HB 323/17
HCAR 102/16
CRB LPN 07/16

THE STATE

Versus

BULISANI NCUBE

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 20 JANUARY 2016 & 26 OCTOBER 2017

Review Judgment

BERE J: When I got seized with this review record on 20 January 2016 I instructed that the accused be immediately released from prison as I deemed the sentence of imprisonment imposed by the trial magistrate was improper. I indicated then that my reasons would follow. Here are they.

The accused person appeared at Hwange Magistrates Court and was convicted on plea of contravening section 89 (1) (a) of the Criminal Law Codification and Reform Act Chapter 9:23, and sentenced to 18 months imprisonment, 6 months of which were suspended for 5 years on condition of good conduct.

The facts of this matter are that the accused, a female offender picked up a misunderstanding with the complainant over allegations of a missing dollar. The accused was accusing the complainant, a fellow female of having stolen the dollar in issue.

Later on the same day the complainant went to the accused's place and found her preparing her meal. The complainant gave the accused her dollar, after which the two picked up a quarrel again over the complainant's alleged theft of the dollar.

As the tempers flared, the accused splashed hot porridge on the complainant's breasts with the result that the complainant sustained superficial burns on her breasts. The medical report concluded that no disability was likely to occur.

During mitigation, the accused, a female offender revealed that she was a 36 years old first offender, and single mother with 3 minor children exclusively dependent on her. The accused also told the magistrate that she had a misunderstanding with the complainant and lost her temper in the process leading to the assault.

This is one case where in my view the trial magistrate emotionally placed too much weight on the seriousness of the offence and completely overlooked the equally strong and compelling mitigatory factors of this case. The record of proceedings shows that the accused pleaded with the trial magistrate to be spared the agony of prison sentence emphasizing her heavy family responsibilities as a single parent with her minor children exclusively dependent on her as a vendor.

It is an undeniable fact that in this country there are very few women recidivists and in my view when one is faced with an accused like the one in this case, one ought to ask themselves whether a prison term is the only appropriate punishment.

In *S* v *Mugwenhe and Anor*[1] the Supreme Court had occasion to deal with a gang assault by male accused persons who assaulted the complainant with among other weapons, stones. The medical report noted the following injuries:

> "a cut on the forehead above the left eye, subconjuctival haemorrhage and contusions on the right elbow and right angle."

The doctor who carried out the medical examination concluded that, in his opinion, the injuries he observed on the complainant were as a result of repeated blows having been inflicted on the complainant with moderate to severe force with a blunt heavy object. The court concluded that the assault on the complainant was serious.

The head note to this judgment is instructive and this is what the court said:

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[1] *S* v *Mugwenhe and Another* 1991 (2) ZLR 66 (D-F)

> "while the "tariff" approach to sentencing is gaining wider currency, it ignores the fact that the determination of sentence is pre-eminently a matter for the discretion of the trial court. The discretion should be exercised to the full and sentences should be individualized as far as possible. Imprisonment should not be regarded as the only punishment which is appropriate for retributive and deterrent purposes nor should "deterrent" and "exemplary" sentences be regarded as just. Assault with intent to do grievous bodily harm does not automatically attract a prison sentence …"

In this case the full bench of the Supreme Court was unanimous that a sentence of a fine of $250 or in default of payment one month imprisonment with an additional 2 months imprisonment wholly suspended on future good conduct was appropriate.

In the instant case, it is clear that the accused was initially a victim of theft by the complainant as evidenced by the complainant's decision to reimburse the stolen dollar. There is nowhere in the magistrate's reasons for sentence that this aspect is mentioned in its proper context.

It has been mentioned time and again that when it comes to sentencing, the court must avoid being emotionally involved in the exercise of its discretion. My brother MATHONSI J puts it this way:

> "Magistrates should not let their emotions cloud their judgments on what is an appropriate sentence or allow themselves to be carried away by imagination as this may lead to them exaggerating the seriousness of the offence and the imposition of a disproportionate sentence. See Harrington 1988 (2) ZLR 344 (S)"[2].

In the instant case, accepting that the accused person had already served a period of almost 14 days when I ordered his release, it is fair to say that she must have learnt a lesson from that short term of incarceration. I am more inclined to set aside the sentence of the court *a quo* and substitute same with the following sentence:

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[2] *The State* vs *Tatenda Takawira* HH-75-15

"$100 or in default of payment 10 days imprisonment. In addition the accused is sentenced to 3 months, all of which is suspended for three years on condition that the accused is not convicted within that period of any offence of which assault is an element for which she is sentenced to imprisonment without the option of a fine."

Takuva J ……. I agree