1. THE STATE
versus
CLETO CHIREYI
and
SHADRECK CHIDIDA
and
PEDZISAI DUBE
and
JAISON ZVINOIRA

2. THE STATE
versus
EDSON MUNAKI

3. THE STATE
versus
STEVEN MAGAISA

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 22 February 2011

CRIMINAL REVIEW

MAWADZE J: All the three matters were dealt with by the same senior magistrate atChiredzi Magistrates Court after which they were referred to this court for automatic review.

I have decided to deal with all the three matters in a single review judgment in view of the fact that the charge involved in all the matters is the same, and the misdirection on the part of the trial magistrate is evident and common to all the three matters.

In all the three matters the accused persons were duly convicted after pleading guilty to contravening s 89 (1)(a) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] (hereinafter the code) which provides:

> "89 Assault
>
> (1) Any person who-
> (2)
>
> (a) commits an assault upon another intending to cause that other person bodily harm or realising that there is a real risk or possibility that bodily harm may result; or
>
> (b) …

> shall be guilty of assault and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding ten years or both".

The convictions of all the accused persons in all the three matters is in order and raises no issues. Accordingly the convictions are confirmed in all the three matters.

It is the sentences imposed by the trial magistrate upon all the accused persons in all the three matters that has exercised my mind. It is disheartening to note that the senior magistrate who should be fairly experienced on the bench disregarded all the basic principles of sentencing and imposed custodial sentences which in all respects induce a serious sense of shock.

The first misdirection I noted in all the three matters is the failure by the trial magistrate to fully inquire into and understand the facts of each case in relation to circumstances surrounding the commission of the offences. The need for such a prudent approach was aptly captured by SMITH J in *S* v *Cephas Myakuna* HH 87-86 on p 2 of the cycostyled judgment as follows:

> "In addition the magistrate should have investigated the cause of the altercation between the accused and the complainant, whether either or both of the parties were intoxicated, whether or not there was any provocation and the precise circumstances in which the blow was struck. All these factors would have been relevant in determining the intention of the accused and for the purpose of assessing sentence.
>
> Furthermore, the magistrate should ascertain all the circumstances of the case in order to be able to impose an appropriate sentence". (underlining is mine)

Let me briefly revert to the summary of the proceedings in each case to illustrate this point and other issues I shall refer to later.

1. THE STATE v 1) CLETO CHIREYI CRB 772-5/10
   2) SHADRECK CHADIDA CRB 772-5/10
   3) PEDZISAI DUBE CRB 772-5/10
   4) JAISON ZVINOIRA CRB 772-5/10

The material facts in their case are that all the four accused persons were employed by Arda Nandi Estates in Chiredzi as security guards. On 30 July 2010 all the accused assaulted the complainant with a baton stick below the feet. The reason for the assault is unclear but it is said this was after the complainant – was allegedly accusing them of violence and fights within the compound (*sic*). The complainant reported the matter to the Police leading to the arrest of the accused. It is not clear as to when the report was made. Apparently the complainant was not

medically examined hence no medical evidence was placed before the court. It is however said the complainant did not sustain visible injuries. All the four accused are first offenders.

After entering a verdict of guilty in respect of all the four accused the following mitigation was recorded in respect of each of the accused.

"Accused 1: 40 years, married with 2 children, earns $43-00 per month. US$10-00 saving. No assets. Erred.

Accused 2: 35 years, married with 2 children, earns $43-00 per month. US$10 savings. No assets. Erred.

Accused 3: 30 years, married with 2 children. US$40-00 salary, US$9-00 on person**,** no assets. Erred.

Accused 4: 38 years, married with 4 children. US$50-00 per month, US$10-00 on person, no assets, erred."

The brief reasons for sentence given by the trial magistrate are in notes form in all the three matters. After noting that all the four accused persons are first offenders and pleaded guilty to the charge the trial magistrate indicated that the offence was serious as it was a gang assault and that offences of that nature wherein game scouts and security guards assault suspects in their custody are very prevalent in Chiredzi (the magistrate puts it at three cases daily dealt with in court). However it is not clear why complainant in this case could be deemed to have been a suspect in the custody of the accused(s). No such facts were disclosed.

Each of the accused was on 18 August 2010 sentenced to 18 months imprisonment of which 6 months imprisonment were suspended on the usual conditions of good behaviour leaving each accused with an effective sentence of 12 months imprisonment.

In this case the statement of agreed fact is unhelpful in outlining the circumstances relevant to the assault.: In fact the reason for the assault is unclear and incomprehensible. The trial magistrate did not seek to inquire from the accused persons the reasons for their conduct. This in my view should have been obvious to the mind of the trial court. The manner of the assault is not explained. Did the accused take turns to assault the complainant? Did they use one baton stick? What was the degree of force used and the possible number of blows inflicted by each or all of the accused. No attempt was made to deal with these pertinent issues. I shall revert to the importance of such issues in relation to sentence later.

