

**The State
Versus
Tichaona Chimoga**

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 9 December 2005

Criminal Review

BHUNU J: The accused an employee of Foodworld Supermarket was caught red handed drinking beer he had stolen from his employer. When confronted he assaulted the employee who had accosted him.

When the shop manager tried to intervene he was also assaulted.

The accused was however eventually apprehended and taken to the police station. At the police station he again assaulted one of his fellow employees who had taken him there.

Arising from the above facts the accused was charged with one count of theft and 3 counts of common assault. The trial magistrate treated all the 4 counts as one for the purposes of sentence. He then sentenced the accused to pay a fine of \$100 000.00 or in default of payment 20 days imprisonment.

The learned scrutinising regional magistrate took issue with the manner the trial magistrate grouped all the 4 counts as one for the purposes of sentence. He observed that as a result of the improper grouping of the counts for the purposes of sentence the accused ended up getting an inadequate sentence. In referring the matter for review he had this to say;

"In my view there was no basis to combine the four counts for purposes of sentence even if all the counts were committed on the same day. These are my reasons: -

- (a) There is nothing similar between the offences of theft and assault.
- (b) Counts 2, 3 and 4 could have been combined since the assaults took place on the same day.
- (c) The principles to be applied in sentencing the accused for theft and assault are totally different.
- (d) Because the counts were improperly combined the accused ended up receiving a very lenient sentence.
- (e) For stealing property worth \$13 000.00 and subsequently assaulting three people one after the other at different times in my view deserved a stiffer penalty. The accused had stolen some beer and drunk it whilst on duty. The people he assaulted were actually his seniors at the work place. In my view a total fine in the region of \$500 000.00 was justified."

The treatment of multiple offences for sentence is an area which causes a measure of difficulty and is fraught with uncertainty. This court has in the past attempted to give

guidelines on how to handle cases of this nature. In the case of *Sydney Taruvinga vs The State* HC-H-37-89 CHIDYAUSIKU J as he then was had this to say: -

"There is no fixed rule of law which requires a judicial officer to treat a multiplication of counts as one for the purposes of sentence but it is now the established practice that before a judicial officer can treat a number of counts as one for sentence there has to be some close affinity between those counts either in the manner or time in which the offences were committed. A typical example would be where an accused is charged firstly with possession of a particular object and secondly supply of the same object. It would not be possible in that case to supply without possession and the two offences are, one might say, very closely related and it would be desirable to treat them as one for the purpose of sentence.

In a case such as the present one where there is a multiplicity of counts and the judicial officer has decided to group a number of counts together for the purposes of sentence there has to be some rational basis for such groupings such as proximity in time, pattern of commission of the offence etc."

It is clear that in terms of the above precedent that the list of reasons for which a number of counts may be treated together for the purposes of sentence is by no means closed.

In the instant case the assaults were triggered by the theft. The accused assaulted the complainants in a desperate bid to avoid a citizen's arrest for the theft. Had there been no theft there would have been no assaults. The assaults were perpetrated in furtherance of the theft. All the 4 counts were simultaneously committed with one common purpose that is to avoid arrest arising from the theft.

That being the case all the 4 counts were closely related in time and space.

On the basis of such observation the trial magistrate decided to follow the precedent laid down in the *Taruvinga case (supra)* and he treated all the 4 counts as one for the purposes of sentence. Whether or not to treat multiple counts as one for the purpose of sentence is a matter of discretion. Superior courts do not lightly interfere with the exercise of discretion by a judicial officer in the lower courts.

The learned scrutinising regional magistrate would have treated the matter differently for the cogent reasons he gives. He would undoubtedly have been correct in the exercise of his discretion but that is not to say the trial magistrate was wide of the mark in exercising his discretion differently. Both magistrates are in effect justified in their perception of the sentencing principles in this regard to judicial precedent.

The view that both magistrates are justified finds expression a number of decided cases. In the case of *Sydney Taruvinga v The State (supra)* the learned judge proceeded to say at page 3: -

"In my view the trial magistrate could have adopted any one of the following approaches. He could have treated each count on its merits and sentenced the

appellant on that count as if it was the only count; then if the aggregate sentence on all counts is too severe order the sentence on some counts to run concurrently with that on others so that the total effective sentence is appropriate.

He could also have treated all counts as one for sentence and imposed an appropriate sentence. It also would have been proper for him to group certain of the counts together on some rational basis and impose sentence on those grouped counts and then look at the global sentence and make some of the sentences run concurrently or suspend a portion of the global sentence in order to achieve an appropriate sentence."

It is clear that the trial magistrate adopted one of the suggested sentencing modes. He cannot be blamed for following binding precedent. The proposed sentencing mode suggested by the regional magistrate finds expression in the recent judgment of MAKARAU J in the case of the *State v Bernard Damba and the State v Nhamo Chanakira* HH -69-2004. In that judgment the learned judge quoted with approval the dicta laid down by Smith J in the case of *S v Chawasarira* 1991 ZLR 67 at 69. In that case His Lordship observed that:

"Separate punishment cases, be imposed for each separate charge. One globular sentence for two or more offences should only be considered where the offences are of the same or similar nature and are closely linked in point of time. If these two requirements are not satisfied then a separate sentence must be imposed."

Having surveyed legal authorities MAKARAU J was at pains to lay down useful guidelines as to the approach a sentencing court must take in determining whether or not to impose a globular sentence. The guidelines are as follows;

1. The general position is to impose a separate sentence for each conviction.
2. Where the multiple counts are similar in nature and not merely kindred, and closely related in terms of time, the sentencing court has an option to either take each count separately or to take all counts as one.
3. The option to take all counts as one need not be taken. It is however preferable that it be taken.
4. The option to take all the counts as one is not available where the multiple charges are not similar in nature, even if they are closely linked in terms of time.
5. The option to take all counts as one is not available where the multiple offences are not closely linked in terms of time of they are similar in nature, unless they are committed as part of an ongoing course of conduct especially in fraud and theft by conversion matters involving the same complainant and using the same *modus operandi*."

Given the wider and more liberal position expounded in the *Taruvinga case (supra)* which was adopted by the trial magistrate and the narrower restricted opposition expounded in the *Chawasarira case (supra)* and preferred by the Regional Magistrate, I lean in favour of the later.

In my view the broader liberal approach tends to introduce an element of uncertainty. It is permissive, it allows judicial officers to find justification for treating multiple counts as one for sentence in circumstances which may lead to absurdity. The danger is that judicial officers are left as loose cannons to fire aimlessly at will. On the other hand the narrow restricted approach is certain and specific. It directs judicial officers with a measure of accuracy as to when and when not to treat multiple counts as one for the purpose of sentence. This brings about some measure of the much needed uniformity in sentencing.

In the case at hand the crime of theft bears no resemblance to the crimes of assault yet the trial magistrate was able to lump them together in the rather flimsy sole reason that all the offences were closely linked in terms of time and space.

In this case I consider that it was necessary to couple the fine with wholly suspended term of imprisonment as a deterrent measure. I suspect that the trial magistrate stayed away from adopting that mode because he would have had to invent some unconventional wording to properly capture the conditions of suspension. The difficulty arises from the fact that offence of theft does not share the same essential elements as assault.

I therefore share the Regional Magistrate's view that the crime of theft ought to have been treated separately although the crimes of assault could have been treated as one for the purpose of sentence.

The real crux of the matter is however whether or not the resultant sentence is in accordance with real and substantial justice.

On this score I share the learned scrutinising regional magistrate's views that the sentence was wholly inadequate having regard to the accused's moral culpability.

The accused stole from his employer. He was therefore in breach of trust. Upon detection he resorted to violence to ward off the impending citizen's arrest. He stole beer a luxury item. The motive was greed rather than need. His moral blameworthiness was therefore of a very high degree indeed such that a paltry fine of \$100 000.00 or in default of payment 20 days imprisonment for the 4 counts put together makes a mockery of justice. I am therefore unable to confirm these proceedings as being in accordance with real and substantial justice.

I accordingly withhold my certificate.

OMERJEE J, agrees.....

