

THABANI SHUMBA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & MAKONESE JJ
BULAWAYO 29 JANUARY & 1 FEBRUARY 2018

Criminal Appeal

S. Nkomo for the appellant
W. Mabhaudi for the respondent

MAKONESE J: The 33 year old appellant appeared before a senior magistrate sitting at Esigodini facing one count of contravening section 89 of the Criminal Law (Codification and Reform) Act (Chapter 9:23), that is assault. It was alleged that appellant had assaulted a 35 year old female complainant with clenched fists and stones on the head intending to cause bodily harm. The appellant pleaded guilty and was convicted as charged and sentenced to 18 months imprisonment of which 6 months was suspended on the usual conditions of future good conduct. This appeal indicates the appellant's dissatisfaction with the sentence handed down by the court *a quo*.

Background

The brief facts as gleaned from the outline of the state case are that complainant and appellant met at a certain bus stop at Esigodini around 0200 hours on 28 June 2017. It is not clear from the record what activities both complainant and appellant were engaged in at that time of day. It was agreed, however, that complainant was on her way home in the company of her sister when they met the appellant. It would seem that appellant struck a chord with complainant's sister and made his intention known that he had fallen in love with her, and both intended to be in each other's company that night. As the two were walking away complainant noticed that appellant was armed with an okapi knife. Complainant immediately raised the alarm

with her sister pointing out that appellant was carrying a dangerous weapon. Complainant's conduct angered the appellant who took offence that his newly found relationship was being disrupted by complainant's intervention. The appellant launched an attack upon the complainant with clenched fists and stones upon the head. As a result of this attack complainant sustained serious injuries. A medical report tendered into the record of proceedings reflects that the complainant sustained a laceration on the left eye-brow, some multiple abrasions and loose front teeth.

In sentencing the appellant, the court *a quo* weighed the appellant's blameworthiness and made a finding that the factors in aggravation far outweighed the mitigatory features of the case. The court noted the general prevalence of offences involving violence around the Esigodini area. The trial magistrate indicated that he was alive to the fact that the sentence imposed on the appellant was within the stipulated guidelines for community service but opined that an effective term of imprisonment was the only appropriate sentence. Counsel appearing for the state, *Mr Mabhaudi* contended that it is trite law that sentencing is the domain of the trial court and that the appeal court may only interfere with the discretion of the court *a quo* where there is a misdirection. The court was referred to *S v Nhumwa* SC 40-88 where it was held that:

“Sentencing is the discretion of the trial court and it is not for the appeal court to interfere with the sentence on the ground that it could have passed a sentence somewhat different from that imposed by the court a quo.”

The state forcefully argued that the trial court had given its reasons why community service was deemed inappropriate and that for that reason, there was no misdirection and in the event the appeal had no merit. On the other hand *Mr S. Nkomo* appearing for the appellant, drew our attention to the fact that in spite of the trial magistrate's assertion that he was alive to the fact that the sentence imposed fell within the stipulated guidelines for community service, the court failed to give cogent reasons why an effective custodial sentence was the only appropriate sentence. In his reasons for sentence the trial magistrate had this to say:

“... This court was alive to the fact that the accused person’s sentence falls within the stipulated guidelines for community service but be that as it may this court considered a term of imprisonment to be fit and proper because the accused person just attacked the defenceless complainant for no apparent reason.” (emphasis added)

