

THE STATE
versus
CLIVE VANGI
and
JUSTICE NDLOVU

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE 21 February 2012

Criminal Review

HUNGWE J: The two accused persons appeared before the court of the provincial magistrate sitting at Masvingo. They faced two counts; first assault as defined in s 89 (1)(a) of the Criminal Law (Codification & Reform) Act [*Cap 9:23*] and second; malicious damage to property as defined in s 144 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The offences charged arise from the events which occurred at Plot 18 Southwill Farm, just outside Masvingo town on 7 June 2010. The two denied both charges. After a trial they were both convicted of both counts.

Nothing turns on conviction.

They were each sentenced as follows:

“Count 1: 2 years

Count 2: 10 years

Total: 12 years of which 2 years are suspended for five years on condition each does not, during that period, commit offences of which an assault upon the person of another and malicious injury to property are elements and for which each is sentenced to a term of imprisonment without the option of a fine.”

In mitigation both accused indicated that they were married. Each had one child and had no savings or assets. They are both unemployed.

In assessing an appropriate sentence the learned trial magistrate held that the only factors he found in accuseds favour was that they were both young first offenders who had family commitments. He found as aggravating the fact that they both brutally assaulted the complainant causing him permanent disability. Over and above that they went on to set his hut on fire burning his property inside the hut. He considered it fortuitous that the complainant escaped the inferno and concluded that a severe penalty was called for.

Assessing sentence is considered by many jurists as the more difficult part in a criminal trial. Such a view of the task for judicial officers is understandable because sentencing involves balancing disparate interests. On the one hand society expects that an accused person who has been convicted after a fair trial deserves his or her just deserts. It is common for prosecutors, prosecuting on behalf of the State or the public to literally bay for the accused's blood. In the ordinary parlance it is said that the accused must be punished with the utmost rigour of the law.

On the other hand the accused deserves a fair sentence. A fair sentence is a logical conclusion of the accused's fair trial rights. A fair hearing will include the right to be treated equally before the law. Therefore where the courts have in the past set a precedent by their practice as to what constitutes a fair sentence, an accused person holds a legitimate expectation that he or she will be accorded the same treatment or punishment in similar circumstances. Indeed this is only one of the principle that underpins judicial precedent. Where an accused is legally represented, counsel will urge the court to draw guidance from previously decided cases if the facts require such guidance. Indeed as in tradition the courts cherish such guidance.

For the unrepresented accused this task lies on the court before whom the accused is to be sentenced. There is a duty on a judicial officer to make sure he is in a position to assess and arrive at a proper and just sentence. For him or her to do so he or she must have as much factual information about the circumstances of the commission of the crime and the accuseds personal circumstances as possible. Unless those facts have emerged from the evidence at the trial, if an unrepresented accused does not say anything in mitigation, then the judicial officer should put such questions as would elicit that information. (See *S v Mafu* HB 68-90).

It is a cardinal principle of sentencing that the sentencing court must seek and strive to pass a punishment that will fit both the fair expectations of society and the offender. Whatever the gravity of the crime and the interest of society, one of the most important factors in determining sentence include the person of the accused and the type and circumstances of the crime. To over emphasise an offender's crime and under estimate his personal attributes as a human being constitutes a misdirection.

The Criminal Law (Codification and Reform) Act [*Cap 9:23*], provides for a fine of up to level 14 or up to twice the value of the property damaged as a result of the crime whichever is the greater, or imprisonment up to 25 years or both. It is an aggravating circumstance if the damage or destruction is caused by fire or explosives or the damage or

destruction causes injury or involves a risk of injury to person in or near the property concerned or occasions considerable material prejudice to the person entitled to own, possess or control the property damaged or destroyed.

In the present matter, the following aggravating features are present; fire was used to destroy the hut which housed building and materials belonging to someone other than the complainant in count 1; although there was no bodily injury to anyone, there was risk that such injury could result from the fire. The accused knew that their victim in count one was inside the hut when they set it alight to force him out of it.

Further they knew that the resultant damage or destruction of the contents of the hut would cause considerable loss to the owner.

Even accepting all the above factors as constituting aggravating features in the present case, a sentence of 12 years is so harsh as to induce a sense of shock. The value of the property destroyed is given as US\$1 750-00.

In the result the conviction in both counts is confirmed. The sentence in both counts is quashed. In their place the following is substituted:

“Count one : Each 12 months imprisonment.

Count two : Each 5 years imprisonment. Of the total of 6 years imprisonment 18 months imprisonment is suspended for five years on condition that each accused does not, during that period commit an offence involving an assault on the person of another or malicious damage to property for which he is sentenced to imprisonment without the option of a fine.”

BHUNU J: agrees.