THE STATE
versus
LOVEMORE CHATAIKA

HIGH COURT OF ZIMBABWE
CHITAPI & CHINAMORA JJ
HARARE, 15 January, 2020

Criminal Review Judgment

CHITAPI J: The accused appeared before the learned regional magistrate at Harare charged with the offence of attempted murder as defined in s 189 of the Criminal Law (Codification and Reform) Act *Chapter 9:23* as read with s 47 of the same Act. It was alleged against the accused that on 27 November, 2017 and in Overspill E area, he unlawfully assaulted the complainant once with an iron bar on the head intending to kill the said complainant or realizing that his conduct might cause the death of the complainant.

The brief facts of the matter which the magistrate found to be bizarre or unusual as indeed they are were that the accused and the complainant were both residents of Epworth. They stayed in Overspill area albeit at different addresses. It does not often happen but the two were "married" to each other's ex-wives.

From the evidence and the magistrate's finding of fact, the accused was staying with the complainant's ex-wife at the complainant's house. The complainant had abandoned his wife and home. The complainant however occasionally visited his abandoned house and home ostensibly to visit his 4 children and to discuss property sharing and money which the abandoned wife had realized following the sale of their jointly owned field.

The complainant was in fact now staying with the accused's ex-wife in another section of overspill, Epworth.

On the fateful day, the complainant visited his ex-wife to discuss the issue of the money realized from the sale of the field as aforesaid. The two disagreed. The ex-wife called the accused to return home from his work place to intervene in the resolution of the dispute. The dispute was subsequently resolved.

Later in the evening of the same day, the complainant passed by the accused's homestead. He was drunk. As he passed his abandoned home he shouted that he was now going to his residence in another section. The magistrate made a finding that this utterance was a deliberate act of provocation in which the complainant was boasting that he was now going to be with the accused's ex-wife at what was now his new home.

The accused was infuriated by the utterance whereupon he stood up from where he was seated, picked up a hoe with a metal handle and struck the complainant with it on the forehead once above the left eye. The complainant allegedly fell to the ground and bled from the wound. The accused proffered a spurious defence that the complainant had been armed with an okapi knife threatening to open up the accused's wife's (complainant's ex-wife) womb to terminate the pregnancy which the woman was allegedly carrying. He also averred that the Complainant had thrown a brick on the door of the house and that the two had engaged in a fight which resulted in the complainant emerging second best with the injury to his head and left eye.

The defence was spurious because the court believed the evidence of the accused's wife (complainant's ex-wife) that the accused was angered by the complainant's utterances whereafter he said that he would teach the complainant a lesson and struck him with the hoe. The accused's wife testified that she failed to restrain the accused. She also stated that the accused picked the hoe from near the gate to the homestead where it was lying on the ground as he went for the complainant who was passing the residence. The accused's wife testified further that the accused was in the habit of bullying the complainant. I have to note however that according to the evidence, the complainant was on the fateful day the agent *provocateur* and started the altercation through his provocative utterances or shenanigans.

The magistrate noted in his judgment that there was no medical report or evidence led to detail the extent and nature of the complainant's injuries. The hoe which was allegedly used was not produced in evidence. The magistrate made a visual note of what he described as "an apparent depression on the skull of the complainant just above the left eye. The magistrate reasoned that he could not make a positive finding that the accused's conduct had reached the proportions or at least transcended a <u>mere</u> (own underlining) assault for there may be a very thin line between an attempted murder and a gruesome assault. The magistrate acquitted the accused of attempted murder as charged but convicted the accused of assault as a competent verdict. He thereafter

sentenced the accused to 3 years imprisonment with 1 year suspended on conditions of future good behaviour.

In my view the sentence imposed by the magistrate is in the circumstances of the facts of the case so excessive as to induce a sense of shock and outrage. It is so disturbingly inappropriate as to have resulted in a substantial miscarriage of justice. The sentence merits interference within the exercise of powers reposed upon a judge of the High Court on review of proceedings of inferior courts as set out in s 29 (2) (b) (ii) of the High Court Act, [*Chapter 7:0*6].

The magistrate from his reasons for sentence stated that it was aggravatory that the attack upon the complainant was gratuitous and carried out merely for purposes of "the accused's only ego and there was no good reason why he was assaulting him." This finding contradicts the magistrates finding of fact that the complainant provoked the accused by being spiteful of him that he the complainant was now going home to the accused's ex-wife. There can be no doubt that the conduct of the complainant sparked the altercation. Equally one has to be objective and accept that the complainant's utterances were provocative by reasonable standards. The magistrate materially misdirected himself in reasoning that the assault was not provoked when he assessed sentence.

