THE STATE
versus
ADMIRE TSIGA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4 October 2018

**Review Judgment**

CHITAPI J: The record of proceedings in this case was placed before me on review in terms of s 57 (1) (a) of the Magistrates Court Act [*Chapter 7:10*]. The record shows that the accused appeared before the local resident magistrate at Mutawatawa, Uzumba Maramba Pfungwe on 27 April, 2018 facing two charges of assault.

On the first count, the accused was charged with assault as defined in s 89 (1) (a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. The charge alleged that the accused unlawfully assaulted the complainant at Chivore business centre, Uzumba, on 18 April, 2018 at around 2000 hours. The details of the assault were that the accused clapped the complainant thrice on the check and further struck the complainant several fist blows intending to cause the complainant bodily harm or realising the real risk or possibility of bodily harm resulting. The complainant sustained a swollen ear and some bruises on the head. The complainant was not medically examined.

On the second count, the accused was charged with assaulting or resisting a peace officer "as defined in s 176 of the Criminal Law Codification and Reform Act. The allegations against him were that on the same date, time and place as in the first count, a police officer approached the accused and tried to restrain him from assaulting the complainant. The accused refused to be restrained. Two other police constables came to the aid of their colleague. The accused refused to be restrained when the police were trying to arrest him. The accused then struck the policeman (complainant herein) once on the face with his fist and bit the complainant on his left hand. The police officers however managed to handcuff the accused. The accused continued to shout at the

police officers. In the course of the struggle to arrest the accused, the accused pushed the complainant and the latter fell on his back to the ground. Following the arrest of the accused a mob, demanded that the police release the accused and fearing for their safety police removed the handcuffs and released the accused.

The complainant in the second count was medically examined by a clinical officer at Mutawatawa Hospital. The officer observed on the complainant, teeth bite wounds on the left wrist and right thigh. Also observed was some tenderness of the lower back and abdominal muscles. The injuries were described as serious and the force used as moderate. The injuries were recorded as being consistent with the use of both a sharp and blunt instrument. The likely permanent disability recorded as likely to occur was back pain. The accused admitted to the production of the medical affidavit. The affidavit also recorded the condition of clothing of the complainant as "clean and intact." The clinical officer then also recorded "torn ZRP uniform left at home." This was inadmissible hearsay. The affidavit should contain proof of injuries observed, treatment administered and may express an opinion on the possible amount of force used to inflict the injuries, whether the injuries were serious, moderate or severe and whether permanent disability is likely to result. I am not persuaded that the expression "likely – back pain" would, without more, qualify for permanent disability. I say so because whilst I accept that permanent disability would connote that the person will not, because of the injury function normally, one could not simply as the clinic officer did conclude that the back pain would likely become a permanent feature. The fact that the court had before it an affidavit whose production the accused did not object to, did not entitle the court to just accept wholesale the contents of the affidavit even where the contents were questionable given the circumstances of the *actus reus* and its commission. It would have been advisable for the magistrate in this case to direct that the clinical officer should be called to clarify the contents of his or her affidavit.

That said, I have come to the conclusion that the conviction was proper because despite my comments on the veracity of the contents of the medical report, there was no substantial miscarriage of justice that resulted. The evidence proved that the accused committed both offences. The convictions are therefore confirmed.

The accused was separately sentenced on each count. On the first count he was sentenced to to 12 months imprisonment with 6 months suspended for 5 years on condition of good

behaviour. In respect of the second count, the accused was sentenced to 24 months imprisonment with 6 months suspended for 5 years on condition of good behaviour. The court did not indicate whether the sentences would run consecutively or concurrently. In terms of s 343 of the Criminal Procedure & Evidence Act, the court should make the appropriate directive as to whether the sentences are to be separately served or they are to be served concurrently. In the absence of such direction, it is assumed that the accused must serve both sentences. The accused must therefore on this construction serve an effective 24 months imprisonment.

In my judgment, the total effective sentence of 24 months taken as a whole is so disturbingly and shockingly excessive in the circumstances of the case, as to justify interference on review. The trial court properly took a serious view of the offences. I would agree that the offences are serious because they constitute a violation of the complainant's rights to personal security, human dignity the right not to be subjected to cruel, inhuman and degrading treatment or punishment. The rights violated are constitutionally guaranteed rights. The duty to protect, promote and fulfil the rights is reposed on every person, including government and all its institutions as well as on all juristic persons. Although the trial court did not specifically refer to the accused's conduct as constituting a violation of constitutionally guaranteed rights, the court nonetheless rightly expressed its abhorrence for the accused's conduct.

Despite the seriousness of the offences, it was nonetheless encumbent on the court to strike a proper balance between, the interests of the accused, the interests of society and the seriousness of the offence. From my reading of the reasons for sentence, the court did not consider and place due weight on the circumstances surrounding the commission of the offences.

The offences were committed on 18 April 2018 at a business centre. There had been an independence day celebratory function prior to the incident. The police were in attendance at the business centre to ensure order on the day. When the accused testified in his defence, he indicated that he was drunk and did not remember everything that took place. From a consideration of the accused's behaviour, there can be no doubt that he acted under the influence of alcohol as stated by him. In any event, there was no evidence led to the contrary. Even the behavior of the crowd, which threatened the police officers to release the accused shows that the people were generally rowdy, an indication, given the circumstances, that people were under the influence of intoxicants.

The trial court found in count one that the accused assaulted the complainant for no apparent reason. The reason given in the state outline and evidence was that the accused approached the complainant and challenged him as to why he was conversing with and behaving like a police officer when he was not a policeman. In the second count, the accused was heard to shout that the police officers did not have justification to arrest him because since he resided in Mtawatawa, only police from Mtawatawa had the right to arrest him. All this did not make sense and evidenced the accused's state of mind and sobriety. The trial court did not consider the background or circumstances in which the offences were committed.

The other issue is the imposition of separate sentences for what essentially constituted one course of conduct. The accused assaulted the complainant in count one. On being restrained, he became violent and assaulted the police officer who was subsequently joined by his colleagues as they tried to arrest the accused. The accused was handcuffed but a mob demanded his release. Quite clearly, the mob which was not arrested was also to blame for encouraging by their conduct, the accused to continue with his rowdy behaviour.

There was no evidence that the accused, a first offender was a person of a violent disposition. In cases of this nature where police are assaulted whilst executing their duties, or threatened, deterrent sentences are called for so as to deter, punish the accused and to further deter like-minded persons. The circumstances of each case balanced with the circumstances of the accused and the nature of the offence however remain the determinant factors which inform what the appropriate sentence should be. In terms of section 221 (1) of the Criminal Law Codification and Reform Act, voluntary intoxication is a mitigatory factor following a conviction for an offence which requires proof of intention either actual or constructive. The offences in *casu* fit the band of such offences. The trial court did not take into account the mitigatory effect of intoxication in this case. Such failure amounted to a misdirection of such magnitude that it vitiates the sentences imposed. See *S* v *Jeri* HH 516/17; *S* v *Ndlovu* HB 98/15.

In all the circumstances of the case, the sentences must be set aside as they do not accord with real and substantial justice. The following order is therefore made:

The individual sentences imposed on both counts 1 and 2 are set aside and substituted as follows:

Both counts are treated as one for purposes of sentence. The accused is sentenced to 12 months imprisonment of which 4 months is suspended for 5 years on condition that the accused is

not within that period convicted of any offence of which assault is an element or any offence involving a contravention of section 176 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] for which he is sentenced to imprisonment without the option of a fine.

Effective sentence is 8 months imprisonment.

Wamambo J *agrees*:……..