THE STATE
versus
TAFADZWA NDANGA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4 July, 2018

Review Judgment

CHITAPI J: The accused was convicted on 13 June, 2018 for the crime of assault as defined in s 89 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The accused was charged with having assaulted the complainant with an iron bar intending to cause bodily harm or realising the risk or possibility that bodily harm may result and continuing to engage in the unlawful conduct notwithstanding the realisation. The brief facts of the case were that the complainant parked his vehicle close to his bedroom window at his house in Chitungwiza around 9.00pm. He secured the vehicle by locking all the doors of the vehicle and closing all windows.

Around 3.00am, in the early hours of the following morning, the complainant woke up to some noise emanating from outside the bedroom window. He woke up his brother to accompany him outside the house to investigate the source of the noise. The accused was seen standing near the front of the vehicle. When confronted to explain his presence, the accused became violent. He then struck the complainant with an empty beer bottle once on the head and also used an iron bar to strike the complainant on the thigh. He bit the complainant on his right arm, all in an effort to resist apprehension. Neighbours who heard noises caused by the commotion woke up and assisted in the apprehension of the accused. He was arrested.

The complainant was attended to at Chitungwiza Hospital. The medical report which was produced by consent shows that the complainant suffered a fracture of the right femur. The doctor indicated that the force used to inflict the injury was severe and the injury itself was very serious with a likelihood of permanent disability a possibility.

I have considered the record of proceedings. The conviction was in my view proper. The sentence was however on the lenient side given the circumstances of the assault and injuries sustained by the complainant. The sentence also needs to be corrected because the magistrate miscalculated the effective sentence. The accused was sentenced as follows;

> "20 months imprisonment of which 8 months imprisonment is suspended for 5 years on condition accused is not convicted of an offence of which assault is an element for which accused will be sentenced to imprisonment without the option of a fine. The remaining 8 months are effective."

There is a clear miscalculation on the part of the magistrate. The difference between 20 months and 8 months is 12 months and not 8 months. The effective sentence should therefore have been pronounced and recorded as 12 months imprisonment and not 8 months imprisonment.

I have surmised that the sentence erred on the lenient side. The magistrate should have been guided to take into account the factors listed in s 89 (3) of the Criminal Law (Codification & Reform) Act. The aforesaid section provides as follows:

"**89 Assault**

1……

2…….

3. In determining an appropriate sentence to be imposed upon a person convicted of assault, and without derogating from the court's power to have regard to any other relevant considerations, 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;
d) Whether or not the person carrying out the assault intended to inflict serious bodily harm;
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 factors aforesaid should be taken into account as a matter of law as it is a peremptory requirement that they should be taken into account. The court should then consider them together with any other factors which a sentencer generally considers such as guilty pleas, previous convictions, accused's personal circumstances and so forth.

I need to point out that the right of every person to personal security is guaranteed under s 52 of the Constitution. The right entails that every person's bodily and psychological integrity

should be protected. Every person is guaranteed freedom from inter-alia all forms for violence from public and private sources. By accessing the complainant premises without his permission, the accused equally violated the complainant's right to privacy as defined in s 59 (a) of the Constitution which provides that, " Every person has the right to privacy, which includes the right not have their home, premises or property entered into without their permission." Had the magistrate been alive to these constitutional provisions and the peremptory considerations to be taken into account in sentencing an offender convicted of assault as set out in s 89 of the Criminal Law (Codification and Reform) Act, as aforesaid, the probability is that a stiffer sentence could have been imposed. It must also be kept in mind that the legislature has played its part in providing for a very harsh sentence *regimen* for the offence of assault under s 89 (1) of the Criminal Law (Codification and Reform) Act. The sentence provided for is a fine not exceeding level 14 or imprisonment not exceeding 10 years or both. The fact that level 14 is the highest level on the scale of fines and that 10 years is a very steep sentence shows that the offence is and must be viewed seriously. Courts must not defeat legislative intents by failing to properly enforce the law as set out in the existing statutes.

The remarks which I have made must guide future sentencing trends or approaches which the court sentencing an offender for assault must adopt. Gone are the days when an offender who engages in dehumanizing another person through assault should expect to be treated with kid gloves. The Constitution advocated for a violence free society where society must embrace the concept of accepting that every person has a right to his or her inherent dignity. Exemplary and deterrent sentences must therefore be imposed for offences of assault. In saying so, I do not advocate for the imposition of imprisonment as the only appropriate penalty. However even in circumstance where a fine is deemed appropriate, the level of the fine should be stiff enough to the offender's pocket and deterrent enough to dissuade would be offenders from committing assaults in the belief that one can just deposit $20.00 at the police station or be sentenced by the court to a fine which is a pittance and walk away without feeling the sting of the punishment because of the negligible fines amount levied.

In casu, although the sentence presents itself as lenient given the circumstances in which the assault was committed, it is not so lenient as to fail to pass the real and substantial justice levels. An effective sentence of 12 months is sufficient to deter the accused and others. I am not able to

suggest though what could perhaps have been the most appropriate sentence in this case because of the dearth in information required to be established and considered as set out in s 89 (3) of the Criminal Law (Codification Reform) Act. Had all the information been elicited and been recorded, I would have been placed in an enabled position to give a guide on the quantum of the sentence. My inclination that the sentence was lenient was informed by the facts on record and in particular, that the accused was so aggressive that he seriously injured the complainant using a weapon in circumstances where the accused was the aggressor and had trespassed into the complainant's premises with a motive to commit a crime.

That said I therefore dispose this review by certifying the proceedings as being in accordance with real and substantial justice, save that;

1. The sentence imposed by the magistrate is corrected to reflect the effective sentence as 12 months imprisonment instead of 8 months.
2. The accused should be brought before the magistrate and advised of the correction which arose from, a subtraction error which appears *ex facie* the record.

WAMAMBO J agrees …….