Where a sentencer assesses sentence based on an incorrect assessment of facts or facts which are not supported on the evidence, the trial process ceases to be fair as guaranteed in s 69 (1) of the Constitution of Zimbabwe 2013. Real and substantial justice cannot be founded or grounded upon a consideration of wrong or incorrect facts in convicting or sentencing an accused person. Where wrong or incorrect facts have been relied upon as happened in this case, this amounts to a gross irregularity in the proceedings or decision and grounds a ground of review as set out in s 27 (1) (c) of the High Court Act.

In assessing sentence the magistrate made reference to s 89 of the Criminal Law (Codification and Reform) Act. The magistrate stated that the section lists factors that a court should consider when sentencing in assault cases. He then states as follows:

> "These facts are the amount of:
> - Force that was used
> - The weapon that was used if any.
> - Part of the body be aimed at during the attack ad juries sustained by the victim."

It is convenient to quote the relevant sentencing provision. It is s 89 (3) and it provides as follows

> "(3) In determining an appropriate sentence to be imposed upon a person convicted of assault, and without derogating from the court's power to have regard to any other relevant considerations, a court shall have regard to the following-
> (*a*) the age and physical condition of the person assaulted;
> (*b*) the degree of force or violence used in the assault;
> (*c*) whether or not any weapon was used to commit the assault;
> (*d*) whether or not the person carrying out the assault intended to inflict serious bodily harm;
> (*e*) whether or not the person carrying out the assault was in a position of authority over the person assaulted;
> (*f*) in a case where the act constituting the assault was intended to cause any substance to be consumed by another person, the possibility that third persons might be harmed thereby, and whether such persons were so harmed."

The provisions of s 89 (3) are peremptory and the sentencer shall have regard to the factors set out in subpara (a-f). The section does not derogate or stop the sentencer from considering and taking into account in addition to the factors listed where they apply, any other factors which a court ordinarily considers when assessing sentence. Such other factors may relate to the personal circumstances of the convict or factors surrounding the commission of the offence. Also relevant would be the provisions of s 334 (3) and 334A of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The sections provide for the taking of evidence including hearsay evidence as exceptions to such hearsay evidence and the making and use of sentencing guidelines as may be promulgated from time to time.

It must therefore follow in my review judgment that whilst sentencing is a discretion and province of the magistrate or judge who has convicted the convict, such discretion can only be said to have been judicially exercised and not susceptible to interference where the sentencer has not misdirected himself or herself in law, fact or both in assessing sentence.

The magistrate stated in reference to the factors I have quoted as considered by him, " All these factors were looked at the present case." It is noted that the metal hoe handle was used on the most fragile part of the body which is the head. One just fails to understand what a person would be thinking when he strikes another on the head with a metal object. Fair and well, the magistrate was correct to take a serious view of the nature of the assault. He however did not have the benefit of seeing the hoe handle to be able to appreciate how dangerous a weapon it was. There was no medical report from which the magistrate could have made a finding on *inter alia* the seriousness of the injury or the force used. These factors are relevant in assault cases. The magistrate did not consider the age and physical condition of the person assaulted.

The State prosecutor advocated for the imposition of a fine or community services. Whilst the prosecutor's suggested sentence would not bind the magistrate, what emerges from the States position is that the prosecutor realized that he had no evidence to aggravate the sentence. The magistrate should have interrogated the factors relevant to sentence and even directed that the complainant be examined by a medical practitioner before sentence.

There was therefore no sound factual basis from which the magistrate assessed sentence. The circumstances of the case did not warrant the imposition of a sentence of imprisonment let alone of the length imposed by the magistrate.

In the result, the sentence imposed by the magistrate is set aside and in its place the following sentence substituted:

> "The accused shall pay a fine of $100-00 in default 30 days imprisonment. In addition 6 months wholly suspended for 3 years on condition that he is not within that period convicted of any offence involving assault as an element in respect of which upon conviction, he is sentenced to a term of imprisonment without the option of a fine."

Since the accused has already served the sentence, he shall not pay the fine but the record shall be corrected to reflect the substituted sentence.

CHINAMORA J: agrees …….