STATE
versus
DARLINGTON CHINGWANGWA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 25 September 2013

Criminal Review

HUNGWE J: The accused was properly convicted, on his own plea, of assault as defined in s 89(1) (a) of the Criminal Law (Codification & Reform) Act, [*Cap 9:23*], and another of pledge-taking as defined in s 122(1) of the same Act. In sentencing the accused the magistrate treated the two counts as one for sentence and sentenced him to six months imprisonment with two suspended for five years "on condition the offender is not within that period, convicted of any offence involving violence or theft for which he will be sentenced to imprisonment without the option of a fine." The learned scrutinising regional magistrate before who the record was placed queried the wording of the conditions of suspension in the following terms:

> "These offences are not related i.e. they are not of a similar nature and as such the court ought not to have treated them as one for sentence if it wished to suspend a portion of thereof on condition of good behaviour as it did…….. The trial magistrate conceded that he erred by mixing conditions of suspension for two offences which are not of a similar nature."

The learned regional magistrate asked this court to correct this anomaly.

In the learned regional magistrate's view, the trial magistrate fell into error "by mixing conditions of suspension for two offences which were not of a similar nature." It is correct to state that these two offences are not of a similar nature, therefore it was preferable to sentence the accused separately for each offence. Such an approach would have avoided the criticism now justly levelled against the wording of the conditions of suspension. The court would have decided to separately suspend that portion of sentence it felt would reduce the effective sentence to the appropriate level so as to achieve what it intended. The trial magistrate erred in smuggling a condition which was unrelated to the offences for which the

accused had been convicted. The anomaly lies, in my view, in the absence of a conviction of the accused for theft, or a similar offence, in the proceedings before the court. There was no basis, therefore, to import a condition which was unrelated to the behaviour for which he was presently under sanction to avoid in the future. The court correctly suspended the portion of the sentence imposed on condition he did not commit an offence involving violence as it had convicted him for an assault. As for the theft-related condition, in my view, there was no basis for such a condition. Pledge-taking is not a competent verdict for theft.

The guiding principle, when framing conditions of suspension of a sentence, are that the condition must not be too widely stated or too vague. *S* v *Gumbo* 1980 ZLR 433; *S* v *Moyo* 1981 ZLR 98. There is no hard and fast rule dictating when a court should treat a number of counts separately for the purpose of sentence, or when it should treat them together for the purpose of sentence. However a court should adopt one or more of these procedures. When two charges are closely inter-related such that they can be taken together for the purpose of sentence it may well be that each can also be properly taken as aggravating the other for the purpose of sentence. *S* v *Pasipamire* 1969 (3) SA 723 (R). The cardinal rule regarding clarity remains important. Clarity, in the present case, can be achieved by removing all reference to theft in the conditions of suspension. Further it may well be appropriate to reflect better clarity by defining precisely the violence contemplated by the court *a quo* by rephrasing the sentence to reflect that such violence is that directed at the person of another.

In the result therefore, the sentence imposed in the court *a quo* will be amended to read:

> "Both counts treated as one for the purpose of sentence:
> 6months imprisonment of which 2 months imprisonment is suspended for five years on condition the accused is not, during that period, convicted of any offence of which an assault on the person of another is an element for which he is sentenced to imprisonment without the option of a fine."

MAVANGIRA J agrees.