GRADUAL GUMBO
versus
STATE

HIGH COURT OF ZIMBABWE
TAGU, MUREMBA JJ
HARARE, 05 November 2013 & 12 November 2013

Criminal appeal

*J. Gumbo,*for the appellant
S. Fero, for the respondent

MUREMBA J: This is an appeal against sentence. The appellant was charged with contravening s 4 as read with s 3 (1) (a) of the Domestic Violence Act [*Cap 5:16*] for assaulting his former wife.

The facts of the case are that the appellant and the complainant are former spouses. On 12 March 2013 they met at a business centre in their rural area. They did not exchange greetings. When the complainant left the business centre for her home, the appellant who was in the company of his brother followed her. When he caught up with her a misunderstanding ensued. This resulted in the appellant assaulting the complainant with open hands and kicking her several times with booted feet in the stomach. The appellant was restrained from further assaulting the complainant by one Anywhere Gwatidzo.

The medical report states that the complainant sustained swollen eyes and abdominal pains. Although there was no possibility of permanent disability, the injuries were severe and severe force was used to inflict them. The doctor also indicated that the complainant was pregnant.

The appellant pleaded guilty before a magistrate sitting at Bindura on 20 March 2013. He was properly convicted and the conviction is hereby confirmed.

He was sentenced to 12 months imprisonment of which 4 months were suspended on condition of good behaviour. He was left with an effective 8 months imprisonment. In assessing sentence the trial magistrate took into account the following points in mitigation. The appellant is a first offender. He has one child and three dependants to care for. He

pleaded guilty to the charge. However, notwithstanding this mitigation, the trial magistrate went on to impose a custodial sentence of 12 months leaving appellant with an effective sentence of 8 months imprisonment. The magistrate's reasons are that the appellant assaulted his former wife with open hands and kicked her with booted feet several times all over her body intending to cause bodily harm. The medical report indicates that the complainant sustained swollen eyes and abdominal pains. Severe force was applied resulting in severe injuries. The complainant was pregnant and as such was in a delicate condition thus posing a danger not only to the complainant but to her pregnancy as well. The magistrate said the appellant decided to use his wife as a punching bag instead of resolving his misunderstanding with the complainant amicably.

The magistrate said, "This is a serious case calling for a custodial sentence. A fine or community service will trivialise this offence and encourage domestic violence. Therefore a term of imprisonment will meet the justice of the case."

The appellant's grounds of appeal are as follows :-

"1. The court misdirected itself by imposing a custodial sentence where a non - custodial sentence would have met the justice of the case.
2. The court misdirected itself by not giving due weight to all the mitigatory factors in this case.
3. The court misdirected itself by placing more emphasis on the fact that complainant was pregnant something which was never verified from her in court. Although the doctor indicated that she was pregnant he did not state that he carried out pregnancy tests. In fact complainant is not pregnant.
4. The court misdirected itself by not considering community service or a fine as appropriate forms of punishment"

The appellant prayed for the setting aside of the sentence of the court *a quo* and substituting it with either community service or a fine.

In the heads of argument, the appellant's counsel argued that since the effective custodial sentence was less than 24 months the court ought to have considered imposing a non- custodial sentence in the form of a fine or community service. It was submitted that if community service was not appropriate, the magistrate ought to have explained why it was not appropriate.

The appellant's counsel went on to cite a plethora of cases which emphasize on the need for judicial officers to seriously consider community service in non serious offences particularly those with effective custodial sentences of 24 months and less.

It was also submitted that the trial magistrate did not give due weight to the appellant's mitigatory factors which involved the guilty plea that he tendered and that he was a first offender. The magistrate is alleged to have merely paid lip service by repeating these phrases.

The appellant's counsel argued that the trial magistrate never bothered to find out what exactly was the nature of the misunderstanding which arose between the appellant and the complainant which resulted in the appellant assaulting the complainant. It was further argued that, in arriving at the effective custodial sentence, the trial court unduly focused on the prevalence of the offence of domestic violence. It cited the prevalence of the offence to justify the sentence and consequently failed to canvass the appellant's personal circumstances.

The appellant's counsel further argued that the trial magistrate misdirected herself by placing more emphasis on the fact that the complainant was pregnant at the time the offence was committed. It was argued that the complainant was not pregnant. Although in the medical report the doctor said the complainant was pregnant, there is nothing to show that he had done a pregnancy test. The trial court should therefore not have relied on this information in sentencing the appellant.

The respondent's counsel submitted that the trial court did not misdirect itself in exercising its sentencing discretion. It was submitted that the magistrate properly balanced the mitigatory factors and the aggravatory factors as the issue of the pregnancy was never challenged during the proceedings. The magistrate cannot therefore be faulted for saying that the complainant was pregnant when she passed the sentence.

The respondent's counsel submitted that this was a serious assault which did not warrant the imposition of a fine or community service but an effective custodial sentence. The respondent's view though, was that the custodial sentence that was imposed is so severe as to induce a sense of shock and that there is a need to reduce it to 4 months imprisonment of which 2 months imprisonment is suspended on condition of good behaviour leaving the appellant with an effective 2 months imprisonment. She said a short and sharp custodial sentence will suffice.

It is correct that the trial magistrate did not probe the appellant further to find out from him what the misunderstanding between him and the complainant was all about which resulted in him assaulting the complainant. The nature of the misunderstanding ought to have

been explored by the trial magistrate in order to arrive at an appropriate sentence. It is not proper to assume that since it is the appellant who had followed the complainant therefore it means that it is him who was the aggressor. Maybe the complainant provoked him, not that it justifies the assault but it mitigates it. It is important to ask the accused why he committed the offence. See *S* v *Cleto Chireyi* HH 63-11. *In casu* the failure by the magistrate to enquire into the nature of the misunderstanding amounts to a misdirection.