2. THE STATE v EDSON MUNAKI CRB C810/10

In the absence of a proper inquiry into the circumstances of this case the facts of this matter remain incomprehensible and bizarre. In fact one may suspect that the accused is either mentally unstable or was heavily intoxicated.

The complainant is a member of the Neighbourhood Watch Committee and on 18 August 2010 at about 2150 hours he was at Mufakose beer hall in Triangle when he left the beer hall to buy bread at a nearby tuckshop. The accused was just outside the beer hall and without saying a word struck the complainant with an empty pint of beer bottle on the right side of the face near the eye and fled from the scene. The complainant sustained a deep 3 cm long cut below the right eye and a swollen and bruised right cheek. Apparently one blow was delivered. The medical report indicates that severe force was used and the injuries are described as serious and likely to cause permanent injuries (although this is not explained how). The doctor was not called to explain this aspect neither was the complainant asked to shed light on his current state of health *vis-a vis* injuries he sustained.

The mitigation recorded is very brief.:

"23 years old. Married wife pregnant, unemployed. $10-00 on me no assets".

The trial magistrate did not adduce anything further from the accused even the reason why he accused attacked the complainant in such a rather bizarre and unprovoked manner. No attempt was made to ascertain if the accused was intoxicated or had been provoked by the complainant. In other words the trial magistrate proceeded to assess the appropriate sentence without ascertaining all those issues.

The reasons for sentence are in note form and equally brief. Two factors were considered in mitigation that the accused is a first offender and that he pleaded guilty to the charge. In aggravation the offence was deemed serious as the accused used a bottle to hit the complainant "on the eye" with possibility of inflicting permanent injuries. Community service was deemed inappropriate without giving reasons. The accused was on 25 August 2010 sentenced to 18 months imprisonment of which 6 months imprisonment were suspended on the usual conditions of good behaviour leaving an effective term of imprisonment of 12 months.

3. THE STATE v STEVEN MAGAISA CRB C 793/10

In this case both the accused are employed. On 16 August 2010 while at their house at about 1700 hours the accused alleged that complainant wanted to leave him for another man. The accused proceeded to assault the complainant with open hands and booted feet all over the body several times. The complainant sustained a swollen left eye, swollen and tender neck and upper chest. The medical report indicates that several blows were delivered with severe force inflicting injuries described as serious.

It is not clear why the accused laboured under the impression that a rival suitor was about to snatch his wife away. The trial magistrate did not seek to inquire into this aspect, even the basis for such a misapprehension. The mitigation recorded is as follows:

> "26 years. Married to the complainant, 1 child, earns $120-00 per month. US$30-00 savings, 2 goats".

The reasons for sentence as per the habit of the trial magistrate are in note form. The court considered two factors in the accused's favour – pleading guilty and being a first offender. A fine was deemed inappropriate as the offence was viewed as serious as it caused potential danger to life. Community service was not even considered. On 23 August 2010 the accused was sentenced to 24 months imprisonment of which 6 months imprisonment were suspended on the usual conditions that leaving an effective term of imprisonment of 18 months.

To my mind it is clear that the trial magistrate did not ascertain at all the circumstances of each of the three cases in order to properly assess and impose an appropriate sentence.

The trial magistrate did not even seek guidance from the provisions of s 89 (3) of the code which provides as follows:

> "89 Assault
> (1) …
> (a) …
> (b) …
> (2) …
> (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; and
(f) …"

The above list is not exhaustive but gives useful guidelines in how to assess an appropriate sentence in an assault case. This is in addition to a plethora of case law on the assessment of sentence in such cases even before the promulgation of the code when the offences were not codified but categorised as assault (common) and assault with intent to cause grievous bodily harm. See *S* v *Melrose* 1984 (2) ZLR 217 (S), *S* v *Dube* 1991 (1) ZLR 218 (S), *Sindura & Anor* v *S* HH 104-04.

Each of the factors (in addition to others) listed in s 89 (3) of the code should be carefully weighed in deciding whether to impose a custodial or a non custodial sentence in cases of assault. This reasoning process should be evident from the trial magistrate's reasons for sentence.

In all the three matters the trial magistrate failed to first consider whether imprisonment was appropriate in all the matters. Superior courts have always reminded magistrates that imprisonment is a rigorous form of punishment and should be resorted as the last resort. See *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66 in which EBRAHIM JA at pp 69-70 made reference to the case of *S* v *Scheepers* 1977 (2) SA 154 at 159.

> "Apart from the fact that prisons are overcrowded and that the upkeep of prisons and maintenance of prisoners place a tremendous economic burden on the State, there are also other disadvantages attaching to imprisonment. The convicted person is removed from society, he is deprived of all responsibility and opportunities of acting independently as a free member of the community, his life is disrupted, manpower is lost and the prisoner comes into contact with elements which are … out of all proportion to that which he possibly deserves. If the same purposes in regard to the nature of the offence and the interest of the public can be attained by means of an alternative punishment to imprisonment, preference should, in the interests of the convicted offender, be given to alternative punishments … imprisonment is only justified if it is necessary that the offender be removed from society … if the objects striven for by the sentencing authority cannot be attained by any alternative punishment".

