

THE STATE
versus
TAFARA MAPARURA

HIGH COURT OF ZIMBABWE
TAGU & CHITAPI JJ
HARARE, 28 February 2017

Criminal Review Judgment

CHITAPI J: The accused was charged with one count of assault as defined in terms s 89 (1) (a) of the Criminal Code [*Chapter 9:23*] and another count of unlawful entry as defined in s 131 of the same code. In the first count it was alleged that on 6 July 2015 at Chiradzine Shop. Deda Business Centre, Rusape, the accused unlawfully assaulted the complainant, Tafara Maparura on the left hand with a pool stick and head butted him thereby causing injuries to the complainant. In the second count, it was alleged that on the same date and place, the accused unlawfully broke two window panes and a door lock of the shop and gained entry therein without the consent of the complainant Tafara Maparura.

The accused pleaded not guilty before the magistrate at Rusape Magistrates Court. He was however convicted on both counts and sentenced on the assault conviction to 20 months imprisonment wholly suspended for 5 years on conditions of future good behaviour. On the unlawful entry count he was sentenced to 15 months imprisonment with one month suspended on condition that he paid restitution of US\$10.00 to the complainant. The remaining 14 months were wholly suspended on conditions of future good behaviour.

The sentences individually or taken together are disturbingly lenient and inadequate and resulted in a failure of justice. They do not pass the test of real and substantial justice. They send the wrong message to society that one can just walk away lightly for committing offences involving a violation of the bodily integrity of another and his or her property rights in breach of ss 52 (a) and 57 (a) of the Constitution of Zimbabwe (2013). The aforesaid sections provide as fundamental human rights and freedoms, the right to freedom from all forms of violence from public and private sources as well as the right to privacy which encompasses inter alia the right not to have one's home, premises or property entered without permission

The facts of the case were that – the complainant owns a shop at Deda Business Centre, Rusape. Around 1900 hours on 6 July, 2015, the accused entered the shop. He started to argue with two patrons who were playing a game of snooker. The complainant admonished the trio to leave his shop and they left. The complainant thereafter closed his shop and locked it. The accused returned after some time, broke into the shop by breaking two window panes to gain entry through the back of the shop. Apparently the accused was not happy that he had been ordered out of the shop. When the accused forcibly entered the complainant's shop, he took hold of a snooker stick and struck the complainant with it several times on his left hand. He also head butted the complainant once. The accused was accusing the complainant of wanting to assault the accused's mother. The complainant suffered swellings on his left hand. The damaged property was assessed at US\$ 20.00 and US\$10.00 was recovered.

In the judgment, the magistrate after assessing evidence of the complainant and one other state witness made findings that the accused had a motive for assaulting the complainant. The motive was that the complainant had given the accused's mother notice to vacate the next shop which she was renting. The magistrate rejected the accused's version of events that there was a fight between him and the complainant. The accused was therefore the aggressor whom the complainant had not wronged.

The medical report produced as exh 1 shows that the complainant suffered a fracture of the radius bone. The complainant's hand had to be cast in plaster. Although moderate force was used, the injuries sustained by the complainant were said to be serious.

The magistrate in the reasons for sentence took into account the fact that the accused was a first offender. In respect of the assault charge, the magistrate stated that although the injuries inflicted on the complainant were serious there was no permanent injury. In regard to the second charge of unlawful entry he reasoned that it was only fair that the accused restitutes the damaged property because it was difficult nowadays to replace lost broken items. The magistrate concluded that a suspended prison sentence was proper as it would show how serious the offence is. The magistrate further stated, "The injury may heal but the use of the hand will not be same."

Looking at the sentence on the face of it, the accused was sentenced to 20 months on the first count and to the second count to 15 months, a total of 35 months on the two charges with 1 month suspended on condition of restitution of \$10.00 leaving 34 months wholly suspended on condition of good behaviour. For practical purposes, this accused was sentenced to 20 months as the wholly suspended portion. This is so because all that the

accused needed to do was to behave himself for 20 months. The 14 months in count two would expire before the 20 months since the sentences were to run concurrently. The accused engaged in one course of conduct. He broke into the complainant's shop in order to attack him and proceeded to do so. The accused's dominant intent was to attack the complainant. See *S v Zacharia* 2002 (1) ZLR 48 (H), *R v Chinemo* 1985 (1) ZLR 32 (H) on splitting of charges. The magistrate could simply have taken the two counts as one for purposes of sentence and ordered a suspension of part thereof on the various conditions as he deemed appropriate. It is however not so much the treating of the counts individually for sentence purposes which has offended my sense of justice than the inadequacy of the sentences as I have already pointed out.

I have already indicated that the accused violated the complainant's fundamental rights. Section 89 of the Criminal Code which creates the offence of assault provides for a sentence of "a fine up to or exceeding level fourteen or imprisonment for a period not exceeding ten years or both". The same section in subsection 3 lists factors which a court should take into account in addition to other relevant considerations in assessing an appropriate sentence following on a conviction for assault. The subsection specifically provide that 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
- (e) whether or not the person carrying out the assault was in a position of authority over the person assaulted.
- (f) in a case where the act constituting the assault was intended to cause any substance to be consumed by another person, the possibility that third persons might be harmed thereby, and whether such persons were so harmed"

In respect the offence of unlawful entry the Criminal Code provides for a fine not exceeding level 13 or twice the value of the stolen, destroyed or damaged property whichever is greater or imprisonment not exceeding 15 years if the crime was committed in aggravating circumstances. If aggravating circumstances are not present, the fine that may be imposed should not exceed level ten or twice the value of the damaged, stolen or destroyed property. The period of imprisonment is capped at an upper limit of 10 years. An unlawful entry is committed in aggravating circumstances which are listed in s 131 (2) of the Criminal Code as follows: where the convicted person-

- (a) entered a dwelling house; or

- (b) knew there were people present in the premises; or
- (c) carried a weapon; or
- (d) used violence against any person, or damaged or destroyed any property in effecting entry; or
- (e) committed or intended to commit some other crime.”

In *casu*, I have already commented on a possible splitting of charges. The prosecutor and indeed the magistrate perfunctorily dealt with this matter. The accused committed an unlawful entry into the complainants shop and in the process broke two window panes to gain entry. When the accused gained access into the shop forcibly, he went on to assault the complainant fracturing his hand. The accused carried a weapon in the nature of a snooker stick which he used to assault the complainant with.

The magistrate did not consider the sentence provisions in the Criminal Code. Had the magistrate done so, he or she could have appreciated that the offence or offences which the accused committed are viewed seriously by the legislature and heavy sentences are provided for. Even before the codification of the criminal offences, the courts always viewed assaults with dangerous weapons seriously see *S v Ngwenya* HB 174/88 in which the court held that first offenders can expect to be sentenced to effective jail terms where they commit mindless and vicious assaults using weapons.

I do not understand what motivated the magistrate to treat the accused so leniently in this case. The complainant had not wronged the accused. The accused just behaved as a township or business centre bully. The complainant was an elderly man aged 43 years while the accused was aged 23 years; a difference in ages of 20 years. The accused's behaviour needed to be adequately punished if not by the imposition of an effective prison term, then consideration should have been given to community service. The scenario here was of a businessman who was lawfully trading. He was forced to close shop by the actions of the accused who started an altercation with complainant's patrons who were playing a snooker game. The accused was together with the patrons ordered out of the shop, only for him to return and finding the shop closed, broke windows to gain entry through the back of the shop with the clear intention to attack the complainant who had not wronged him. The attack was vicious and the complainant did not retaliate. To impose a wholly suspended prison term offends one's notions of justice. The court failed to pass a sentence which promotes the upholding of and respect for the fundamental human rights which the constitution clearly protects as per ss 52 (a) and 57 (a) of the constitution of Zimbabwe. Violence needs to be

frowned upon by the courts. The assault on the complainant following the unlawful forced entry into the complainants' shop by the accused called for an exemplary sentence.

In all the circumstances of the case, the sentence imposed was not well informed. The magistrate should have been guided by the relevant provisions of the Criminal Code on sentence. Although I will not impose sentence afresh, I make the finding that the proceedings were not in accordance with real and substantial justice. I accordingly withhold my certificate. I have bounced my judgment off my brother TAGU J, who has also perused the magistrates court record of proceedings. He agrees with my observations, criticisms and conclusions as set out herein. Judicial officers should always consider the provisions of the criminal code in assessing sentences for offences provided for therein. More often than not guidance on sentence in the form of what factors to take into account in assessing an appropriate sentence is invariably provided for therein.

TAGU J: agrees