ARCHIBOLD MARANGE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHITAPI JJ
HARARE, 23, 26 & 31 March 2021

Criminal Appeal

W Chishere , for the appellant
R Chikosha, for the respondent

CHITAPI J: The appellant pleaded guilty and was convicted and sentenced to terms of imprisonment by the provincial magistrate sitting at Harare on 14 July, 2020 on three charges of assault as defined in s 89 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23]* and two charges of kidnapping as defined in s 93 (1) (a) of the same enactment.

The appellant was dissatisfied with the convictions and sentences imposed. He noted an appeal against both conviction and sentence on 21 July, 2020. At the hearing of this appeal, the appellant's counsel abandoned the appeal against conviction but persisted with the appeal against sentence. The appellant set out eight grounds of appeal numbered 2 – 9 in the notice of appeal. Grounds 2, 3, 5 and 8 can be reduced to a single ground of appeal which can be paraphrased as:

> "That the court *a quo* erred in fact and law in not giving due weight to the guilty plea offered by the appellant, the appellant's status as a first offender and the fact that the appellant acted under provocation and resultantly the court passed too severe a sentence than was warranted in the circumstances."(own wording)

The rest of the grounds of appeal were as follows:

> "4. The court *a quo* grossly erred at law and misdirected itself in failing to appreciate the well settled legal position that where a statute provides for a non- custodial sentence as a starting point, the court is enjoined to consider a non-custodial sentence unless there are strong and compelling reasons not to do so.
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> 6. The lower court further erred in failing to take on board the attitude of the complainants, particularly that the victims of the assault had forgiven the appellant and what they only wanted was a reimbursement of their medical expenses.

7. The court *a quo* erred at law in sentencing the appellant to two and half years imprisonment for kidnapping when the maximum penalty provided by the law is two years imprisonment.
9. The court *a quo* further erred at law in failing to properly consider and impose community service when the circumstance warranted a serious consideration of community service as a viable option."

It is necessary to first set out the facts found proved which led to the conviction of the appellant. The appellant a 39 year old adult man resides at 496 Caledonia Phase 4, Harare. The complainants Francis and Simbarashe Mupondi both reside at 2236 Caledonia Phase 17, Harare. Simbarashe is a nephew to Francis. On the night of 5 July, 2020 the appellant went to the Mupondi's residence where he forcibly entered the house in which Simbarashe and Francis were asleep. The appellant made accusations against Francis Mupondi accusing him of having a love affair with the appellant's wife. The appellant then assaulted both Francis and his nephew with open hands and fists. The appellants thereafter force marched the two victims to his residence at 496 Caledonia Phase 4 where upon arrival, the appellant again assaulted them with an iron bar, fan belt and clenched fists. He also poured water over the two complainants. The appellant was said to have acted with the assistance of an unnamed accomplice. It was also determined by the court *a quo* that the complainants were deprived of their freedom from around 0100 hours to 0630 am when they were released upon the intervention of police officers. In count five, the appellant assaulted the complainant Godfrey Chikakano his neighbor after the two met at Mandeza Shops, Caledonia Phase 4, Harare on 4 July, 2020. The appellant accused the complainant of having an extra marital affair with the appellants wife. The appellant assaulted the complainant using open hands and fists before the complainant managed to run away.

An analysis of the trail of events as I have outlined them above, shows that save for the fifth count which occurred on the 4th July, 2021 the other four counts arose from one course of conduct wherein the appellant first attacked the two complainants before force marching them to his place of residence and holding them hostage until they were freed by the police. The only reason that separate charges were drawn in relation to the assaults on the complainants and the subsequent kidnappings was informed by the fact that two separate victims were involved albeit the *actus reus* being committed simultaneously in regard to both victims

In the trial proceedings, evidence was led both complainants suffered injuries which required medical attention. The medical report in relation to Francis detailed that he suffered injuries described by the doctor who examined him as;

> "painful red eye, multiple swellings and bruises on the face and head, swellings and lacerations on the right leg."

The doctor opined that the cause of the injuries was consistent with "multiple strikes with blunt objects". The force used was moderate. The injuries were described as serious. There was a possibility of permanent disability which the doctor opined on based on the observation that –

> "the patient sustained trauma to the head which may result in head injury and concussion."

In regard to complainant Simbarashe, the doctor recorded that the complainant had a swelled painful left ear and swelling and pain in both feet. The injuries were likely caused by use of a blunt object using minor force. The injuries were described as "not serious". There was no possibility of permanent disability. No medical report was produced in relation to the complainant in the fifth count.

The appellant was sentenced as follows

"Count one – 3 years imprisonment
Count two – 1 year imprisonment
Count three and four as one – 2 ½ years imprisonment
Count five - $1000.00 in default of payment three months imprisonment"

The total imprisonment term to be served was 6 1/2 years from which total, 12 months imprisonment was suspended on conditions that the appellant does not within a period of 5 years post sentence commit any offence of which violence is an element where upon conviction the appellant is sentenced to a term of imprisonment without the option of a fine. A further 12 months was suspended for 3years on condition that the accused does not within that period commit any offence of which the detention or denial of liberty of another person is an element for which if convicted the appellant is sentenced to a term of imprisonment without the option of a fine.

In assessing sentence, the magistrate took into account the personal circumstances of the appellant, that he was first offender and family man aged 39 years old. He acted upon rumors from his children that the appellant's wife had a love affair with the complainant Simbarashe Mupondi and that the two were bed mates. The appellant then attacked both Simbarashe and Francis, the latter for harboring Simbarashe. The magistrate noted that there was no reason at all for the attack on Francis. The Magistrate considered that the innocent complainant Francis is the one who suffered more serious injuries. The magistrate noted that the as regards the fifth count the appellant suspected that the complainant who was the appellants neighbor had bedded the appellant's wife,

and that the suspicions was not grounded on any concrete facts. The magistrate correctly noted that no citizen must take the law into his or her own hands.

In regard to the kidnapping convictions, the magistrate noted that the kidnap lasted from 1:00am- 6:30 am. I will add that not only did the kidnap last 5 hours or so, but the release of the victims was not out of the appellants' benevolence. It was through intervention of the police. The appellant cannot be credited with having corrected his wrongs by releasing the complainants from the kidnap. The magistrate observed that the kidnapping of both victims had taken place at the same time. The two counts of kidnapping were taken as one for purposes of sentence. On the fifth count, the magistrate noted that the assault charge therein was not serious in magnitude. He sentenced the appellant to pay a fine as alluded to before.

The magistrate noted that the attack on the complainants with iron bars, fan belts clenched fists and throwing water on them amounted to serious violations of the law and that a fine would trivialize the offences. The magistrate was spot on on this conclusion. Assault and kidnapping are serious offences against the person of another. The constitution in s 53 provides that no person may be subjected to physical or psychological torture or to cruel or degrading treatment or punishment. The constitution in s 52 (a) further provides for the right of every person to freedom from all forms of violence from public or private sources. Lastly s 51 of the Constitution provides for the inherent right of human dignity of every person in private and public life and for that right to be respected and promoted. These rights are inviolable. The appellant abrogated them. The magistrate therefore correctly took a serious view of the case and the appellants' savagery conduct.

Upon adopting a holistic approach to the grounds of appeal, they simply show that the appellant considers that the sentence imposed was too severe and merited interference by setting the sentences aside and substituting them with a sentence of community service. It was argued that because the statutory provisions which define the offences of assault and kidnapping provided for a sentence of a fine or imprisonment, the magistrate misdirected himself in not imposing a fine. The ground of appeal has no merit. The magistrate considered the imposition of a fine and discounted it on the basis that a fine would trivialize the offences. He supported his decision not to impose a fine on the grounds that, the assaults and kidnapping amounted to the appellant taking the law into his own hands. He considered that weapons were used and the complainants suffered

serious injuries in the case of complainant Francis and non-serious injuries in the case of Simbarashe.

It is noted that the magistrate did not consider the option of community service. This can easily be explained by the fact that the magistrate did not consider that the nature of the offences and their commission could justifiably be punished by community service as a sentence. There is nothing wrong with such an approach because it not a legal requirement that the magistrate should interrogate the suitability of community service where the offence committed is of such serious magnitude that the magistrate does not opt to interrogate that type of sentence. The magistrate was not misdirected in this regard. The circumstances of this case would not in my view be justly served by a sentence of community service for the same reasons given by the magistrate when he considered considering a fine to be inappropriate.

The appellants also averred that the sentence imposed for the two counts of kidnapping of 2 ½ years' imprisonment exceeded the maximum sentence of two years provided for in s 93 (3) of the Criminal Code. This submission has no merit and misquotes the sentencing provisions for kidnapping. The sentence for kidnapping is provided for in s 93 (1) A and B which provides that the punishment for unlawful detention or kidnapping is –

> "A- Imprisonment for life or any definite period of imprisonment except in a case referred to in subparagraph B; or
> B Where the kidnapping or unlawful detention was committed in mitigating circumstances referred to in para (b) of subsection (3), to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both."

