BOSTON MUKONORI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA and MANGOTA JJ
HARARE, 13 May & 4 June, 2015

Criminal appeal

MD Hungwe, for the appellant
E Makoto, for respondent

MANGOTA J: The appellant, a 38-year old, first offender pleaded guilty to, and was convicted of, assault as defined in s 89 (1) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. He was sentenced to 12 months imprisonment. Six months of that sentence were suspended for five years on the usual condition of future good behaviour.

The state allegations were that, on 10 July 2015 and at Number 41. The Chase, Mount Pleasant, Harare, the appellant and one Patience Mushonga were at their place of employment. A misunderstanding ensued between them. The appellant assaulted the complainant with clenched fists. He directed his blows on her face. She bled from her nose. She also sustained an injury on her left hand finger.

The appellant appealed against the sentence which was imposed upon him. He submitted that the sentence was harsh. It induced a sense of shock. He criticised the trial court's reasoning which led to the sentence. He stated that the court *a quo* did not place sufficient weight on to the factors which favoured him. He specifically mentioned the following as such factors: that he was a first offender, that he had family responsibilities and that he showed contrition by pleading guilty to the offence. He moved the court to substitute the sentence with that of a fine or community service. He, in short, prayed that he be considered for a non-custodial sentence.

The respondent supported the appellant's views. It submitted that the trial magistrate overemphasized the seriousness of the offence. It, by implication, maintained the position that the court *a quo* did not attach much weight to the appellant's mitigating factors.

The agreed circumstances of this case were that the appellant and the complainant were workmates. He worked as a driver and she worked as the pre-school's book-keeper. She approached him pursuant to her line of work. She wanted to know what he had done with $9 which the pre-school's administrator had given to him. His response caused her to utter words to the effect that he was against her. A misunderstanding ensued and the assault followed.

It is clear, from the foregoing, that the assault was not warranted. The complainant was merely making a follow-up of what her duties at work required her to do. She did not provoke the appellant at all.

The trial magistrate was guided by the contents of the medical report in his assessment of sentence. The report stated that the complainant suffered a raptured nasal bridge, four or so blows were applied on her person, the blows were of a severe nature and the possibility of permanent injury was likely. It concluded that the assault was serious.

The appellant assaulted a defenceless woman who was about her duties at work. He inflicted serious injuries on her person. There was no evidence to show that he apologised to her for what he did. There was also no evidence which showed that he paid her medical bills.

The court *a quo* asked him and he answered as follows:

"Q. why did you commit this offence
A. I just committed the offence."

He had no plausible explanation for his conduct. The answer which he gave contained no evidence of remorse. His moral turpitude was undoubtedly very high.

The above matters persuaded us to hold the view that the appellant could not escape a custodial sentence. However, the sentence of twelve months, with an effective six months, imprisonment was, in our view, on the harsh side. We were guided, in this respect, by the remarks which this court made in *S* v *Dullabh,* 1994(2) 129, 135 wherein Adam J, citing Baker J in *S* v *Vander Westhuizen,* 1974(4) SA 61 (C) at 66 said:

> "… justice must be done, but it must be done with compassion and humanity, not by rule of thump, and … a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity to succumbing to temptation …… But it must be born in mind that the consideration of mercy must not be allowed to lead to the condonation or minimisation of serious crimes".

We held the view that we should not be too harsh or too lenient with the appellant. We should, as the respondent *in casu* correctly stated, balance the appellant's personal

circumstances, the interests of society and the offence itself.

We observed that the appellant's aggravating features stood on a more or less equal footing with what favoured him. On his side were the fact that he is a first offender who pleaded guilty and has the usual family responsibilities. These were real factors which could not be glossed over.

We were satisfied that the offence which the appellant committed was very serious. The sentencing parametres which the legislature stipulated for the crime were instructive to us. We state them for the avoidance of doubt. They are a level fourteen fine or ten years imprisonment or both.

The appellant, in our view, could not avoid a custodial sentence. However, his mitigatory features persuaded us to impose upon him a short, but sharp, term of imprison. The sentence would be commensurate with his circumstances and the crime which he committed. It was our considered view that a portion of the sentence should be suspended for a period of time. The suspended part of the sentence would deter him from committing crimes of a similar nature in future.

We considered all the circumstances of this case. We were satisfied that the appellant's appeal succeeds in part. We were, therefore, at large. We, accordingly, order as follows:

1. That the sentence which the court *a quo* imposed be and is hereby set aside.
2. That the following sentence be substituted in its place:

   "The accussed is sentenced to 6 months imprisonment of which 3 months imprisonment are suspended for 5 years on condition he does not, within that period, commit any offence involving assault for which he is sentenced to imprisonment without the option of a fine.

   Effective sentence: 3 months imprisonment"

CHATUKUTAJ agrees …….

Kadzere, Hungwe & Mandewere. appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners