

THE STATE**Versus****SITHABILE NDLOVU**IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 26 & 29 SEPTEMBER 2016**Criminal Review**

BERE J: The accused appeared at Western Commonage Magistrates' Court and was charged and convicted of contravening section 113 (2) (d) of the Criminal Law (Codification and Reform) Act Chapter 9:23 and of contravening section 1 (a) as read with section 4 (1) of the Domestic Violence Act Chapter 5:16 (physical abuse).

For the first count the accused was sentenced to 5 years imprisonment part of which was suspended on certain conditions. I have no qualms with both the conviction and sentence in respect of this count. I also have no qualms with the conviction of the accused in respect of the second count. For this second count the accused was sentenced to a straight term of 6 months imprisonment. It is this sentence which has caught my attention.

To appreciate my concerns with respect to the sentence of imprisonment preferred by the trial magistrate I re-state the facts which spoke of the assault as gleaned from the state outline. The relevant portion of the state outline reads as follows:

- “5. Complainant then relaxed and sat on the sofa and accused person charged towards her holding a small sofa cushion and covered her face thereby suffocating her.
6. Complainant then struck accused with her elbow and kicked her therefore hitting against the wall and she freed her and accused ran away. (*sic*)
7. Complainant sustained some injuries as a result of the accused did not seek any medical attention (*sic*) (my emphasis)”

As can be seen from these rugged sentences, all the accused did in this case was to hold the small sofa cushion against the face of the complainant and for this the accused was slapped with a 6 months prison term.

By adopting such intuitive approach to sentence the trial magistrate clearly departed from applying the very basic principles of sentencing and there is no evidence on record that the court attempted to derive assistance from any precedent.

In the case of *Maxwell Mugwenhi and Alick Karande vs The State*¹, EBRAHIM JA cautioned against the impulsive approach to sentence and took a bold decision which was a complete departure from the then orthodox approach of opting for a prison term whenever one was confronted with group assault cases and settled for a fine coupled with a wholly suspended prison term.

In a case that followed on the robust decision of EBRAHIM JA, ROBINSON J was confronted with an almost similar case involving gang assault in *State vs Timothy Chivore, David and Willie Chikovero*².

Comparatively the case which ROBINSON J had to deal with was much more serious than the instant case. In *Chikovero's* case, the gang had attacked the complainant who was alleged to have been having an affair with one of the accused's uncle's wife. The assault was particularly a vicious one. The complainant had been attacked with bricks and stones all over the body resulting in him seeking medical attention. The medical report revealed the following injuries: "laceration 1cm right scalp on head, multiple bruises back and a fractured right ulna"

Having been persuaded by the approach adopted by EBRAHIM JA in *Mugwenhi (supra)*, the learned Judge sentenced the accused persons each to \$300 or in default of payment 1 month imprisonment.

1. 1991 (2) ZLR 66 (SC)
2. HC-H-208-91

HB 247/16
HCAR 1912/16
CRB W/C 1075/16

In addition each of them was sentenced to 2 months imprisonment wholly suspended on the usual condition of future good conduct.

The sentence imposed by the trial magistrate in the instant case was and clearly excessive given the nature of the assault. It should not be allowed to stand and is accordingly set aside and substituted by the following one; the accused is sentenced to pay a fine of \$50 or in default of payment 10 days imprisonment.

Mathonsi J I agree