

THE STATE
versus
ONIMUS KAUTARE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 27 February and 10 March 2004

Criminal Review

BHUNU J: The accused a 30 year old man was convicted on his own plea of guilty on a charge of assault with intent to cause grievous bodily harm perpetrated on a 24-year old woman.

The facts leading to the assault are that the accused is a rank marshal stationed at Copacabana Emergency Taxis in the city.

On the 23rd September 2003 the complainant was a passenger on a minibus marshaled by the accused. It so happened that the bus conductor had a misunderstanding with a passenger who was claiming his change.

The complainant intervened imploring the bus conductor to give the passenger his change. This must have infuriated the accused who started to insult the complainant calling her a prostitute.

When the bus eventually stopped for the complainant to disembark the accused pulled her from the bus and perpetrated a vicious attack on her with clenched fists and head butting. As a result the complainant lost a tooth and sustained a swollen face. On those facts the accused was sentenced as follows:

“8 months imprisonment of which 2 months is suspended for 5 years on condition accused does not within that period commit an offence involving assault.”

The remaining 6 months imprisonment were suspended on condition the accused performed 210 hours of community service.

On the 16th January 2004 the learned scrutinizing magistrate wrote to the trial magistrate querying the conditions upon which the 2 months imprisonment were suspended. She wrote –

“It seems the conditions upon which the 2 months imprisonment was suspended is incomplete. Did the accused appreciate the significance of that suspended prison term?”

The trial magistrate wrote back conceding that the condition upon which the 2 months were suspended were incomplete. He did not respond to the question whether the accused appreciated the significance of the suspended sentence.

I do not share the two magistrate's view that the conditions upon which the 2 months sentence were suspended are incomplete. The conditions are complete but very wide. The trial magistrate did not simply restrict the operation of the suspended sentence as is the norm by adding such phrases as :on condition that the accused does not within that period commit any offence involving assault and for which he is sentenced to imprisonment without the option of a fine or to a fine in excess of ... dollars".

The mere fact that the trial magistrate omitted to include the underlined phrases does not mean that the condition of suspension is incomplete. All what it means is that the trial magistrate did not seek to restrict the circumstances under which the suspended sentence may be brought into effect in the event of a breach.

The underlined phrases are meant to benefit the accused in the sense that in the event of a breach by committing a trivial offence he does not run the risk of having the suspended sentence being brought into effect. This is however, not a rule of thumb that those magical phrases must always be incorporated into every sentence.

Sentencing is to a large extent an art based on common sense, reason and precedent, slavish adherence to routine sentencing techniques and precedent does not however always produce a fair and just sentence. Each offender ought to be treated as an individual. His sentence must be tailor made to suite his own personal exigencies and vicissitudes. Thus a sentencing court ought not to hesitate to depart from the norm and precedent where justified. This is because in sentencing there is often no hard and fast rules. The norm and precedent merely provide useful guidelines in most cases.

Turning to the case at hand, in my view the sentence as it stands perfectly suits the offender and his personal circumstances. What the condition of suspension means and this must have been understood by the accused is that for the slightest breach of the suspended sentence the 2 months imprisonment will be brought into effect regardless of the severity of the current sentence.

The accused is a rank marshal. He perpetrated a vicious and brutal attack on an innocent defenceless woman who had not provoked him in any way. He works with vulnerable members of society on a day to day basis. Rank marshals are supposed to protect and not attack their clients yet they are notorious for abusing innocent members of the travelling public.

In the circumstances of this case an effective term of imprisonment was deserved, but having escaped jail by a whisker the accused needed a constant reminder for the next 5 years, that any future transgression in this regard will certainly mean jail for him. The sentence is in the best interest of the travelling members of the public and society at large.

That being the case I can perceive no reason why I should interfere with the trial magistrate's sentence.

Both conviction and sentence are accordingly confirmed.

Uchena j, I agree.