she has one child is only 21 years old and she is regarded as a youthful offender. She is a first offender. As a single mother she has the additional burden of looking after her child. Can one seriously say she is the type of an offender to be condemned to prison, most probably with child (or leaving the child with no one to fend for the child.).

As already stated no meaningful inquiry into mitigation was carried out. However the offence accused was convicted of and the circumstances of the case can not by any stretch of imagination be described as serious. The accused struck complainant once with a walking stick probably in the heat of the moment. The complainant did not suffer any injuries at all.

The trial magistrate placed undue weight on the fact that the assault took place at the court premises. In fact the trial magistrate equated accused's conduct to contempt of court: The reasons for sentence by the trial magistrates are instructive and I quote;

> "In assessing sentence I took into account that you are a first offender who pleaded guilty this showed contrition."
>
> Against you I took into account that you assaulted the complainant with a stick at the magistrates court in full view of the court staff and other litigants such that the proceedings had to be stopped.
> Your actions display utter contempt of the institution of the court. An exemplary sentence is called for if the decorum of the court is to be maintained." (These are the full reasons for sentence.)

While one should always take a deem view of persons who fail to respect the court decisions, the trial magistrate failed to fully appreciate accused's conduct. In fact the statement of agreed facts and the record of proceedings do not at all show that accused's conduct resulted in all what the trial magistrate alludes to in the reasons for sentence. One can only assume that the trial magistrate should have been a witness to this incident and therefore became privy to certain facts not stated by either the state or the accused. Such a scenario maybe undesirable as this would cloud the mind of the judicial officer who, like in

the case, would end up considering certain facts not stated in the record. Suffice to state that the statement of agreed facts is clear that the incident occurred outside the court room and there is no mention at all that court proceedings were disrupted. While accused's conduct deserves censure, it cannot be viewed in the same light as being in contempt of court.

It is trite law that imprisonment should be resorted to as the last resort. See *S v Gumbo* 1995 (1) ZLR 163 (H). The trial magistrate in this case did not adopt this approach at all. Imprisonment is a very rigorous form of punishment more so for youthful female first offenders. No reasons were given as to why the option of a fine was not appropriate in this case.

Even if one was to assume that imprisonment was appropriate in this case, the trial magistrate did not consider suitability of community service, more so as the sentence of 3 months imprisonment is within the general limit of effective sentence of 24 months imprisonment. This approach does not only fly in the face of guidelines by the national committee on community service but also of a plethora of case law. See *S v Antonio and ors* 1998 (2) ZLR 64 (H), *S v Chinzenze and ors* 1998 (1) ZLR 470 (H), *S v Santana* HH – 110-94 and *S v Shariwa* supra. This omission by the trial magistrate constitutes a misdirection. No inquiry into suitability of community service was held and no reasons were given why community service was deemed inappropriate.

This is not a proper case in which the accused should have been sentenced to a custodial sentence at all. I have discussed this matter with my brother MUSAKWA J and we share the view that a fine is appropriate in this case. Since accused is on bail pending appeal there is no need to order the accused's release from custody. The accused has been able to raise money to deposit as part of the bail conditions and therefore should be able to raise a reasonable amount of money as payment of a fine.

In the circumstances, the conviction is confirmed and the sentence of three months imprisonment is set aside and substituted as follows:-

US$20.00 or in default of payment ten days imprisonment.

MUSAKWA J agrees……..