

THE STATE
versus
SIMBARASHE CHAENDERA
and
TIMOTHY CHOMERA
and
COLLINS BINDU
and
GIFT MULILA
and
TINASHE MAPIRAWANA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 17 January 2014

Review Judgment

MWAYERA J: The review judgment deals with four records which are presided over by the same magistrate at different sittings. In the four records the accused persons were charged with assault as defined in s 89 of the Criminal Law Codification and Reform Act [*Cap 9:23*]

The four records of proceedings which were dealt with by the same magistrate raise the same issue hence for expediency we have decided to issue one review judgment. The sentences imposed were outrageous and too severe given the nature and extent of assault. They must be set aside and substituted with those in keeping with precedent.

Simbarashe Chaendera a 20 year old youthful offender had a misunderstanding with the complainant at a Take Away shop. The accused alleged the complainant had pushed him and he then assaulted the complainant with open hands, booted feet head butt and an iron bar. No medical report was obtained and thus at the time of the plea the extent and nature of injury was not given. He was sentenced to 3 years imprisonment of which 6 months imprisonment is suspended on usual condition of future good conduct.

Timothy Chomera a 19 year old youthful offender assaulted the complainant and queried why the complainant did not respect him yet he was married to the accused's sister. The accused then struck the complainant with a stone on the mouth causing a swollen mouth. The accused was sentenced to 3 years imprisonment of which 1 year was suspended for 5 years on the usual conditions of good behavior. There is no medical report attached to the record

Collins Bindu a 24 year old youthful offender had a misunderstanding on two occasions with the complainant over a friend's girlfriend.

On the first occasion the accused struck the complainant with a small axe and complainant managed to block the attack and thus did not sustain injuries. On the second occasion accused struck complainant with fists twice and the complainant did not sustain injuries. There is no medical report attached. The accused was sentenced to 18 months of which 6 months were suspended for 5 years on conditions of good behavior.

Gift Mulila and Tinashe Mapirawana aged 30 and 24 respectively were at a beer drink when they had a misunderstanding with the complainant which culminated in the two assaulting the complainant with booted feet on the face. The complainant sustained a cut on the cheek. The nature and extend thereof was not given again because there is no medical report. The two were sentenced to each 16 months imprisonment of which 6 months is suspended for 5 years on the usual conditions of good behavior.

Of interest in respective of the four records is the fact that the trial magistrate imposed imprisonment terms for assault whose nature and extend of seriousness was not medically supported. In fact going by the nature of assaults and described injuries none of the cases can lead one to deduce potential danger to life having been occasioned by the assaults. Community service or fines ought to have been considered.

In our view the sentences imposed were too severe and out of sync with sentences imposed by this court on review in kindred offences. Cases decided in this court have discouraged the tendency to regard all cases of violence as deserving of imprisonment.

See *The S v Dangarembwa* 2003 (2) ZLR 87H.

In *S v Chitsu* HH 429/87 the accused hit a fellow patron in a night club on the head with a beer bottle. The sentence of 6 months imprisonment imposed was reduced to a fine of \$150-00 or in default of payment 28 days in imprisonment. With an additional wholly suspended sentence of 3 months imprisonment.

Also *S v Matiza* HH 599/08 the accused hit the complainant on the head with an empty 750ml cooking oil bottle. The sentence of 6 months imprisonment of which 4 months was suspended was reduced on review to a fine of \$50 or 1 month imprisonment. In addition 4 imprisonment was suspended on appropriate conditions of good behavior.

In *S v Hondokanayakunda and Ors* HH 58/89.

One of the 4 accused persons Fernando Chakona struck the complainant with the beer bottle on the forehead for proposing to his wife. The complainant sustained a long cut on the forehead, which was stitched in hospital. The sentence of 12 months of which 3 months was suspended was substituted on review with of \$300-00 or 30 days imprisonment plus an additional 2 months wholly suspended for 3 years on conditions of good behavior.

It is instructive to note from the approach of this court in the few examples of cases given is that it does not necessarily follow that every case where there is use of violence on another imprisonment is appropriate. The nature of assault, whether there was a weapon used, the degree and extent of force and the part of the body to which the assault was directed together with the nature and extent of injury are quite pivotal in considering the appropriate sentence.

The sentences imposed in respect of the cases which form the subject of this review are certainly out of line with sentences imposed by this court for offences of a similar nature and must be set aside for they are excessively harsh. The sentences imposed are accordingly set aside and substituted with the following.

Simbarashe Chaendera

\$400-00 or 2 months imprisonment. In addition 2 months imprisonment is wholly suspended for 3 years on conditions the accused does not within the period commit any

offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

Timothy Chomera

\$200-00 or 1 month imprisonment. In addition 2 month imprisonment wholly suspended for 3 years on condition the accused does not within that period commit any offence involving the use of violence on the person of another for which he sentenced to imprisonment without the option of a fine.

Collins Bindu

Both counts as one for sentence.

\$400-00 or 2 months imprisonment. In addition 2 months imprisonment wholly suspended for 3 years on condition the accused does not within that period commit an offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

Gift Mulila and Tinashe Mupirawana

Each \$400-00 or in default of payment 2 months imprisonment. In addition 2 months imprisonment wholly suspended for 3 years on condition accused does not within that period commit any offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

All the accused have been in custody for more than 2 months and as such are entitled to their immediate release.

We have accordingly issued warrants of their liberation.

The Registrar is directed to bring this review judgment to the attention of the Chief Magistrate.

MWAYERA J

MUSAKWA J agrees