HB 285/16
HCAR 1946/16
CRB W/C 1056/16

THE STATE

Versus

GAINLIFE CHIWARE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 25 OCTOBER 2016

Criminal Review

MAKONESE J: It is now a well established principle that in sentencing youthful first offenders the courts must strive to keep such offenders out of prison. Imprisonment of youthful offenders must always be reserved for serious offences, where any other form of punishment would be deemed inappropriate.

In this mater, the 18 year old male adult appeared before a Provincial Magistrate sitting at Bulawayo on the 13th September 2016 facing one count of assault, as defined in section 89 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). He pleaded guilty and was convicted and sentenced to 15 months imprisonment of which 5 months was suspended for 5 years on the usual condition of good behaviour. The effective custodial sentence was 10 months.

The brief facts are that on the 3rd September 2016 and at Pumula South, Makoni intersection, Bulawayo, the accused unlawfully committed an assault upon Amelka Ndlovu a male juvenile aged 14, with a brick, intending to cause bodily harm or realising that there was a real possibility that harm might result. The complainant and the accused are neighbours. On the day in question, the accused dropped off from a commuter omnibus from town. The accused met the complainant at Makoni intersection. The accused was in the company of his friends. Without any provocation, the accused told the complainant that he hated him. This did not go down well with the complainant. A misunderstanding ensued resulting in the accused picking up a brick and striking the complainant on the mouth. The complainant sustained a cut on the mouth and lost two teeth. The complainant was treated at Mpilo Hospital and discharged. The

Dental Surgeon who examined the complainant concluded that the injuries suffered by the complainant were serious.

Nothing turns on the conviction, but it is the sentence in this matter which is clearly harsh, excessive and not in accordance with the sentencing trends. The learned magistrate did not consider community service as an alternative form of punishment. That alone amounts to a misdirection. In her reasons for sentence, the learned magistrate stated as follows:

> *"... assault which results in permanent disability is serious and such offenders should be punished that they reform and so as to deter would be offenders ... Considering that the complainant is a juvenile who has suffered permanent disability at a tender age, I have decided to order imprisonment so that the accused may reform ..."*

There can be no doubt that the complainant sustained serious injuries as a result of the assault. This factor however should not be over-played against all the other mitigating features of the case, which are as follows:

(a) the accused was a first offender
(b) the accused pleaded guilty
(c) the accused is a youthful offender aged 18 years
(d) the accused's conduct reflects immaturity and was absolutely reckless

It is my view, incorrect for judicial officers to hold the view that imprisonment is the only form of punishment that can rehabilitate and reform an offender. It has been repeatedly pointed out in our jurisdiction and indeed in other jurisdictions that other forms of punishment, such as community service can achieve the desired rehabilitation of offenders. Sending a youthful offender to the polluting environment of prison life does not always reform an offender. It has been shown that in some cases sending youthful offenders to prison may harden them and not have the positive result of reform.

In the instant case both complainant and the accused are not mature adult persons. The accused was certainly the aggressor and his attack upon the complainant was reckless and unwarranted. The courts in sentencing such youthful offenders must attain a delicate balance between the interests of justice and those of the accused. The accused person deserved to receive punishment, but at the same time, accused must not be condemned to prison where he is likely to come out hardened after serving 10 months imprisonment.

There are several decided cases that have established the principle that community service must be considered where the sentence falls below 24 months imprisonment. See the cases of – The *State* v *Shariwa* HB-37-03 and *State* v *Dualvani* 1978 (2) PH, 176 (O).

For these reasons, it is my view that the learned magistrate misdirected herself by failing to consider community service as an alternative form of punishment. The sentence imposed in this matter cannot be allowed to stand and warrants interference by this court.

In the result, I make the following order:

1. The conviction is hereby confirmed.
2. The sentence of the court a quo is set aside and substituted with the following:
   "accused is sentenced to pay a fine of $50 or in default of payment 2 months imprisonment."
3. In the event that the accused has served 2 months imprisonment, accused is entitled to his immediate release.

Takuva J …… I agree