FELIX MUSHAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA and TAGU JJ
HARARE 3, 10 & 19 November 2014

Criminal appeal

F. Murisi, for appellant
Ms *S Fero*, for respondent

TAGU J: The appellant was, on his own plea of guilty, convicted of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [*Cap 9.23*]. He was sentenced to 6 months imprisonment of which 2 months imprisonment were suspended for 5 years on the usual condition of good behaviour. The appellant noted an appeal against both conviction and sentence. In his heads of argument the appellant abandoned his appeal against conviction and persisted with his appeal against sentence. The withdrawal by the appellant *vis- a- vis* appeal against conviction is proper as it was bound to fail for lack of merit. The conviction is therefore confirmed.

The undisputed facts are that on 1 September 2010, the complainant who was part of a COTCO RECOVERT TEAM comprising 4 other members went to the appellant and his brother Julius Mushai who is still at large, on recovery duties. This did not go well with the appellant and his brother. Julius Mushai picked an iron bar and started to hit the team. Others fled but the complainant failed. The appellant and Julius Mushai then assaulted the complainant several times all over the body with the iron bar, clenched fists, booted feet and open hands. The complainant sustained a cut on the upper lip, two shaking teeth, swollen right arm, painful back and headache.

The appellant raised a number of grounds in his notice of appeal. Chief among them being that the sentence imposed was too harsh and shocking in the circumstances such that a reasonable court would not have imposed it. That the court erred in not considering all of

appellant's mitigatory factors nor did it consider other mitigatory factors as they appear from the facts. That the court erred in disregarding the option of community service yet there was a clarion call for it, and there was never an enquiry on that. That the injuries suffered and condition of alleged complainant did not warrant the sentence imposed, and finally, that no enquiry was made on the alleged weapon used in the assault yet that was very material.

Ms *Fero* argued in support of the sentence that in light of the accepted facts and the totality of what is on record, there was no misdirection in the court *a quo*'s assessment of sentence that warrants interference by this Honourable court with the sentence imposed. Ms *Fero* referred to the case of *S* v *Mugwenhi and Anor*1991 (2) ZLR 44/5 at 71 where the court held that in assessing sentence in an assault case:

> "the nature of the weapon used, the seriousness of the injury, the nature and degree of violence and the medical evidence must all be considered."

In that case the court went further to state that all the above factors must be weighed with the accused's submissions in mitigation.

In casu, I am satisfied that the lower court took into account all the factors that were relevant in the assessment of an appropriate sentence. In his reasons for sentence the trial magistrate said-

> "The accused is aged 22 years and quite youthful. He pleaded guilty to show contrition. He is a first offender. The accused assaulted the complainant for no reason at all. The complainant was on duty to recover debts on behalf of the company. He struck the complainant with an iron bar, clenched fists, booted feet and open hands. According to the medical report the complainant suffered a scalp concussion, shaking 2 teeth and other injuries. The force used to inflict these injuries was severe and there is a possibility of permanent injury on the complainant…….I considered community service but am of the view that it would not adequately emphasise the message to the public."

I agree with the trial magistrate's observations. The assault was a serious one. The medical report stated that permanent disability was likely. The complainant sustained two shaking teeth. Community service is only reserved for minor offences.

The appellant properly cited the authorities that set the criteria upon which an appeal court can interfere with a sentence of a lower court such as *Masamba Chininga* v *The State* SC- 79-200, *S* v *Mundowa* 1958 (2) ZLR 392 (A) and *S* v *Ramushu* SC-25-93 where the following was stated-

> "An appeal court can only interfere with a sentence of trial court if the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this later

regard, an accepted test is whether the sentence induces a sense of shock that is to say if there is a striking disparity between the sentence and that which the appeal court could have imposed."

In my view there is no misdirection at all. If anything, the sentence is on the lenient side. The sentence does not induce a sense of shock at all. The appeal against sentence is therefore dismissed.

MANGOTA J agrees ……

Murisi and Associates, appellant's legal practitioners
Prosecutor-General's Office, respondent's legal practitioners