Although the appellant's counsel submitted that it was not true that the complainant was pregnant and went on to aver that the complainant had after the conviction of the appellant compiled an affidavit that she was not pregnant, I find this submission without substance. There is nothing to justify the conclusion that the doctor lied that the complainant was pregnant. In any case the purported affidavit by the complainant was only compiled after the appellant had already been convicted and sentenced. This court is bound by the four corners of the record from the court *a quo*. In any case the purported affidavit was not even attached to the appellant's heads of argument.

However, I must hasten to point out that the issue of the complainant being pregnant at the time of the assault was not adequately dealt with by the trial court. In the state outline it is not mentioned that the complainant was pregnant. It is only in the medical report where it is mentioned that the complainant was pregnant. Even though, it is not indicated how advanced the pregnancy was. During the canvassing of the essential elements, the magistrate did not enquire from the accused whether or not he was aware that the complainant was pregnant at the time he assaulted her. Although the medical report was produced with the appellant's consent it is not clear whether or not he was aware of its contents. The proceedings went as follows:

> "PP – I beg leave to tender in the medical affidavit as an exhibit.
> Accused's (sic) rights to production of the medical affidavit as an exhibit explained and understood by the court.
> Accused – No objections to production"

With this kind of explanation by the magistrate, one cannot say with certainty that the appellant was made aware of the contents of the medical report. At that stage the appellant was not legally represented so he really needed the court's assistance. It was the court's duty to ensure that he fully understood the contents of the medical report.

I am saying this because the court then used the contents of the medical report against him when it sentenced him. It placed some weight on the fact that the appellant had assaulted a pregnant woman in such a gruesome and brutal manner thereby endangering both the complainant and the pregnancy.

The implication of this statement is that the appellant assaulted the complainant with the full knowledge that she was pregnant yet the record does not reflect so. The court ought to have enquired from the appellant during the recording of his mitigation whether he was aware that the complainant was pregnant at the time he was assaulting her. Obviously if the accused knew about the pregnancy or if the complainant was visibly pregnant and he went on to assault her in the manner he did; i.e. kicking her in the stomach with booted feet until he was restrained by another person, then his moral blameworthiness would be very high. This would be so even if he had been provoked. On the other hand, if he was not aware of the pregnancy then his moral blameworthiness cannot be said to be very high. Whether he knew or whether he did not know about the pregnancy makes a great difference. If he knew, an effective custodial sentence was definitely called for even though he was a first offender who admitted to the charge. This would in no doubt be classified as a serious assault deserving an effective custodial sentence.

The failure by the magistrate to ascertain this issue from the appellant or by calling the complainant to explain was another misdirection on the part of the sentencing court. In *S* v *Ngulube* 2002 (1) ZLR 316 NDOU J stated that it is essential for magistrates to equip themselves with sufficient information in a particular case to enable them to assess sentence meaningfully and to reach a decision based on fairness and proportion.

Since the magistrate misdirected herself this court is free to impose what sentence it considers to be appropriate.

Notwithstanding all the personal mitigatory factors in the appellant's favour, we consider the sentence of 12 months that was imposed on him deserved and appropriate. The complainant sustained swollen eyes and abdominal pains. Although there was no possibility of permanent disability, the appellant used severe force to inflict the injuries which the doctor classified as severe. The appellant used booted feet and open hands to assault the complainant all over her body. The appellant only stopped when he was restrained by another person.

As correctly stated in *S* v *Muchekayawa* HB42/12 cases of domestic violence are on the increase and in some instances death has resulted.

Deterrent sentences should be imposed by the courts in order to curb them. In *S* v *Cleto Chireyi supra* MAWADZE J stated that, "In my view it is wrong to regard imprisonment as the only punishment which is appropriate for retributive and deterrent purposes." What this means is that even community service can also achieve the same desired results, depending of course on the seriousness of the particular case.

In casu we are inclined to suspend the effective custodial sentence of 8 months imprisonment on condition the appellant performs community service. This is in view of the nature of the injuries which, though serious, did not result in permanent disability. The cause of the misunderstanding was not established. Although the complainant was pregnant nothing shows that the appellant was aware of it.

In *S* v *Patience Usavi* HH 182-10 MAWADZE J said, "Magistrates should always endeavour to avoid the temptation of imposing the so called "sharp and short" custodial sentences which often result in sending undeserving persons to prison for seemingly non-serious offences."

Likewise in this case we do not feel inclined to impose a "short and sharp" effective custodial sentence as recommended by the respondent's counsel as this can result in undesirable consequences to the accused. As a first offender he deserves a chance to be rehabilitated without necessarily going to prison. Fortunately for the appellant, he was granted bail pending appeal within one week of having been sentenced.

In view of the forgoing the appeal is allowed. The sentence by the trial court is set aside and substituted with following sentence:

12 months imprisonment of which 4 months imprisonment is suspended for 5 years on condition appellant does not within that period commit an offence involving violence on the person of another and for which upon conviction he is sentenced to imprisonment without the option of a fine. The remaining 8 months imprisonment is suspended on condition the appellant performs 280 hours of community service at ZRP Madziwa Mine starting on 10 December 2013. The community service shall be performed between 8am to 1pm and 2pm to 4pm every Monday to Friday excluding weekends and public holidays. It should be performed to the satisfaction of the person in charge of the said institution who may for good

cause shown grant the appellant leave to be absent on certain days or during certain hours but such leave of absence shall not count as part of the community service to be performed.

TAGU J agrees----------

Gumbo and Associates, appellant's legal practitioners
The Attorney General's Office, respondent's legal practitioners