HB 144/17
HCA 66/16

AKIM MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & MATHONSI JJ
BULAWAYO 5 & 8 JUNE 2017

Criminal Appeal

Ms T. F. Nyathi for the appellant
Ms S. Ndlovu for the respondent

MATHONSI J: The appellant was convicted of 2 counts of assault by the Magistrates Court at Lupane on 26 April 2016 after pleading guilty. He had used an iron rod, not produced as an exhibit in court, to assault the 2 complainants for fighting with his father. He was sentenced to 24 months imprisonment 6 of which were suspended on condition of future good behaviour leaving an effective term of 18 months imprisonment.

He has appealed against sentence only on the ground that it induces a sense of shock given the strong mitigating factors present in the matter. He is a first offender who pleaded guilty to the charge and therefore did not waste the court's time. The moment the offence was committed he showed remorse by escorting the complainants to the police to enable them to get treatment. He proffered apologies for his actions and offered to compensate the complainants in the sums of $150,00 each which they had estimated to be their expenses. He is a University student in the middle of his studies.

While the aggravation is that he used an iron rod directed to the head to assault the complainants, it is a fact that the court did not have sight of that weapon to assess the gravity of using it. However, there is the medical evidence, exhibit 1, to the effect that Nkosana Ndlovu the first complainant suffered soft tissue injury and had an eye trauma which the doctor speculated may lead to blindness. That report is not only scanty but clearly unhelpful especially

as it does not reveal the exact location of the soft tissue injury and says nothing about a head injury.

The 2nd medical report, exhibit 2, only states that Mthandazo Ndlovu, the 2nd complainant suffered soft tissue injury and that there is no possibility of disability. It states that moderate force was used. In my view the medical evidence on its own could not be a reliable source upon which to found the sentence that was imposed.

More importantly, the trial court did not bother to inquire into the suitability of community service as an option having settled for an effective imprisonment term of less than 24 months as it was required to do by case law authority. This was a misdirection. The court merely commented that "community service and a fine will be too light."

I notice that the appellant was in custody from 26 April 2016 to 27 May 2016 when he was granted bail. So he served a period of a month when he should have been sentenced to community service.

In the result it is ordered that:

1. The appeal against sentence is hereby upheld.
2. The sentence of the court *a quo* is hereby set aside and substituted with the following sentence:

   "A fine of $300,00 or in default of payment one month imprisonment. In addition 3 months imprisonment which is wholly suspended for 3 years on condition the appellant does not, during that period, commit an offence involving violence for which upon conviction, he is sentenced to imprisonment without the option of a fine."

3. As the appellant has served 1 month imprisonment he is entitled to his continued freedom.

Bere J …….. I agree

Mesdames Vundhla-Phulu & Partners, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners