THE STATE
versus
JULIET PHILIP

HIGH COURT OF ZIMBABWE
CHATUKUTA & CHITAPI JJ
HARARE, 9 June 2017

Review Judgment

CHITAPI J: This matter was placed before me on automatic review of proceedings presided over by the Senior Magistrate at Chegutu Magistrates Court on 20 April, 2017. The accused pleaded guilty before the said magistrate to a charge of assault as defined in s 89 (1) (a) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*].

The charge sheet alleged that the accused, a 23 year woman, on an unknown date in November, 2016 at Chakari, unlawfully assaulted one, Simon Gwana, a young male child aged 6 years. It was alleged that the accused assaulted the complainant by burning "his fingers of his right on a hot fire place thereby causing him certain injuries." It was alleged that the accused acted with intent to cause bodily harm or realized that bodily harm may be suffered by the complaint.

The State outline presented in court was very brief. The accused was said to be a step mother to the complainant. On an unknown date she left her 2 year old baby in the custody of the complainant. It is alleged that upon her return from wherever she had gave to, she found that the 2 year old baby had some burns sustained whilst the complainant and the baby were playing. The accused did not take kindly to the fact that the baby had suffered burns. The accused then forcibly took hold of the complainant's right hand and caused his two fingers to get burnt on a hot fire place.

The accused pleaded guilty to the charge and agreed with the facts, scanty as they were. Importantly, the accused admitted that she placed the complainant's hand on a fire intending that the complainant should suffer harm. The accused had no defence to offer and was accordingly found guilty. Nothing turns on the conviction which is proper.

Following conviction, the prosecutor pointed out that the accused was a first offender. In mitigation of sentence the accused submitted that she was a 23 year old married mother

with a 2 year old child. She was a subsistence farmer of negligible means, her assets being, $2 on her person and two chickens. She had no savings. When asked by the magistrate as to why she committed the offence, she responded that she was angry.

In assessing sentence the magistrate took into account that the accused was a first offender who pleaded guilty. He stated that it was the general policy of courts to spare first offenders effective custodial sentences. The magistrate also correctly ruled that the thrust to keep first offenders out of prison was not a rule of law. In aggravation, he found that the accused had jumped into crime at a deeper end and committed a serious offence with pre meditation. The magistrate further found that the complainant was a young and defenceless child whom the accused treated cruelly.

The magistrate stated that in his view, a term of imprisonment was called for to deter the accused personally and to also deter "other would be offenders generally." In the Magistrate's reasoning, a fine would trivialize the offence whilst community service would send a wrong signal to society. He then sentenced the accused to 18 months imprisonment with 6 months suspended for 5 years on condition of future good behaviour. This left the accused with an effective 12 months sentence to serve.

In my view, the magistrate correctly took a dim view of the accused's conduct. The overall sentence which the magistrate imposed was however in all the circumstances of the case so severe as to induce shock. In my sense I find myself unable to confirm it as according with real and substantial justice. It is a sentence which does not fit the offence and the offender. In coming to this conclusion, I am mindful of the accepted principle that sentencing is a discretion which is reposed in the trial court. It is not permissible for a superior court either on appeal or review to lightly interfere with the sentencing discretion of the magistrate in the absence of a misdirection or other acceptable just cause.

The magistrate overemphasized the deep end and deterrence principles. The accused was not represented. The magistrate did not solicit enough facts to place himself in a position to properly and objectively assess sentence. He should have taken a more active role to seek such facts as would assist him to exercise his sentencing discretions without being emotive or with caprice. This case concerned an assault by use of fire. The nature of the injuries inflicted upon the complainant were not placed before the magistrate. There was no medical report prepared. There was in fact no mention of the nature and extent of the injuries allegedly suffered by the complainant having been of such severity as to merit treatment. In the absence of a medical report or other such evidence pointing to the severity of the injury having been

placed before him, the magistrate misdirected himself in concluding that the accused committed an offence at the deep end.

Section 89 (3) of the Criminal Law Codification & Reform Act sets out several factors which a court shall have regard to without limit, when considering an appropriate sentence for the offence of assault. One of the factors stated in s 89 (3) (d) is "whether or not the assault is committed with intent to inflict serious bodily harm." It does not appear from the facts that the accused intended to achieve anything other than to punish the complaint by also subjecting him to suffer the same injury which the two year old baby whom the complainant had been left to look after had similarly suffered.

The accused was also a youthful female first offender. The magistrate was alive to the fact that the accused was a female first offender. However, he did not consider that at 23 years of age, albeit an adult, the accused was nonetheless youthful and a mother of one child. The magistrate should have had regard to this.

Imprisonment is a rigorous form of punishment to be resorted to as a last resort when all other forms of alternative and competent forms of punishment have been considered and discounted as inappropriate for adequate reasons given. The magistrate reasoned that a fine would trivialize the offence. No adequate reasons were given for holding as the magistrate did. S 89 of the Criminal Code which creates the offence of assault provides for the imposition of a fine of up to level 14 of imprisonment for a period not exceeding 10 years or both. To simply discount a competent sentence of a fine by merely stating that it will trivialize the offence, is in the absence of further detail like the nature, extent and severity of the assault improper. In my view, where an offence attracts a sentence other than imprisonment as a competent sentence, the sentence must go into detail to justify why the more rigorous punishment of imprisonment is considered the most appropriate.

I have considered the provisions of ss 53 and 81 of the Constitution. Section 53 provides that it is illegal to subject any person to physical or psychological torture, cruel, inhuman and degrading treatment or punishment. Section 81 inter alia provides for children's entitlements to parental care. The accused fell foul of the above provisions of the Constitution. I have also considered the judgment of MUTEMA J in *S* v *Sibanda* 2015 (1) ZLR 681 (H) in which the accused was charged under the Domestic Violence Act, [*Chapter 5:16*] for burning her 10 year old son on both hands with hot charcoal and also putting a teaspoon with hot ashes on the child's lips. The accused in that case was punishing the child for stealing some sweet powder which the child mixed with water and drank as a cool drink. The

learned judge upheld a sentence of 24 months with 8 suspended on conditions of good behaviour. I found the judgment instructive but distinguishable on the facts from the case *in casu* in that the injuries suffered by the child were more severe and the child was treated at the local clinic. The accused also lied to clinic staff about what had caused the injuries. The accused did so in an endeavour to protect herself from blame clearly showing that she was not remorseful for her conduct. However, that judgment underlines a concept which l embrace that courts and more so this court as the upper guardian of minor children as enshrined in s 81 (3) should protect children's interests and l would say, jealously so. This notwithstanding the court must not be detracted by the provision and abrogate the principle that in every case coming before a court, the case is determined on its own facts so that while legal principles will remain the same, there is need to apply them to the peculiar facts of each case. There cannot therefore be room for a tariff approach to sentence in cases where a court is supposed to exercise a discretion.

Having considered that the sentence imposed on the accused is in the circumstance so severe as to offend my sense of justice, I should alter it. In terms of s 29 (2) (b) (ii) of the High Court Act, [*Chapter 7:06*], I have power on review to reduce or set aside the sentence imposed by a lower court and substitute it with a different sentence. In the result, I shall set aside the sentence of the magistrate and impose in its place the following sentence which is a short and sharp term of imprisonment with the greater portion suspended on condition of good behaviour.

Since the accused has been in custody since 20 April, 2017 serving her sentence, she is entitled to her immediate release. A warrant for the liberation of the accused shall be issued immediately.

It is ordered that:

1. The conviction of the accused is confirmed.
2. The sentence imposed by the magistrate be and is hereby set aside and substituted with the following:

> "The accused is sentenced to 6 months imprisonment of which 4 months imprisonment is suspended for 5 years on condition that the accused does not within that period commit any offence in which assault is an element and for which upon conviction, she is sentenced to a term of imprisonment without the option of a fine."

CHATUKUTA J: agrees …….