THE STATE
versus
BRIAN MUNEMO

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

Criminal Review Judgment

CHITAPI J: The accused appeared before the magistrate at Murewa Magistrates court on a charge of assault as defined in s 89 (1) (a) of the Criminal law (Codification and Reform) Act, *Chapter 9:23*. He pleaded guilty and was sentenced to 7 months imprisonment with 3 months suspended for 3 years on conditions of future good behavior. The accused was a first offender aged 30 years, married with two children self employed as a welder realizing $50 to $60 monthly, had no assets of value and was the sole bread winner for his family. When asked during mitigation as to why he committed the offence, he said that he was drunk.

The facts of the matter were that on 1 December, 2018, both the accused and the complainant who was a police officer stationed at Juru Police Station were inside Starlight Night Club at Murewa Business Centre drinking beer. The complainant was in the company of his friends when the accused approached him and started to accuse the complainant of causing him problems. The complainant moved away from where he had been seated to avoid the accused. The accused followed the complainant armed with a broken beer bottle which he used to attack the complainant with by hitting the complainant in his back area. The complainant in order to avoid harm ran away from the night club and filed a report with the police leading to the arrest of the accused person. The complainant was medically examined by a doctor who prepared a medical report. The doctor noted that the complainant had suffered a 15 cm lacerated wound on his back. He opined that moderate force had been used and that the injury was serious though not life threatening.

In assessing sentence the learned magistrate recorded that she had taken into account both aggravatory and mitigatory facts. She indicated that the accused was a first offender whom courts

are encouraged to treat with leniency. She also took into account that the accused had pleaded guilty and saved the court valuable time. On the aggravatory side the learned magistrate took a serious view of the fat that the accused had assaulted a police officer albeit he was not performing police duties. I would caution that a serving police officer is always on duty and is not expected to take sabbatical from combating crime on the basis that he is off duty.

The learned magistrate also considered the circumstances surrounding the commission of the offence. She determined against the accused person that the assault on the complainant was unprovoked. The accused accosted the complainant accusing him of causing him problems. The complainant kept his cool and tried to manage the situation by moving away from the night club. The accused was intent on harming the complainant because he armed himself with a broken beer bottle which he used to attack the complainant with. The learned magistrate significantly stated as follows:

> "the courts cannot condone your conduct whereby you assault someone without provocation. It simply means people in the community are not safe from people like you. A sentence of a fine would be too lenient and so is community service as you exhibited conduct of a very malicious and dangerous person. The sentence the court will impose on you will serve to deter you from committing a similar offence. A custodial sentence will be prudent in the circumstances."

The proceedings were placed before the Regional Magistrate for scrutiny. He queried why the trial magistrate did not implement the rule of practice wherein the sentence of community service should be considered for any sentence of 24 months and below and if deemed inappropriate for reasons to be given why such sentence is inappropriate. The scrutinizing magistrate also sought clarification an whether any real effect had been given to the plea of guilty and the fact that the accused was a first offender. The scrutinising magistrate further asked the trial magistrate whether she had probed the extent of drunkenness of the accused. Lastly the scrutinizing magistrate queried.

> " 6 Did the trial magistrate recognize that a medical report is an important guide in so far as sentence is concerned. In *casu* the doctor expressed the opinion that force used was moderate, no danger to life, no possibility of permanent injuries or disability. In these circumstances was effective imprisonment called for?"

In response to the queries the trial magistrate stated that she considered the 4 months effective imprisonment to be appropriate upon a consideration of the gravity of the offence and manner of commission of the offence in that a broken beer bottle was used which resulted in the

complainant suffering a 15 cm laceration. The trial magistrate indicated that the complainant did not provoke the accused but instead removed himself from the scene, yet the accused followed him and stabbed him. As for community service, the trial magistrate accepted the existence of the rule of practice that community service be considered as a real option for sentences of 24 months and under. The trial magistrate pointed out quite correctly that the community service practice was not a rule of thumb cast in iron and stated inter alia that "… all factors should be considered cumulatively and each case varies and is dealt with according to its own merits." The trial magistrate repeated her point that she considered community service as inappropriate because the accused acted with malice and chased after the complainant who had not provoked him. She further indicated that she considered that the aggravating circumstances outweighed the mitigatory factors. The trial magistrate stated that she took into account the accused's explanation that he was drunk and did not deem it necessary to probe further the explanation given. The trial magistrate stated that she considered the medical evidence but still felt that a deterrent sentence was called for despite the fact that the complainant did not suffer permanent disability.

The Regional magistrate was not satisfied that the proceedings were in accordance with real and substantial justice as he considered the sentence of imprisonment imposed on the accused person as being inappropriate. He considered that the trial magistrate had wrongly exercised her discretion in assessing sentence and suggested that the sentence imposed on the accused be set aside. I should point out that whatever determination I make will be for posterity because the accused has since served the sentence. The Regional Magistrate referred to the case of *S* v *Zava* HMA 15/17 wherein MAWADZE J emphasized that the court should not pay lip service to the concept of community service. The Regional Magistrate considered that the imprisonment term would not result in the accused's rehabilitation but would leave him contaminated by hardened criminals. The Regional Magistrate further submitted that the trial magistrate had not given due consideration to the principle that imprisonment should be imposed as a last resort. Reference was made by the Regional Magistrate to cited cases of *S* v *Shariwa* 2005 (1) ZLR 314, *S* v *Ngulube* 2002 (1) ZLR 316 and *S* v *Katsaura* 1997 (1) ZLR 102.

It is clear that the trial and Regional Magistrate are not agreed as to whether the sentence imposed was appropriate in the circumstances. Section 58 (3)(b) of the Magistrates Court Act, [*Chapter 7:10*] provides where the Regional Magistrate is in doubt whether proceedings under his

or her scrutiny are in accordance with real and substantial justice, the Regional Magistrate is required to submit the proceedings for review by a judge of the High Court for review in accordance with the provisions of the High Court Act, [*Chapter 7:06*]. The Regional Magistrate has proposed that the sentence imposed by the trial magistrate should be set aside. The setting aside of a sentence on review by this court is provided for in terms of the provisions of s 29 (2) (b)(ii) of the High Court which provides that the court or judge may, where it is considered that the proceedings of the inferior court are not in accordance with real and substantial justice:

> "reduce or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal."

The proviso to s 29 (2)(b)(ii) provides for how the powers of the judge in disturbing the sentence should be exercised. Significantly however, the provisions of s 29 (2) are subject to the provisions of subs (3) of the same section which reads as follows:

> "3. No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record of proceedings unless the High Court or a judge thereof as the case may be, considers that a substantial miscarriage of justice has actually occurred."

Subsection 29 (5) then provides as follows:

> "(5) A judge of the High Court before whom the record of criminal proceedings in a magistrates court has been laid in terms of s 55, 57 or 58 of the Magistrates Court Act, [*Chapter 7-10*] –
> (a) May lay the proceedings before the High Court for its consideration in terms of this section: or
> (b) May himself exercise the powers conferred by subsection (1), other than paragraph (b) thereof; or subsection (2)
> Provided that a judge of the High Court shall not exercise any of the powers conferred by subparagraph
> (i), (ii) or (iii) of paragraph (b) of subsection (2) unless another judge of the High Court has agreed with the exercise of the power in the particular case.
> (c) shall, of the confirms the proceedings, cause the record to be endorsed with certificate to that effect and returned to the court concerned."

Consequent on the principles of the review procedures which should be followed, it follows that I must before acceding to the proposition by the regional magistrate to set aside the sentence, consider and determine that the trial magistrate committed an irregularity. If I find so then I must find further that the irregularity was of such magnitude that a substantial miscarriage of justice actually resulted.

An irregularity may be one of law of fact. For an irregularity to be said to have resulted in a substantial miscarriage of justice, such irregularity must not only be gross but prejudicial to the accused. For example it will amount to a gross irregularity of law for the court to commit a

violation of the rights of the accused as listed in section 70 of the Constitution. It will amount to a gross irregularity if a court convicts an accused basing such conviction on non-existent evidence or where a court has interpreted evidence led wrongly. The list of what may amount to a gross irregularity is open ended. A substantial miscarriage connotes a failure of justice and the use of one expression instead of the other is just a question of semantics or linguistics.

In *Rex* v *Rose* 1937 AD 467 at PP 476-7. DEVVET JA stated:

> "New the term justice is not limited in meaning to the notion of retribution for the wrong doer. It also connotes that the wrong doer should be fairly tried in accordance with principles of law……and seeking a test to apply, this court has decided in a series of cases that it will be satisfied that there has been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted had there been no irregularity…"

The same reasoning would apply in regard to an irregularity in regard to sentence. It will amount to an irregularity which vitiates a sentence where the sentence imposed is not in accordance with the principles of sentencing and equally so where the sentence imposed is so outrages that a reasonable court would not pass such a sentence.

Turning to the facts and circumstance of the case. I would posit that the offence of assault is a serious offence. It violates the rights of the individual's right to human dignity, personal security and freedom from torture or cruel, inhuman or degrading treatment or punishment as provided for in sections 51, 52 and 53 of the Constitution. Courts are enjoined under section 44 of the Constitution to respect, protect, promote and fulfil rights and freedoms given in the Declaration of Rights. Our society is still wanting in regard to giving effect to the rights of the individual as provided for in the quoted sections. Many a time, focus is given to cases where the violation of the rights as aforesaid have been violated by police and soldiers but not by individuals or other groups of persona. The Constitution places a duty not to violate the rights upon "every person including juristic persons, institutions and agency of government at every level." Therefore society must raise its awareness to the fact that no person be it law enforcement agents or private persons should violate another person's rights to human dignity, personal security or the right not to be subjected to torture, inhuman or degrading treatment.

The legislature in section 89 of the criminal law (Codification and Reform) Act has provided a penalty for assault of "…… a fine up to or exceeding level fourteen or imprisonment for a period not exceeding ten years or both. The fact that the offence is viewed seriously is shown by the fact that there is no limitation imposed on the amount of the fine which may be imposed

which means that in the case of a magistrate the fine that can be imposed may exceed level 14 but should be within the maximum of the magistrate's monetary jurisdiction. The maximum imprisonment sentence of 10 years is quite a very stiff sentence. It is therefore important that courts should give effect to legislative intents and impose fitting sentences for assault which reflect society's abhorrence for the offense.

Subsection 3 of section 89 lists factors which a court determining an appropriate sentence should have regard to in addition to other factors which may appropriately be considered in assessing sentence. Amongst the factors listed include whether a weapon was used, the degree of force or violence used, the intention of the assailant whether to cause serious bodily harm or not and the age and physical condition of the person assaulted. In *casu*, the accused assaulted a police officer whom he knew to be so. He chased after him. He armed himself with a broken beer bottle deliberately so. It could not be said that the accused was so drunk as not to appreciate what he was doing. He was determined to perpetrate the assault as borne by his pursuit of the complainant who had decided to avoid the altercation by leaving the night club. The trial magistrate correctly took a serious view of the nature and circumstances of the assault. The fact that the complainant escaped serious injury was fortuitous and not by accused's design.

In regard to the regional magistrate's strong conviction that community service ought to have been seriously considered I agree that the community service should remain an important sentence option for offences which attract 24 months imprisonment and below. The practice as the trial magistrate pointed out is not a rule of thumb nor does the legislature provide explicitly that where sentences of 24 months or less are found appropriate community service should be imposed. Community service is provided for in s 347 and 350 B of the Criminal Procedure and Evidence as a competent sentence which the court may in its discretion impose. The trial magistrate did not commit an irregularity because she imposed a competent sentence. Whilst admittedly she did not go into greater detail in discounting community as the appropriate sentence, she nonetheless considered the imposition of community service and shot it down as inappropriate in the circumstances of the case. In such circumstances it cannot be held that an irregularity was committed, let alone of such magnitude as amounted to a miscarriage or failure of justice.

I should perhaps put words of caution to the regional magistrate. When scrutinizing proceedings, it should be kept in mind that what the scrutinizing magistrate will be concerned with

is whether the accused was subjected to a fair trial procedurally. Issues such as the consideration that a sentence may appear to be so severe as to induce a sense of shock is an issue for appeal. I got the impression that the scrutinizing regional magistrate was concerned that imprisonment was too severe, a view which the trial magistrate disagreed with. There was otherwise no procedural irregularity which the trial magistrate committed. It is also commendable that the trial magistrate indicated in responding to the regional magistrate's query that she took the concerns raised into her stride for the future.

Resultantly, whilst commending the regional magistrate for referring the record for the judge's decision and taking note that the scrutiny process is being studiously implemented by the said regional magistrate, a determination has however been made to nonetheless confirm the proceedings as being in accordance with real and substantial. I hereby issue my certificate to that effect. I have taken the liberty to refer this judgment to my brother CHINAMORA J and he agrees with it.

CHINAMORA J, I agree:.....