THE STATE
versus
JONAH CHIMOTO

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 13 October 2004

Criminal Review

HUNGWE J: The record of proceedings in the trial of the accused in the court *a quo* was placed before me with the following minute from the learned scrutinising Regional Magistrate.

> "The accused pleaded guilty to two counts and was duly convicted. The learned magistrate proceeded under section 271(2)(a) on the second count but proceeded to take both counts as one and imposed a custodial sentence.
>
> He has conceded that he erred as he could not impose 'imprisonment without the option of a fine' on the second count."

The basis of accused's conviction on the two counts is that on 27 April 2003 accused and the complainant who are apparently friends were drinking beer together from a Bottle Store. They picked up a quarrel over beer and in the altercation that followed accused struck the complainant with a beer bottle. Complainant sustained cuts and other injuries. On being restrained by the police, accused remained belligerent confrontational and extremely provocative towards the police officers.

He was charged firstly with assault with intent to cause some grievous bodily harm and secondly with contravening section 116(j) of the Liquor Act [*Chapter 14:12*].

He pleaded guilty to both counts when asked to plead on 5 August 2003. In respect of the first count the learned trial magistrate endorsed that his trial would proceed in terms of section 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter*

9:07] and in respect of count 2 it would proceed in terms of section 271(2)(a) of the said Act.

Soon after making these entries, the record shows that the learned trial magistrate proceeded to record the guilty verdict in respect of the second count.

He then proceeded to put the essential elements of the first count to the accused. His answers were not categoric. He prevaricated and the trial court properly proceeded to alter his plea to one of not guilty on the same date. The matter must have been postponed because the record shows that subsequently on 25 August 2003, a full trial was embarked upon.

The accused was not disputing the essential elements of the charge. This prompted the public prosecutor to seek admissions in terms of section 314 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The accused was then put on his defence without any witnesses being called as he had admitted the essential elements.

He was properly convicted at the end of that trial.

In passing sentence the trial magistrate remarked that he considered a custodial sentence as appropriate and proceeded to take both counts as one for the purpose of sentence. He sentenced accused to 12 months of which 2 months were suspended on appropriate conditions.

Faced with a case in which an accused stands convicted of two offences, one statutory and the other common law, the trial magistrate's task is first to decide whether to sentence him to particular punishments in respect of each offence or to impose a globular sentence.

It is always preferable that an accused should be sentenced separately for each offence where the offences are entirely different as here. Had the trial court taken this accepted route, it could have

remembered that the first count was a grave common law crime for which it could impose any sentence it deemed appropriate. It would then have been obvious that it could not impose a custodial sentence for a contravention of section 116(j) of the Liquor Act unless there were specially compelling circumstances, in view of the stipulated statutory fines. Besides, by electing to proceed in terms of section 271(2)(a) of the Code, the Court had limited its sentencing options to the bare minimum which excludes imprisonment.

Generally speaking, 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 time. Thus in the present case although the offences are closely connected it was improper to take them as one for sentence by virtue of the fact that whilst there is a prescribed range of sentence for the one, there is none for the other. Furthermore as I pointed out above, the procedure adopted by the magistrate precluded him from treating the two as one. In doing so he misdirected himself. As such this court is at large on the question of sentence.

In the circumstances the sentence imposed in the court *a quo* is set aside and the following imposed.

> "Count 1: $5 000 or in default of payment 10 days.
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> Count 2: 10 months imprisonment of which 2 months imprisonment is suspended for five years on condition the accused does not during that period commit an offence involving violence on the person of another for which he is sentenced to imprisonment without the option of a fine."

Bhunu J agrees:……