The exception referred to in "B" above is set out in paragraph (b) of subsection (3) as aforesaid as follows-

> "(b) a court shall regard it as a mitigating circumstance if, in the case of kidnapping or unlawful detention of a child, the accused is a parent of or closely related to the child and the kidnapping or unlawful detention was not accompanied by violence or the threat of violence."

The victims in this matter were not children let alone of the appellant. The ground of appeal was therefore based upon a misreading of the law. It has no merit. It is dismissed. The sentencing provisions on the contrary show that the kidnapping and unlawful detention were committed in aggravating circumstances provided for in s 93 (3) (a) (ii) of the Criminal Code which provides that the court shall regard it as an aggravating factor if-

> "(a)……..

(b) The kidnapping or unlawful detention was accompanied by violence or the threat of violence"

In *casu*, the complainants were first assaulted by the appellant prior to their kidnap and during the period they were under unlawful detention. Going by the provision of s 93 (1) (b), a fine was out of the question and was properly discounted by the magistrate as inappropriate. The same applied to community service not have been considered. The appellant had to be sentenced to either life imprisonment at the highest scale or imprisonment for any definite period. The magistrate was therefore not misdirected to sentence the appellant to imprisonment of 2 ½ years on the two counts of kidnapping.

The appellant also averred that the court did not take into account that the victims of the assault forgave the appellant and only wanted to be reimbursed their medical expenses. Generally speaking, it is proper to take into account the views of the victim when considering sentence. In this case a reading of the record shows that none of the complainants forgave the appellant. They made forgiveness conditional upon the appellant reimbursing medical expenses on the part of Francis and being paid compensation in the case of Simbarashe. The appellant did not reimburse the medical expense or compensate Simbarashe for the assault. There was really nothing for the magistrate to consider as regards forgiveness which was not accepted by the complainants.

Lastly, it was averred that the guilty pleas given by the appellant were not accorded sufficient weight in assessing sentence. The magistrate in the reasons for sentence stated that-

"In the light of the pleas of guilty, significant periods are suspended on condition of good future conduct".

The magistrate went on to suspend portions of imprisonment on appropriate conditions. There was no misdirection committed by the magistrate in this regard. The appellant did not establish the basis to hold that insufficient weight was attached to the guilty plea. Being *verbose* is not necessarily a measure that the many words translate to giving sufficient weight to a factor than where one is succinct or laconic. The magistrate did suspend a portion of the sentence upon taking into account the guilty pleas and in this regard, the ground of appeal has no merit.

However, after considering the record of proceedings and hearing counsel's submissions, it was noted that there was no jurisdiction for not treating the two counts of assault involving Francis and Simbarashe as one for purposes of sentence. Mr *Chikosha* for the respondent who had opposed the appeal properly conceded that the assaults on the two complainant were committed at

the same time and that the sentence in count 2 should run concurrently with the one in count 1. In the view of the court, although Mr *Chikosh*a's submission if adopted would have the same effect of reducing the sentence as would the taking into account of the counts as one for purposes of sentence, Mr *Chikosha*'s submission has the problem that it would mean that there was justification for the magistrate to treat the kidnapping counts as one for purposes of sentence and no justification to do the same for the assault counts. The assault counts must be taken as one for the purposes of sentence. In the view of the court and considering that the counts of assault and kidnapping were constituted by one course of conduct by the appellant, the overall sentence of 6 ½ years imposed by the magistrate even before suspending portions thereof was too severe when one takes account that the appellant acted under provocation albeit such provocation was not caused by any proven action by the complainants. The appellant acted out of unbridled jealousy founded on rumours. The appellant is not inherently a wicked person. An appreciably long sentence of imprisonment will meet the ends of justice in this case. The following order is made.

The appeal against conviction having been abandoned and the appeal against sentence having been persisted in;

(a) the appeal against sentence in count 5 is dismissed

(b) the appeal against sentence in counts 1, 2, 3 and 4 succeeds in part in that the sentence of the magistrate is set aside and substituted with the following sentence—

(c) (i) Count 1 and 2 as one for sentence - 1 year imprisonment

(ii) Count 3 and 4 as one for sentence - 2 years imprisonment

Total sentence is 3 years of which 1 year imprisonment is suspended for 5 years on condition that within the period of suspension, the accused is not convicted of the offence of kidnapping or assault as defined respectively in ss 89 and 93 of the Criminal Law Code [*Chapter 9:23*] whereupon conviction the appellant is sentenced to imprisonment without the option of a fine.

ZHOU J AGREES:…….

Saunyama Dondo, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners