

THE STATE  
versus  
TONGAI DHINYERO

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 1 December 2016

### **Criminal Review**

MUSAKWA J: This matter came to me on automatic review following the accused's conviction and sentence for assault and theft. It reflects a lack of prosecutorial astuteness.

The accused pleaded guilty to assault and contested the theft charge. The two charges are interconnected. According to the facts the accused and the complainant reside in different villages within the Penhalonga area. On 17 October 2016 the complainant mistakenly broke one Martin Maira's beer bottle. It is not clear whether the bottle had any beer. Nonetheless the complainant and Martin Maira resolved the issue.

Later when the complainant made his way home, he was attacked by the accused person. The accused person tried to hit the complainant with a bottle but failed. Thereafter the accused got a log and hit the complainant several times until he lost consciousness. When the complainant came to he realised that his Blackberry Z10 cell phone and \$82 in cash were missing. The medical report, whose handwriting is difficult to read shows that the complainant sustained a swollen face and eyelids as well as ecchymosis all over the body. The force used to inflict the injuries was moderate. The injuries were serious although there was no danger to life.

Both counts were treated as one for purposes of sentence. The accused was sentenced to 5 years' imprisonment of which 6 months were suspended for 5 years on condition of good behaviour. A further 6 months were suspended on condition that the accused restituted the complainant in the sum of \$162 through the clerk of court by 30 November 2016.

In its judgment the trial court correctly noted that the state should have preferred a charge of robbery. It further noted that the accused's intention in assaulting the complainant was to incapacitate him in order to steal.

The crime of robbery is defined in s 126 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as follows:-

“Any person who steals or does any act constituting the crime of unauthorised borrowing or use of property shall be guilty of robbery if he or she intentionally uses violence or the threat of immediate violence.

(a) immediately before or at the time he or she takes the property, in order to induce the person who has lawful control over the property to relinquish his or her control over it; or  
(b) immediately after he or she takes the property, in order to prevent the person who had lawful control over the property from recovering his or her control over it.”

The facts of the case clearly reveal robbery such that a diligent prosecutor should not have struggled to zero on the correct charge.

Whilst the trial court found it proper to pile blame on the state, it is not absolved from the inertia it displayed. The trial court could have stopped the proceedings in terms of s 54 (1) of the Magistrates Court Act [*Chapter 7:10*] which provides that-

“When in the course of a trial, whether or not any evidence has been led, it appears that the offence is from its nature only subject to the jurisdiction or more proper for the cognisance of a court of greater jurisdiction, or when the public prosecutor so requests, the magistrate shall stop the trial and immediately adjourn the case and remand the accused and submit a report to the Prosecutor-General, together with a copy of the record of the proceedings in the case.”

One might argue that the anomaly was cured by the sentence that was imposed by the trial court. It may be noted that the trial magistrate imposed the maximum sentence that is in accordance with his jurisdiction as conferred by s 50 (3) of the Magistrates Court Act. This is notwithstanding that the maximum punishment for assault in terms of s 89 of the criminal Code is a fine not exceeding level fourteen or imprisonment not exceeding ten years or both such fine and imprisonment. Contrast this with robbery in which s 126 (2) of the code provides that-

“A person convicted of robbery shall be liable—

(a) to imprisonment for life or any shorter period, if the crime was committed in aggravating circumstances as provided in subsection (3); or

(b) in any other case—

(i) to a fine not exceeding level fourteen or not exceeding twice the value of the property that forms the subject of the charge, whichever is the greater; or

(ii) to imprisonment for a period not exceeding fifty years;

or both:

Provided that a court may suspend the whole or any part of a sentence of imprisonment imposed for robbery on condition that the convicted person restores any property stolen by him or her to the person deprived of it or compensates such person for its loss.”

The present offence was committed in aggravating circumstances because of the infliction of serious bodily injury on the complainant. In this respect s 126 (3) of the Code provides that-

“For the purposes of subsection (2), robbery is committed in aggravating circumstances if the convicted person or an accomplice of the convicted person:

- (a) possessed a firearm or a dangerous weapon; or
- (b) inflicted or threatened to inflict serious bodily injury upon any person; or
- (c) killed a person; on the occasion on which the crime was committed.”

In light of the above observations, it is clear that the proceedings cannot be said to be in accordance with real and substantial justice. I accordingly withhold my certificate.