In *casu* in CRB C772-5/10 and CRB C793/10 the accused persons are family men and were gainfully employed. They have now lost their jobs and the ability to fend for their families. In my view it is wrong to regard imprisonment as the only punishment which is appropriate for

retributive and deterrent purposes. Our courts, have with the advent of the concept of community service long departed from this notion.

In all the three matters the trial magistrate failed to carry out any meaningful pre-sentence inquiry. As already shown the mitigation recorded in all the three matters is unhelpful and perfunctory. In the case of *S* v *Usavi* HH 182-10 at p 2 of the cycostyled judgement I expressed the strong view that such scant pre-sentence information is unhelpful in arriving at an appropriate and just sentence. See also *S* v *Shariwa* 2003 (1) ZLR 314 (d); *S* v *Ngulube* 2002 (1) ZLR 316. The sentences imposed by the trial magistrate are therefore difficult to justify.

Even if one was to take the robust view that imprisonment was appropriate in all the three matters, the trial magistrate still fell short of the need to consider the suitability of community service as all the sentences imposed are within the general limit of effective 24 months imprisonment. In all the three cases no inquiry is made into the suitability of community service and no cogent and sound reasons are given as to why community service is inappropriate in each case. This constitutes a serious misdirection See *S* v *Anonio & Ors* 1998 (2) ZLR 64 (H); *S* v *Chinzenze & Ors* 1998 (1) ZLR 470 (H), *S* v *Santana* HH 110-94 and *S* v *Shariwa supra*. The sentences imposed by the trial magistrate in all the three matters cannot be said to be in accordance with real and substantial justice at all.

The difficulty I have encountered in all the three matters is that there is insufficient relevant information to assist this court to assess in a deserving manner the appropriate sentence in each case. There was no inquiry into the circumstances of the assault in each case, that is the reason and at times the manner of the assault. The medical evidence placed before the court is again not helpful. See *Reze & Anor* v *S* HH 2-04 in which CHINHENGO J emphasised the value of medical evidence in assessing sentence. It would be prejudicial to all the accused in all the three matters to refer the matters back to the trial magistrate for purposes of carrying out a proper pre-sentence inquiry and assessment of appropriate sentences. In all the three cases the accused were sentenced in August 2010 and all have served at least 6 months of their sentences. At most I do not believe that any of the accused in the three matters under review should have been sentenced to a period in excess of 6 months imprisonment. Again, my view is that none of the accused, even after having been sentenced to 6 months imprisonment should have served an effective term of imprisonment, but I would have suspended part of the 6 months imprisonment on condition of

good behaviour and the remainder on condition of community service (unless good cause was shown).

In my view in the case of *S* v *Cleto Chireyi & 3 Ors* CRB C 772-5/10 a sentence of 4 months imprisonment of which 2 months imprisonment are suspended on condition of good behaviour and the balance of 2 months on condition each accused performs community service would be appropriate.

In the case of *S* v *Munaki* CRB C 810/10 it is extremely difficult to assess the appropriate sentence given the lack of useful information. Be that as it may a sentence of 6 months imprisonment with 3 months suspended on condition of good behaviour and the balance of 3 months on performance of community service would be in order.

Lastly in the case of *S* v *Magaisa* CRB C 793/10 a sentence of 6 months imprisonment with 2 months suspended on condition of good behaviour and the remainder of 4 months on condition of community service would have been appropriate.

To my mind it is clear that the magistrate in all these three matters fell into the same temptation highlighted by BARTLET J in *S* v *Gweshe* HH 191-98 in which the learned judge at p 2 of the cycostyled judgment said:

> "Unfortunately the magistrate's main concern seems to have been to complete the proceedings as quickly as possible. By doing so he was unfair to the accused and very probably unfair to the complainant as well. In addition he was neither doing justice nor doing his job properly".

On the basis of the foregoing, it is my view that the sentences imposed upon all the accused persons in all the three matters can not be said to be in accordance with real and substantial justice. The sentences are unduly severe and induce a sense of shock.

All the accused persons were sentenced on 18 August 2010, 25 August 2010 and 26 August 2010. They have all now been in prison for more than the period they could have deserved to be in prison. I am unable to confirm the sentences imposed as in accordance with real and substantial justice in all three matters.

Accordingly, all the accused persons in all the three matters cited herein, that is CRB C 772-5/10; CRB C 810/10 and CRB C 793/10 are entitled to their immediate release and warrants for their liberation should be issued.

MAWADZE J: ……..

MUSAKWA J: agrees ……..