CAIN NCUBE

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MATHONSI JJ
BULAWAYO 7 NOVEMBER 2011 AND 10 NOVEMBER 2011

Ms Mundopa for the appellant
Mr E. Mungoni for the respondent

Criminal Appeal

MATHONSI J: The appellant was convicted by the Magistrates Court in Filabusi, on his own plea of guilty, of assault as defined in section 89(1) (a) of the Criminal Law Code [Chapter 9:23] and sentenced to 24 months imprisonment of which 6 months imprisonment was suspended for 5 years on the usual conditions of future good behaviour. This left him with an effective sentence of 18 months imprisonment.

The facts are that the 52 year old appellant and the 60 year old complainant were drinking beer at a neighbours' homestead when they had a misunderstanding after the appellant had accused the complainant of stealing his cap.

The appellant picked up a 1 metre long log which he used to assault the complainant twice on the head and once on the back inflicting head injuries and a swollen back. According to the medical evidence of Dr B. B. Khabo who examined the complainant, he observed the following injuries:

> "Laceration of scalp at back of head; wound on left middle finger; bruises on back; linear fracture of the skull (shown by x-ray)."

The erstwhile doctor concluded that severe force was used as to cause the fracture of the skull and unconsciousness and that disability was likely to result from the injuries.

When the complainant appeared in court to give evidence, the trial magistrate observed a visible scar on the head, a visible scar on the left middle finger and that the right thumb was

deformed as it had a bending shape. The complainant told the court that the appellant is his nephew. He said that he was still in pain and could not bend or carry out his duties owing to the injuries he sustained 1 ½ months after the assault.

Although the complainant asked the court to give the appellant a non-custodial sentence, the trial court took the view that the offence was serious in that the complainant was a defenceless old man who was attacked using a log on a vulnerable part of the body as a result of which he sustained serious injuries. It was the trial court's view that a deterrent prison term was called for and that a fine or community service would not meet the justice of the case.

Unhappy with the sentence, the appellant launched this appeal against sentence on the following grounds:

"(1) The above sentence induces a sense of shock considering the age of the accused. Accused is 52 years old.
(2) In her reasons for sentence the learned magistrate put too much emphasis on the age of the complainant as being 70 years of age yet the complainant is actually 60 years.
(3) The learned magistrate also erred in her view that the accused assaulted the complainant for no reason yet it is clear from the state outline that the assault was as a result of a misunderstanding between the accused and the complainant. The assault was not premeditated. The courts in such cases have been leaning towards a non-custodial sentence. *S v Dangarembwa* 2003 (2) ZLR 87(H).
(4) The appellant was a first offender and thus deserved to be treated as such. However, 24 months imprisonment does not reflect that the accused was a first offender.
(5) The court failed to give due weight to other mitigatory factors as follows that:
(i) Appellant is married
(ii) The appellant pleaded guilty to the offence thus did not waste the court's time.
(iii) The attitude of the complainant in light of the sentence that was to be given to the accused. Complainant forgave him and wanted the court to let him go home.
(iv) Appellant was remorseful."

In terms of section 89(1)(a) of the Criminal Law Code under which the appellant was charged;

"Any person who commits an assault upon another person intending to cause that other person bodily harm or realising that there is a real risk or possibility that bodily harm

> may result, shall be guilty of assault and liable to a fine up to or not exceeding level fourteen or imprisonment for a period not exceeding ten years or both."

Among the factors that the court has to take into account in determining an appropriate sentence as set out in subsection (3) of section 89 are the age or physical condition of the person assaulted, the degree of force or violence used in the assault; whether or not any weapon was used and whether or not the assailant intended to inflict serious bodily harm.

All the foregoing factors were taken into account in assessing sentence. The complainant was a fairly old person aged 60. Ms *Mundopa* for the appellant made a mill out of the fact that in her reasons for sentence the trial magistrate cited the age of the complainant as 70 instead of 60. I am of the view that it really does not change anything. The fact remains that the complainant was an old man and the court *a quo* took that into account.

The degree of force used by the appellant was severe and a weapon was used under circumstances suggesting that the appellant intended to cause serious bodily harm. One does not attack an old man with a one metre long log on the head with such severe force as to cause a fracture of the skull and unconsciousness without intending to inflict serious injury. In fact such injury resulted and the consequences of the appellant's actions were there for the court to see.

In my view this was a very serious case of assault and the complainant must consider himself lucky that even more serious consequences did not flow from the assault.

The penalty section gives the trial court the option to impose a level 14 fine or imprisonment of up to 10 years. The aggravating features of this case blighted any mitigation that existed and removed the appellant's case from the realm of a fine to that of a custodial sentence.

The sentence that was imposed falls squarely within the trial magistrate's sentencing discretion. It is not for the appeal court to interfere with the sentencing discretion of the trial court merely on the ground that it might have come up with a different sentence. If the sentence complies with relevant principles, even if it is harsh this court will not interfere. *S v*

Nhumwa S-40-88; *S v Mundowa* 1998(2) ZLR 392 (H) at 395 B-C. *S v De Jager and Another* 1965(2) SA 616(A) at 628-9 and *S v Mkombo* HB 140/10.

Regarding the plea by the complainant that the appellant be given a non-custodial sentence, it is true that weight must be attached to the wishes of the complainant. *S v Kelly* 2004(1) ZLR 176(H). However the sentencing court is not bound by the wishes of the complainant and this case is distinguishable from *S v Kelly (supra*) in that it involves assault which resulted in serious injury thereby reposing upon the court the added responsibility of assessing a sentence that sends the right message to likeminded people. The *Kelly* case involved theft from an employer.

For these reasons I am of the view that the appeal is without merit. It is accordingly dismissed.

Legal Aid Directorate, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners

Kamocha J agrees.....