The approach adopted by the trial magistrate raises a few issues that need to be interrogated. Firstly, it is one thing to say community service has been considered and rejected. Secondly, it is entirely another matter whether in fact the trial court gives any cogent explanation as to why community service is not suitable as an alternative form of punishment. The trial court is expected to give some explanation why an effective custodial sentence is the only appropriate sentence. It is trite that where first offenders are concerned, imprisonment must only be resorted to when no other form of punishment would be appropriate. Thirdly, and more importantly, the learned trial magistrate’s explanation for rejecting community service as an appropriate sentence was that appellant attacked the defenceless complainant for no apparent reason. A proper reading of the record, however, clearly shows that the explanation proffered by the trial magistrate for rejecting community service is not supported by the established facts. The attack upon the complainant occurred around 0200 hours. The attack was not premeditated. The record shows that once the appellant had reached an agreement with the complainant’s sister to spend time with her, these plans were interrupted and frustrated by the complainant who indicated that appellant was armed with a knife. This drew the ire of the appellant who reacted angrily and assaulted the complainant. It is my view that this was not one of those cases of a wanton and brutal attack on a defenceless woman. Further, it would seem that the trial magistrate blew out of proportion the nature of the injuries suffered by the complainant. In the case of *S v Mugwenhe and Anor* 1991 (2) ZLR 66, EBRAHIM (JA) expressed disquiet about the invariable imposition of a term of imprisonment in cases of assault with intent to cause grievous bodily harm, particularly where the assault causes serious injury or disfigurement. The learned judge went on to examine some of the principles to be considered in arriving at an appropriate sentence. He emphasised that sentences should, as far as possible, be individualized and imprisonment alone should not be regarded as the only punishment which is appropriate for retributive and deterrent purposes. He enjoined judicial officers to avoid the tendency to approach sentence, “in the manner of *an automation*”. In that matter the injuries were far more

serious than those in the appeal before us. The attack was a gang attack and the complainant had sustained the following injuries: a cut on the forehead above the left eye, subconjunctival haemorrhage, contusions on the right elbow and right ankle. The injuries 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. In conclusion EBRAHIM (JA) stated that at page 72B;

“The nature of the assault was nevertheless serious. The attack on the complainant was in the nature of a gang attack, the force used was of moderate severity but it was a persistent assault, the complainant suffered serious injuries, and the appellants only desisted when other persons shouted out for the police. I intend to balance these aggravating features against the mitigating features and take into account the observations I have made earlier in this judgment on some of the principles to be considered in arriving at an appropriate sentence. I am satisfied that a fine, conjoined with a suspended sentence of imprisonment, would meet the requirements of the case.”

In another similar case whose circumstances bear close resemblance to the facts of the appeal before us; *Chivore & Ors v The State* HH-208-91, ROBINSON (J) dealing with a similar case of a gang attack upon a complainant who suffered a fracture on his right forearm, following an attack in which bricks and stones were used to attack the complainant, substituted a sentence of 2 months imprisonment, with that of a fine coupled with a wholly suspended sentence. The court in that case adopted the reasoning in *Mugwenhe & Others v The State (supra)*.

In this appeal it is not in doubt that the sentence imposed by the court *a quo* fell within the 24 months threshold for community service sentence. See; *S v Chireyi & Others* 2011 (1) ZLR 254. In my view, the court was required to give cogent reasons for not imposing community service. I conclude therefore, that the court *a quo* erred by failing to consider community service as an alternative form of punishment for a first offender who pleaded guilty. Courts have always emphasised the need to keep first offenders out of prison. See; *S v Mabhena* 1996 (1) ZLR 134 (H).

In the circumstances, and for the foregoing reasons, the sentence of the court *a quo* cannot be allowed to stand. Whilst community service would have been the appropriate sentence

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this court would have to remit the matter to the trial magistrate for an assessment by community service officer. It is in my view, in the interests of justice to bring this matter to finality. In the result, and accordingly the following order is made:

1. The appeal succeeds.
2. The sentence of the court *a quo* is set aside and substituted with the following:
“Accused is sentenced to a fine of \$300 or in default of payment, 3 months imprisonment. In addition accused is sentenced to 3 months imprisonment, wholly suspended for 5 years on condition accused does not within that period commit any offence of which violence is an element and for which upon conviction, accused is sentenced to a term of imprisonment without the option of a fine.”

Bere J I agree

Mathonsi Ncube Law Chambers, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners