EAGEN MADAMOMBE
and
INNOCENT AFA
and
SHANE CHIDEDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU AND MUREMBA JJ
HARARE 05 November 2013

Criminal Appeal

*A. Taruving*a,for appellant 1 and 3
E. Nyazamba, for the respondent
No Appearance for appellant 2

TAGU J: This is an appeal against sentence. The first and third appellants were convicted of one count of assault while the second appellant was convicted of two counts of assault as defined in s 89 of the Criminal Law (Codification and Reform Act) [*Cap* 9.23] after pleading guilty to their respective counts. They were jointly tried. The facts are that all the three appellants firstly assaulted the first complaint and then the second appellant assaulted the second complainant alone on the 8 October, 2011. In respect of the second appellant, both counts were treated as one for purposes of sentence. All the appellants were sentenced as follows:

> **"**Each one is sentenced to:
> 18 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition the accused does not during that period commit any offence involving assault and for which upon conviction he is sentenced to imprisonment without the option of a fine. 12 months effective."

The grounds of appeal advanced by the first appellant are that:-

> "1. The sentence imposed was too severe and harsh as to induce a sense of shock taking into account the circumstances of the offence and the offender involved.
> 2 .The court *a quo* erred in not placing due weight on the fact that accused person pleaded guilty and thus showed contrition and did not waste court's time.

3. The court *a quo* erred in imposing a lengthy prison term when a sentence of community service or a fine would have met the justice of the case and more consistent with the sentences imposed by other courts.
4. The court erred in failing to take into account the role played by each accused person in the assault.
5. The court erred in placing due weight to a medical affidavit which did not bear the authentic stamps where the Complainant was treated.
6. The court erred in taking into account and assuming that the accused persons acted in connivance when in fact facts say a different thing and accused persons were never interrogated about it.
7. The court erred in failing to implement recommendations that are put as a matter of principle that young offenders such as accused person who are also first offenders ought to be treated with more leniency and be kept out of prison or jails much as possible."

The appellant made a prayer that the sentence imposed upon him by the trial court beset aside and substituted with a non-custodial sentence.

The grounds of appeal of the second and third appellants are that:-

"The learned Magistrate erred at law and in fact in failing to place due weight attached to the mitigatory factors aligned to the appellant(s) especially that he is a first offender. There are a plethora of cases which state that if an accused person is a first offender and the sentence likely to be imposed is 24 months imprisonment and below the court should consider other forms of punishment such as community service, a fine or a wholly suspended imprisonment sentence coupled with a fine. Hence the sentence of 18 months imprisonment even though six months were suspended induces a sense of shock. See remarks by HONOURABLE JUSTICE CHINHENGO in State v Antonio and Ors 1998 ZLR (2) 64 at p 68B and the case of State v Allegrucci 2002 ZLR (1) at p 674.

The learned magistrate erred at law in imposing a custodial sentence without placing due weight attached to the personal circumstances of the appellant who is a youthful offender. It is common practice that youthful offenders should be kept out of prison to avoid the risk of them mixing with hardened criminals in prison. At law punishment should fit the criminal as well as the crime, be fair to the state and to the accused and be blended with a mixture of mercy according to the circumstances. See State v Rabbie 1975 four SA 85 AD."

The second and third appellants prayed that the sentence imposed by the court *a quo* be set aside in its entirety and same to be substituted by a sentence of community service, a fine or a wholly suspended imprisonment sentence coupled with a fine whichever this Honourable Court deems fit to meet the justice of this case.

The convictions are hereby confirmed.

The second appellant did not file his heads of argument in terms of the rules. In terms of Rule 37 (2) heads of argument should be filed with the Registrar of the High Court within fifteen days after being called upon to file heads of argument by the Registrar. Rule 37 (5) of the (Supreme Court**,** Magistrates Courts, and Criminal Appeals) Rules, 1979 says:-

> "If the Registrar does not receive heads of argument from the appellant's legal practitioner within the period prescribed in subrule (2), the appeal shall be regarded as abandoned and shall be deemed to have been dismissed."
> Therefore, the appeal in respect of appellant number 2 is dismissed.

The lawyer for the respondent does not oppose the application by the first and third appellants. The respondent relied among other cases on the case of State v Mabhena 1996 (1) ZLR 134 where it was said:-

> "On appeal the court stressed that whenever a court intends to impose an effective sentence of 12 months imprisonment or less upon a first offender, it should consider imposing a sentence of community service in order to keep a first offender out of prison in the interests of rehabilitation."

In casu, the court *a quo*, other than saying community service will trivialise the offence, there is nothing to demonstrate that serious consideration for imposing community service was done. The respondent argued that the sentence imposed indeed induces a sense of shock to the extent that the appeal should be allowed.

I am in agreement with the concession made by the respondent. There was also misdirection in that the court *a quo* did not pay regard to the roles played by each appellant. The sentence imposed on the second appellant who assaulted two people cannot be the same with that of the first and third appellants who faced one count. The sentence imposed on first and third appellants has to be interfered with since it is harsh and induces a sense of shock.
Since there was a misdirection we are now at large to determine an appropriate sentence. In view of the nature of the offence and the fact that the complainants had not provoked the appellants they should have been sentenced to 12 months imprisonment. However, the appellants had served 1 month imprisonment before their release on bail. The sentence will be reduced to take into account the one month already served.

The appeal is allowed to the extent that the sentence imposed by the court a quo in respect of the first and third appellants only is set aside. Each appellant is sentenced as follows:-

11 months imprisonment of which 3 months imprisonment is suspended for five years on condition that the appellant will not within this period commit an offence involving violence perpetrated on the person of another and for which on conviction the appellant will

be sentenced to imprisonment without the option of a fine. The remaining 8 months is wholly suspended on condition the appellant performs 280 hours of community service at ZRP Mabvuku. The community service starts on 16 December 2013. The community service must be performed every Monday to Friday excluding weekends and public holidays between the hours of 08.00 AM to 01.00 PM, and from 02.00 PM to 04.00 PM. The community service must be performed to the satisfaction of the person in charge of the said institution or his or her delegate who may on good cause shown grant appellant leave of absence on certain days or hours, but such leave of absence shall not be counted as part of the community service to be performed. The community service to be completed within 8 weeks.

MUREMBA J Agrees……

Khanda & *Company*, appellant's legal practitioners
Attorney –General's Office, respondent's legal practitioners.