HB 196/17
HCA 59/13

TAMUKA ZHOU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 3 & 6 JULY 2017

Criminal Appeal

Mudisi for the appellant
Ms S. Ngwenya for the respondent

MAKONESE J: The appellant appeared before a magistrate sitting at Mberengwa facing a charge of contravening section 3 (1) as read with section 4 of the Domestic Violence Act (Chapter 5:16), that is physical violence. He was convicted and sentenced to 6 months imprisonment of which 2 months was suspended for 5 years on the usual conditions of future good conduct.

The brief facts of the matter are that on 30th December 2012 and at Mataga Clinic, Mberengwa the appellant assaulted the complainant with clenched fists and booted feet all over the body. Appellant further pushed the complainant out of a motor vehicle that was stationary. As a result of this assault, complainants sustained soft tissue injuries on the face, had a swollen face and bruises on the chest.

In his reasons for sentence, the trial magistrate stated as follows:

> *"In assessing sentence I have considered that the accused is a first offender. Accused has been living a clean life before this conviction. Accused person has got siblings to take care of. Complainant did not sustain very serious injuries from the assault. Accused did not use any weapon to assault the complainant.*

Assault cases and especially domestic violence cases are on the increase hence the need for deterrence. Accused's conduct constitutes a form of domestic violence which must be discouraged. It is high time people learn to resolve differences without using violence. Complainant sustained serious injuries from the assault. Accused forcibly dumped the complainant who had been staying with as a wife (sic). People should not abuse and take advantage of women in a manner accused did. A deterrence sentence would be just. (emphasis added)

The state has conceded that the sentence imposed by the trial magistrate is excessive and induces a sense of shock. The learned trial magistrate failed to consider the option of a sentence of a fine and never took into account the fact the sentence imposed fell within the grid of 24 months and that it was imperative to consider the possibility of community service. This is a misdirection on the part of the trial magistrate which has been highlighted by this court in several decided cases. The reasons for sentence as outline in the court *a quo* show that the trial magistrate contradicted himself in the reasons for sentence. In the first paragraph of the reasons for sentence the magistrates states that:

"Complainant did not sustain serious injuries"

In the second paragraph of the reasons for sentence, the learned magistrate immediately contradicts himself by stating as follows:

"Complainant sustained serious injuries."

The medical report clearly shows that complainant's injuries were not serious and there was no possibility of permanent injury. It is my view that trial magistrate should not have over emphasized the issue of general deterrence without paying due regard to other weighty mitigating factors of the case. The imposition of short and sharp prison sentences has been shown to provide no useful purpose. Sentencing trends have shifted in recent years towards the imposition of community service as an alternative form of punishment. The country's prisons are currently over-crowded and custodial sentenced must be reserved only for serious cases where no other forms of punishment would be deemed appropriate. See *S* v *Majaya* HB-15-03. Courts must consider the accused's personal circumstances, the circumstances surrounding the

commission of the offence amongst other considerations. In the case at hand, the appellant is a first offender. Appellant looks after his siblings. The complainant did not suffer serious injuries. No weapon was used in the assault. The complainant and appellant seemed to have a misunderstanding that led to this assault. This is not one of those serious cases of assault and the trial court seemed to have paid lip service to the mitigating factors of the cases. In doing so, the learned trial magistrate imposed a sentence that is harsh and unduly excessive in all the circumstances of the case. See *S* v *Shariwa* HB-37-03.

In the result, the sentence of the trial court cannot be allowed to stand and the court orders as follows:

1. The appeal against sentence succeeds.
2. The sentence of the court *a quo* is set aside and substituted with the following:-
   "Accused is sentenced to pay a fine of US$100 in default of payment 3 months imprisonment. A further 6 months imprisonment is wholly suspended for 3 years on condition if an offence involving violence for which he is convicted and sentenced to a term of imprisonment without the option of a fine".

Moyo J …….I agree

Mutendi, Mudisi & Shumba, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners