TONDERAI SINDURA
and
OBERT SINDURA
versus
THE STATE

APPELLATE DIVISION OF
THE HIGH COURT OF ZIMBABWE
KAMOCHA AND CHITAKUNYE JJ
HARARE 12 AND 19 FEBRUARY 2004 AND 5 MAY, 2004

Criminal Appeal

Mr *Tsivama*, for the appellants
Mr *V. Shava*, for the respondent

KAMOCHA J: Both appellants pleaded guilty to the crime of assault with intent to do grievous bodily harm and were found guilty as charged. They were then each sentenced to 12 months imprisonment of which 3 months imprisonment was suspended for a period of 5 years on the customary conditions of future good behaviour.

Aggrieved by the trial magistrate's decision the appellants noted an appeal against both conviction and sentence. They, however, abandoned the appeal against conviction at the hearing of the appeal and persisted with their appeal against sentence. Their complainant against the trial court's sentence was that 12 months imprisonment was harsh and excessive if regard was had to the following factors:

(a) That they were first offenders who pleaded guilty;
(b) That they were provoked by the complainant;
(c) That the injuries suffered by the complainant were not too serious; and
(d) That the learned magistrate ought to have considered the option of community service.

Counsel for the respondent submitted that he did not support the sentence imposed by the trial court on the basis that the sentencing trends now

favour the keeping of first offenders out of prison and rehabilitation of such offenders.

The circumstances giving rise to the commission of the offence may be summarised thus. The appellants who are aged 29 and 25 years respectively are brothers. They earn a living by selling gold while the complainant who is aged 30 years is a gold buyer. On 5 June 2002 complainant approached the two accused persons at their gold claim to buy gold. He bargained with the two accused for the price of the gold. The bargaining did not seem to go on well because the complainant was under the impression that the agreed price of the gold was $3 000 while the two accused thought that it was $5 000. The complainant handed $5 000 to the first accused. Since he believed that the final figure agreed on was $3 000, he demanded back a sum of $2 000. But because the two accused had already received the $5 000 they refused to return the $2 000 back to him and argued that their gold was worth $5 000. The complainant's demand for $2 000 infuriated the two accused. An argument ensued resulting in the two accused arming themselves with a shovel and stick.

The two accused then attacked the complainant with those weapons by striking him on his back, palm and legs. They fractured his scapula, his 5th metacarpal, and 4th phalange. They delivered several blows using severe force. The doctor who examined the complainant described the injuries inflicted as serious and held a view that permanent disability was likely.

After convicting both accused on their pleas of guilty the trial magistrate reasoned as follows before imposing the sentence complained of:-

> "Reasons for sentence
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> Mitigation
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> Both accused are fairly youthful offenders at 29 years and 25 years respectively. They are both married and are family men.
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> Both accused pleaded guilty and are first offenders. Courts have always been urged to give weight to these factors in mitigation. The accused also showed contrition and the court will not lose sight of this and give all factors the recognition that they deserve.
>
> Aggravation
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> Offences of this nature abound in this community. The need for deterrence cannot be over emphasised. Much as the court is aware that deterrence cannot be achieved solely by imposing sentenced of increasing

> severity, exemplary sentences are called for if any meaning and benefit will be derived from this.
>
> The assault was apparently an act of wanton aggression on the person of the complainant with no reasonable basis at all. That increases the accused's moral blameworthiness.
>
> Both accused attacked the complainant with weapons. That cannot be condoned. Whenever there is an element of gangsterism on an assault it takes the offence beyond the realm of ordinary assaults. That also makes the offenders unsuitable for community services. (emphasis added)
>
> Society expects protection from these courts and imposing community service in circumstances of this nature could be akin to the court abdicating its duty and that is bound to plunge community service into disrepute.
>
> Against that background and the fact that the medical report shows that the injuries were so serious that there is likelihood of permanent injury and that the assault was severe. Imprisonment is called for."

The above passage clearly shows the learned magistrate took into account that the accused were youthful first offenders who tendered pleas of guilty. He considered community service and found it to be inappropriate in the circumstances. It is therefore not true to suggest that the court did not take those factors into account. He found that community service was unsuitable in this case.

The two accused armed themselves with weapons and delivered several blows with those weapons and fractured three bones of the complainant. It is difficult to understand the appellants' reasoning when they allege that the complainant's injuries were not so serious after breaking three of his bones.

Equally difficult to understand is the suggestion that the accused were provoked by the complainant because all that happened was that the three could not agree on the price of the gold. That, in my view, did not warrant an attack on the person of the complainant with a shovel and a stick.

While accepting that the assault was apparently an act of wanton aggression on the person of the complainant with no reasonable basis at all and that the appellants' blameworthiness was of a high order, Mr *Shava* for the respondent still felt that he could not support the sentence imposed. Reliance

was placed on the case of *S v Mabhena* 1996(1) ZLR 134 where ADAM J had this to say at 140E-F

> "There is little doubt that in this case the magistrate erred about community service. The sentence he imposed was 18 months imprisonment with labour of which 8 months was suspended on condition of good behaviour, leaving an effective sentence of 10 months imprisonment. This court has on a number of occasions indicated in the past that for first offenders in appropriate cases where a court imposes a sentence of 12 months effective imprisonment or less then community service should be considered and sound reasons given for not imposing it. My underlining.

The trial court, in my view, gave sound grounds for not imposing community service. It clearly gave due weight to community service and concluded that it was inappropriate in the circumstances. There was, therefore, no misdirection on the part of the trial court. In the result I hold the view that the concession made by the respondent's counsel was not properly made.

In conclusion I find the trial magistrate's approach to sentence to be unassailable. I would, in the result, dismiss the appeal against sentence.

KAMOCHA J

CHITAKUNYE J. I agree

Sawyer & Mkushi, appellant's legal practitioners